

DERIVATION OF RIGHTS: AFFORDING PROTECTION TO LATENT SOCIO-ECONOMIC RIGHTS IN THE FDRE CONSTITUTION

Amsalu Darge Mayessa★

1.1. INTRODUCTION

A country's constitution has the potential to be powerful vehicle for giving domestic legal effect to international standards on economic and social rights. Civil and political and socio-economic rights have received extensive protection via their inclusion as justiciable rights in the constitutions of various countries. For instance, the 1996 South African Constitution can be used as a model because it entrenches the two grand categories of human rights as directly justiciable rights in its Bill of Rights. This symbolizes a far reaching commitment on the national fora to the interdependent and indivisibility of all human rights.¹

When it comes to Ethiopia, almost one third of the Articles of the FDRE Constitution are devoted to elaborating all categories of human rights.² Chapter three of the FDRE Constitution engrained Bill of Rights that stands in volume having thirty two articles³ embracing civil and political rights extensively and very scant socio-economic rights. Ratification of

★Holds his LLB degree from Hawassa University, School of Law(2008) and LLM in Human Rights Law from Addis Ababa University, School of Law(2011), formerly he served as public prosecutor at West Wollega Zone Justice Office and Currently, he is a Lecturer and Director of free legal aid center at Ambo University School of Law. He can be reached at yedargeamsal@gmail.com.

¹Sandra 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), MartinusNijhoff Publishers(2001),p.56-76.

²Minase Haile, 'The New Ethiopian Constitution: It's Impact up on Unity, Human Rights and Development', *Suffolk Transnational Law Review*, Vol.20, No.1 (1996), p.53.

³Fasil Nahum, *Constitution for A Nation of Nations, the Ethiopian prospect*, the Red sea Press (1997),p.10

international and regional human rights instruments by Ethiopia is also a plus. To mention some: International Covenant on Economic, Social and Cultural Rights (ESCR), Convention on the Right of Child (CRC), the African Charter on Human and Peoples' Rights (ACHPR) and etc. Hence, these human rights are part and parcel of the law of the land.⁴ The Bill of rights recognized in the FDRE constitution as fundamental rights and freedoms are bifurcated into "Human Rights" on the one hand and 'Democratic Rights' on the other hand. Socio-economic rights are embedded in the latter category. The classification seems only technical since all human rights are indivisible.⁵

Ethiopia has acceded to the ESCR on 11 Sep.1993 and hence, all the socio-economic rights enunciated under the ESCR are an integral part of the law of the land.⁶ On the other hand, in the legal system of Ethiopia the FDRE Constitution is the supreme law of the land.⁷ All citizens and all organs of the government, political organizations, etc have the constitutional obligation to respect and obey the provisions of the supreme law of the land.⁸

The most fundamental rights for instance, the right to clean water, food etc are impliedly protected under "National Policy Principles and Objectives (herein after NPPO)" (Art 90). It is therefore possible to boldly argue that there are no separate and specific provisions devoted to the right to health, to

⁴FDRE Constitution Art.9 (4).

⁵Id, Art 10(1) of the FDRE constitution seem to consider the inalienable (indivisible) nature of human rights and art 9(4) also plainly remedy the situation by making cross- reference to the ACHPR which aptly maintained the notion of indivisibility and interdependency of human rights in its preamble.

⁶Gebreamlak Gebregiorgis, 'The Incorporation and the Status International Human Rights under the FDRE Constitution', *Ethiopian Human Rights Law Series*, Vo 1.2, Faculty of Law, (2008), p.37.

⁷FDRE Constitution Art 9(1).

⁸Id, Art 9(3).

housing, to education, to food and to clean water expressly. The later categories of rights are implicitly protected by the constitution.⁹

When we look at the right to health, there is no separate provision in the constitution pertaining to the same right, explicitly in an avowed manner; however, references to the right could be made indirectly to other provisions in the constitution. Hence, the FDRE constitution enshrines socio-economic rights both in the bill of rights and in what it calls NPPO which are important guide line for the three organs of government.¹⁰ The implied recognition of socio-economic rights in the supreme law of the land paves the way to look for the derivation of rights.

1.2. FEATURES OF SOCIO-ECONOMIC RIGHTS UNDER THE FDRE CONSTITUTION

As it has been avowedly stated herein above, socio-economic rights are recognized and protected under the FDRE constitution. These rights include the explicit and implied socio-economic rights. In this section, the author will try to reveal the feature of these rights and how they are enunciated in the same constitution that may also show whether the FDRE constitution accorded a balanced recognition of both sets of rights. Socio-economic rights found in the FDRE constitution are characterized by:

1.2.1. Fewer in Number

The provisions of economic and social rights enunciated in the FDRE constitution are very scant in number when compared to civil and political rights. There are only three articles that directly deal with these rights, but generally the constitution is constituted of 106 articles. On the other hand

⁹Dejene Girma, 'Economic, Social and Cultural Rights and their Enforcement under the FDRE Constitution', *Jimma University Law Journal* Vol.1, No. 2, (2008), p.74-75.

¹⁰SisayAlemahu, 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia', *Journal of Ethiopian Law*, Vol. 22, No.2, (2008), p.138.

civil and political rights have a wide coverage of the constitution. This aspect of constitutionalization of socio-economic rights reveals that socio-economic rights are not given the same emphasis like that of civil and political rights. It seems selective in the way it recognized these socio-economic rights. This aptly tells us the failure of the FDRE constitution to accord a balanced protection to the two grand categories of human rights. As T.S. Twibell said ‘Ignoring rights is not really a complex legal problem, it may be justified that Ethiopia lacks many resources due to its underdeveloped industrial and educational infrastructure.¹¹ However, socio-economic rights can be negatively protected.

1.2.2. Broad and Very Vague

Despite their terseness, those socio-economic rights enunciated in the FDRE constitutions are very broad and vague. If a certain law is broad and vague it always opens the door for controversy and contradiction. When such rights contested before the court of law; it is hardly possible to give content to the contested right and remedy the situation. For instance, in Art 41(3) what does the phrase “publicly funded social services” mean? Almost all the rights under the same articles are crude that it is difficult to identify the rights guaranteed and the extent of protection afforded to them.¹² Specifically Art 41(6) and (7) do not give rise to a right based approach rather, they impose duty on the government to ensure the enjoyment of the rights provided for in article 41(1) and (2) recognized in crude terms.¹³ The only possible way of alleviating this problem is “interpretation” through which it is possible to expand the existing rights in order to cover the untouched areas of economic and social rights. The vagueness of socio-economic rights is not the only

¹¹T.S. Twibell, ‘Ethiopian Constitutional Law: The Structure of the Ethiopian Government and The New Constitutions Ability to Overcome Ethiopians Problem’, Vol. 21, No. 399, *Loy.L.A. International and Comparative Law Journal* (1999), pp.444-445.

¹²Sisay at note 10, p.139 and see also Twibell at note 11, pp.442-443.

¹³Dejene, supra note 9, p.83-85 and see also Sisay at note 10, pp.148.

feature of Ethiopian constitution, but also it is attributed to the ICESCR from its inception, Philip Alston put this situation clearly:

It is generally agreed that the major short coming of the existing international arrangements for the promotion of respect for economic rights is the vagueness of many of the rights as formulated in the covenant and the resulting lack in the clarity as to their normative implications.¹⁴

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

1.2.3. Poorly Drafted

This feature is mainly attributed to the constitutionalization of some fundamental socio-economic rights; among others, encompassing the right to food, to clean water, to health, to social security and etc under Art 90¹⁵ of the constitution as ‘social objectives’ than directly justiciable rights. Arguably, the author boldly claims that these implied socio-economic rights are rights; hence, they should not have been put under National Policy Principles and Objectives which eluded their direct judicial protection. One can see and draw adequate lessons from the constitutionalization of socio-economic rights in the South African Constitution of 1996; in which the drafting of the relevant provisions in the South African Bill of Rights relating to socio-

¹⁴Philip Alston, ‘No Right to Complain About Being Poor: The Need for an Optional Protocol to the Economic Covenant in AsbjornEide and Jain Helgesen (ed.s), *The Future of Human right protections in a Changing World: Fifty years since the four freedoms Address-Essays* in Honour of TorkelOpsah (1991), p.86.

¹⁵Art 90(1) of the FDRE Constitution provides that: to the extend the country’s resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security. It is totally a government obligation without the corresponding individual rights and tied up by the language of progressive realization.

economic rights were substantially influenced by the provisions of the ICESCR.¹⁶

1.3. JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS IN THE FDRE CONSTITUTION

There exists dominant debate regarding the justiciability of socio-economic rights.¹⁷ Many legal academics hold the view that it is inappropriate to include socio-economic rights as justiciable rights.¹⁸ But here, it is essential to consider General Comment No. 9 of the Committee on Economic, Social and Cultural Rights, which expresses that states parties are under obligation to use all the means at its disposal to give effect to the rights recognized under the covenant. In this respect, appropriate means of redress or remedies must be available to any aggrieved individual or group.¹⁹ In addition, the expression of the Committee is that some rights of the ICESCR are capable of immediate implementation reveals that the rights in question are justiciable irrespective of resource situation.²⁰ Granting remedies for violation of civil and political rights and putting socio-economic rights (other half of indivisible right) beyond the reach of courts would thus be arbitrary and incompatible with the notion of indivisibility.²¹

Economic and social rights as one part of the bill of rights are recognized under the FDRE constitution. All organs of the government including legislative, executive and judiciary at all levels, are under obligation to

¹⁶Liebenberg, Supra note 1, pp.76.

¹⁷Henry J. Steiner et al (ed.s), *International Human Rights in Context, Law, Politics, Morals* (3rd ed.), Oxford University Press (2007), p.313.

¹⁸Liebenberg, Supra note 1, pp.58.

¹⁹General Comment No.9, Para. 9.

²⁰Ida Elisabeth Koch, 'The Justiciability of Indivisible Rights', *Nordic Journal of International Law*, (2003) p. 5.

²¹Steiner, Supra note 17, pp.313.

respect and give effect to those rights provided for in the bill of rights.²² Meaning, measures taken by Ethiopia should go beyond constitutional entrenchment that is the task of concretizing these rights and converting the same into legally consumable commodities.²³

This aspect of giving effect to the obligation undertaken in the international treaty and constitutionally guaranteed socio-economic rights plainly binds the judicial body to enforce and respect those fundamental rights and freedoms. Therefore, imposing the responsibility of respecting, protecting and fulfilling the rights, on the judiciary, has given a justiciable dimension to these rights.²⁴ There is also another provision under the constitution that further rejuvenates the adjudicatory power of the court: ‘Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by a court of law or any other competent body with judicial power.’²⁵

It is evident that a claimant can bring any justiciable matter before the judicial body and get remedy. Here, the major issue is whether socio-economic rights are justiciable or not under the FDRE constitution. In our constitution the availability of socio-economic rights (as legal basis) under the fundamental rights and freedom is a proof for the justiciability of the same. Because the title of the chapter expresses that those rights which are believed to be of such nature are listed therein and socio-economic rights are one of them and subjected to some form of judicial enforcement (the setting element of justiciability).

It is therefore possible to boldly argue that the FDRE constitution protects economic and social rights by incorporating them in the bill of rights as

²²FDRE Constitution Art 13(1).

²³Tsegaye Regassa, ‘Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia’, *Mizan Law Review*, Vol.3, No. 2, (2009), p.289.

²⁴Sisay, *Supra* note 10, p.142.

²⁵FDRE Constitution Art 37(1).

directly justiciable as well as by making pertinent international treaties ratified by Ethiopia part and parcel of the law of the land.²⁶ What is regrettable is that the claimable socio-economic rights as directly justiciable human rights are very meager in number. To mention some:

Article 41 of the constitution is with the title of “Economic, Social and Cultural rights.” It has 9 sub-articles that deal with different socio-economic rights. The first two sub-articles guarantee, the right to engage freely in economic activity and to pursue a livelihood of his/her choice and the right to choose his/her means of livelihood, occupation and profession.²⁷ These are a plainly guaranteed socio-economic right to work anywhere in the country without any qualification of the type of the work as long as it is not contrary to the law. Therefore, this right to work has a directly justiciable dimension before Court of law.²⁸ The other directly justiciable right is under sub-article 8 of the same provision which guarantee the right to receive fair prices; that is:

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

This right has an aim of protecting the farmer’s and pastoralists socio-economic rights so as to enable them to receive fair price for their products which has the purpose of improving their living conditions. Not only this, but it has also extended the protection of their right to property which has

²⁶Sisay, Supra note 10, p.151.

²⁷See art 41(1) and (2) of the FDRE Constitution.

²⁸Dejene, Supra note 9, p. 91-93.

both the nature of civil, political and socio-economic rights. Sub-article 8 further stipulates that the government should use the right to receive fair prices as a guide in the course of formulating economic, social and development policies.²⁹

Sub-art 3 of the same article, however, does not provide for the right to publicly funded social services embracing the right to health, housing, clean water and etc, for such rights are not explicitly guaranteed rights under our constitution and hence, they are not directly justiciable. If so, the right to equal access to publicly funded social services is not socio-economic right. Dejene said that “sub- article 3 is a tricky provision...at first glance; it appears that it grants the right to these services...does not provide for the right to health, housing, water or electricity. In short it does not provide the right to get social services.” He further argues that this sub-article does not seem socio-economic rights but civil and political rights for it talks about the notion of equality.³⁰ Therefore, Art 41 except sub 1, 2 and 8 does not provide for all rights falling within the realm of socio-economic rights in black and white letters as one would hope by reading at its caption.³¹

The other directly justiciable right is provided under art 42 which protect the right to work. It embraces rights among others, right to form associations like trade unions, and the right to equal pay for equal work for women, the right to strike, the right to reasonable limitation of working hours, to rest and leisure, to leaves and etc. The first two rights have the nature of civil and political rights, where as the latter illustrated rights are socio-economic rights in their very nature for they do entail positive obligation of the government.³² It also accords protection to only workers who have already a job and earn

²⁹Id, p.88-89.

³⁰Id, p.86-87.

³¹Sisay, Supra note 10, p.139.

³²Dejene , Supra note 9, p.91-92.

their livelihood; however, it does not extend protection to those who are not able to earn their livelihood. In short, it does not impose obligation on the state to provide job for the jobless rather it protect work related rights for one cannot forces the government to provide him a job.³³

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

Therefore, the only possible way of addressing such problems is looking for the impliedly guaranteed rights through the derivation of rights. Socio-economic rights are hazy under the FDRE constitution. Hence, they have to be read into other rights expressly guaranteed so as to ensure the justiciability of the same at the minimum threshold established independent of resources.

1.4. INDIRECT JUSTICIABILITY: EXPLORING THE IMPLIEDLY GUARANTEED SERUNDER THE FDRE CONSTITUTION

Under this section, the author will delve into looking at the workability of the indirect justiciability and also whether the FDRE constitution has acknowledged the notion of indivisibility and interdependence of the all human rights. Not only these two issues, but it also reveals other cross-cutting rights enunciated in the constitution which lay the ground for the better enjoyment of the latent socio-economic rights pre-empted in the constitution.

³³Id, p.91, sees also Sisay, Supra note 10, p.140.

From the very outset the FDRE constitution maintained the inalienability or indivisibility of human rights and fundamental freedom as the fundamental principles of the constitution.³⁴ That is, one can see the pre-empted notion of indivisibility in Article 10(1) which states: “Human rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable.’ It is this notion that, in a solid way, established the idea of inherence, universality, indivisibility and inviolability of human rights.³⁵

The Ethiopian constitution has entrenched both socio-economic rights and civil and political rights under the same chapter and within the same text. This aspect of constitutionalization, putting the two sets of rights under the same chapter and in the same text there by putting the same within the ambit of the Court reveal the integration of human rights. That is (Art 14-43) embodies civil, political, and very few socio-economic rights. The FDRE constitution also protected some socio-economic matters that guarantee the implied socio-economic rights under chapter ten. The judiciary is also obliged to respect and enforce the provisions of the chapter of human rights and fundamental freedoms³⁶ as well as guided by the principles embedded in chapter ten of the constitution.³⁷

The notion of interdependency, indivisibility and interrelatedness of human rights in the FDRE constitution can also plainly be inferred from Art 9(4) which makes reference to international and regional human rights treaties

³⁴See Art 10(1) of the FDRE Constitution.

³⁵Tsegaye , Supra note 23, p.301.

³⁶See Art13(1) of the FDRE Constitution plainly states that the judiciary as one organ of the state, is duty bound to respect and enforce civil and political rights, including socio-economic rights, that enable them also to have a jurisdiction over cases involving the latter rights as well.

³⁷See Art 85(1) of the FDRE Constitution with no ouster clause that enunciated some, but very important tacitly guaranteed socio-economic rights which fall within the ambit of judiciary and judges will take the National policy principles and objective as a guideline to give effect to some socio-economic matters enunciated therein while implementing the constitution, other laws and public policies.

ratified by Ethiopia as an integral part of the law of the land. For instance, Ethiopia acceded to the ACHPR in 1998.³⁸

Socio-economic rights did not get a balanced protection as compared to civil and political rights under the FDRE constitution. But, such regrettable situations of socio-economic rights recognition can also be remedied via cross-reference to treaties by Art 9(4). The double-edged recognition of human rights in Ethiopia under the constitution both as part and parcel of the law of the land and as tools of interpretation of the fundamental rights and freedoms accords a heightened level of protection to human rights in the country.³⁹

The FDRE constitution refers to international treaty for interpreting bill of rights as a guiding principle to maintain consistency with international treaties which may help the Ethiopian courts to give content to some rights in the FDRE Constitution. For instance, it point to the UDHR which embodies the two grand categories of human rights. It is therefore possible to claim that the FDRE constitution has laid down a fertile ground for the operationalization of the indirect approach to justiciability.⁴⁰

³⁸Accession to the African Human Rights Charter Proclamation No.114/1998, Federal Negarit Gazeta, 4th year, No.1.

³⁹Taken from 'Editorial Introduction', in *Ethiopian Human Rights Law series*, Faculty of Law, Vol.2 (2008), P.VI and see also Art 9(4) and 13(2) of the FDRE constitution.

⁴⁰Art 13(2) of the FDRE Constitution states that; the fundamental rights and freedoms specified in this chapter shall be interpreted in a manner conforming to the principles of Universal Declaration of Human Rights: Here, one may easily deduce that the principles or notions embedded in the UDHR gives equal importance to both sets of rights and according equal treatment in one main text as indivisible and interdependent human rights. Therefore, it implied the very principles of integrating the two grand categories of human rights including socio-economic rights and civil and political rights, when judges consult international treaties in elucidating their meaning to give effect to the fundamental rights and freedoms enunciated in the chapter three of the FDRE constitution, they should also look into the visions pre-empted in the UDHR. In short, it is integrating the two sets human rights without any disparity.

The following discussion will look at cross-cutting rights entrenched in the FDRE Constitution, that help, to explore the implicit socio-economic rights protected in the same but not limited to the following.

1.4.1. Right to Equality or Non-Discrimination

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

A foundational value of the constitutional order and a value implicit in almost all the rights enumerated in the Universal Declaration, arguing that human rights can only be protected in a state in which there is no equality of rights but also equality of dignity. There cannot be dignity in life without food, housing, work and livelihood.⁴¹

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

Ethiopia under Art 25 enunciated the right to equality in the FDRE constitution. Hence, this article will have untold contribution in establishing the Violation of Socio-economic rights. Meaning, the violation of a given socio-economic rights may trample not just the specific socio-economic right in question but also the equality clause enunciated in the constitution. In such instances, the use of the right to equality, or, alternatively, proving discrimination has been shown to be an essential instrument as a means of signifying the violations of socio-economic rights.⁴² This is an extension of cross-cutting right to the protection of socio-economic rights sphere, for the

⁴¹ChidiAselmOdinkalu, 'Analysis of paralysis or paralysis by Analysis?, Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights', *Human Rights Quarterly*, Vol. 23 (2001), p.328-329.

⁴²Takele Soboka, 'The Indirect Approach to promote Justiciability of Socio-Economic Rights of the African Charter on Human and peoples' Rights,' draft, accepted for publication in Rachel Murray (ed.) *Human Rights Litigation and the Domestication of International Human Rights in Africa* (forthcoming 2009), p.24.

former rights are not contested to be adjudicated before the Court. And they can be used as a means of ensuring the justiciability of socio-economic rights with ease. One can also infer from the ‘phrase equal accesses’ under Art 41(3) of the FDRE constitution that ensure every Ethiopia right to equal access to publicly funded social services. The phrase plainly makes a close tie between socio-economic rights and equality guarantee that also overlap with article 25.⁴³ Thus, these articles strengthen one another in according protection to socio-economic rights. Meaning, the government is obliged to amend or repeal laws or policies that have the effect of marginalizing or excluding particular groups from the enjoyment of publicly funded social services.⁴⁴

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

Courts may also intervene and accord protection to socio-economic rights on the ground of equality guarantee and fight discrimination in the sphere of housing, health and water.⁴⁵ Thus, one can challenge the violation of socio-economic rights, implicitly guaranteed in the FDRE constitution before court

⁴³Dejene, Supra note 9, p.87.

⁴⁴Rakeb Messele, the *Enforcement of Human Rights in Ethiopia: Research* Subcontracted by Action Professionals’ Association for the People (APAP), (UN published 2002), p. 38.

⁴⁵Sisay, Supra note 10, p.142.

of law and can claim a redress on the legal basis of equality guarantee enshrined in the same constitution.

1.4.2. The Right to Life and Dignity

The right to life enunciated under Art 15⁴⁶ of the FDRE constitution will have a great assistance in realizing the protection of socio-economic rights via the notion of indivisibility and interdependence of rights. There is a close interlink between the right life and dignity with that of the right to adequate standard of living that embody food, shelter and housing. Thus, it is possible to argue that the right to an adequate standard of living and health is part of the right to life and dignity.⁴⁷ Such aspect of integrated approach to human right was aptly revealed in the case of *Olga Tellies and others V Bombay Municipal Corporation and others*, (AIR (1986) SC 180), Paragraph 32 as cited in Steiner at note 17).

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

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

⁴⁶Art 15 o the FDRE Constitution and art 5 of the ACHPR which is made an integral part of the law of the land. The former deals with the right to life where as the latter deals with human dignity and also Art 24(1) of the FDRE constitution concords with the latter concept of right, which cannot be realized without adequate right to food, health, water and housing; hence, 'the right life with dignity.'

⁴⁷Craig Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', *Osgoode Hall Law Journal*, vol. 27, No. 4 (1989),P.874.

Accordingly, the same Court held that, the right to life at the same time encompasses; inter alia, the right to health, housing, clothing, food, water, work, others and anything that enables people to have a decent life. Therefore, it is possible to extend protection, to the socio-economic rights that are hidden in the constitution through the interpretation of the constitutional right to life. This will help us to reinvigorate some latent socio-economic rights under the FDRE constitution. Thus, the right to life is not a bare right rather it is a right to life with dignity as a human person.

When equal protection is given to both sets of rights, each right will receive the protection of the other. For instance, state cannot realize a right to adequate standard of living of its Citizens without according a due protection to right to food, housing, clothing, clean water and health. The same holds true for the right to life that appropriately depends on the right to health, food, housing and etc. This holds true that the failure to meet these rights, say, the right to health, and food, would inevitably jeopardize the enjoyment of those rights, say, the right to life and dignity which are explicitly recognized.⁴⁸

1.4.3. The Right to Fair Hearing

The right to fair hearing applies across the board to civil and political rights as well as socio-economic rights, and group rights.⁴⁹ For instance, the right to free legal assistance as a social dimension of the right to a fair trial was given primacy by European Court of Human rights in the Airey case. The court in the same case plainly revealed the relationship between the two sets of rights saying ‘...many of the civil and political rights have implications of economic and social nature... hence, the interpretation of the convention

⁴⁸Dejene, Supra note 9, p.95 and see also Scott, Supra note 47, p.875.

⁴⁹Takele, Supra note 42, p.32.

may extend to the sphere of socio-economic rights.’⁵⁰ Another aspect of the protection of social and economic rights is access to courts that guarantee citizens right to a fair and public trial. This notion is also given primacy by the African Commission in which the Commission has thus declared the right to fair trial to be a fundamental right; the non observance of which undermines all other human rights.⁵¹

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

1.4.4. Remedies

‘No right without remedies, no remedies without actions.’ ‘No actions without sanctions.’⁵² This reveals that the existence of remedies has no importance, if it cannot be demanded or enforced.⁵³ Any person or group who

⁵⁰Airey V Ireland, Cited in Martin Scheinin, ‘Economic and Social Rights as Legal Rights’, in *Economic, Social and Cultural Rights: A text book*, second Rev. edn., AsbjornEideetal (ed.s), MartinusNijhoff publishers (2001), p.34-35.

⁵¹Resolution on the Right to Fair Trial and Legal Assistance in Africa, Adopting the Dakar Declaration on the Right to Fair Trial in Africa, Doc/05/26/ InF. 19, see also Scott at note 47, p.860.

⁵²Pieter N. Drost, *Human Rights as Legal Rights*, 2nd printing, A. W. Sijthoff’sUitgeversmij, Leiden, (1965), p. 58.

⁵³Ibid.

is a victim of an economic and social rights violation should have access to effective judicial or other appropriate remedies at both national and international levels.⁵⁴ But, in the first place redress for violation of human rights and fundamental freedoms should be available to victims within their own state.⁵⁵ Art 2(1) of the ICESCR proclaims that appropriate measures to implement the covenant should be taken by states and this might include judicial remedies. It specifically refers to non-discrimination requirement and cross refers to the right to remedy in the covenant on civil and political rights.⁵⁶

Constitutional remedy is simply the relief that one obtains whenever these rights expressly or impliedly guaranteed under the constitution are violated. And the right to remedy when rights are violated is a right expressly guaranteed by global and regional human rights instrument like for instance, Art 8 of the UDHR and Art 2(3), 9(5), 14(6) of the ICCPR.⁵⁷ The remedy could be judicial, administrative or legislative remedy. As it was discussed in detail on the General Comment No.9, domestic system is the primary option for the effective protection of socio-economic rights. The role of judicial body in protecting these groups of rights is avowedly provided under the same that: ‘All federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provision of this chapter.’⁵⁸

The responsibility is also shared among other organs of the government. For instance, the duty of the legislature is to enact laws that ensure the better

⁵⁴Dianah Selton, *Remedies in International Human Rights Law*, A Text Book, Second Edn., Oxford University Press (2000), p.17.

⁵⁵Paul Sleggart, *The International Law of Human Rights*, Clarendon Press, Oxford (1992), p.69.

⁵⁶Shelton, *Supra* note 54, p.18.

⁵⁷*Id.*, p.14.

⁵⁸See Art 13(1) of the FDRE constitution.

protection of the rights or to amend laws that violate these rights to be consistent with the constitutionally guaranteed human rights. Similarly, the duty of the executive may be to enforce these rights and address them to the needy person. The Court is therefore, bound by this article to safeguard socio-economic rights enunciated under the constitution, in respecting, protecting and enforcing the fundamental rights and freedoms.⁵⁹ One can see from the above wording that socio-economic rights could be subjected to judicial scrutiny and also be provided with judicial remedy. Here, there is no particular provision that excludes the judicial review of socio-economic rights entrenched in the constitution. Thus, as long as socio-economic rights are justiciable, judges have the power to decide on cases of socio-economic rights embracing the impliedly guaranteed rights based on the legal basis of Art 37(1) of the FDRE constitution. This is one of the constitutional remedy for the violation of those rights provided for in the chapter of human rights and fundamental freedoms.

1.5. RELEVANCE OF NPPO TO INDIRECT JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS

In the foregoing discussions, it has been said that socio-economic rights guaranteed expressly under the FDRE constitution are very few. As a result, the need to look for the impliedly protected rights arises. We can find a number of hidden socio-economic rights in the constitution under the Chapter of NPPO.

In addition to incorporating socio-economic rights in the chapter of Bill of Rights, the FDRE constitution enshrined some substantive socio-economic matters (Implied rights), as social and economic objectives and the principles.⁶⁰ Public authorities of federal and member state government are

⁵⁹Sisay, Supra note10, p.142.

⁶⁰Rakeb, Supra note 44, p.29.

obliged to be guided by these principles and objectives in the implementation of the constitution, laws and policies.⁶¹ The constitution further strengthens that the government is duty bound to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them.⁶² It further provides that policies aim at providing all citizens access to health, education, clean water, housing, food and social security.⁶³ These NPPO are not directly justiciable; however, they may affect the interpretation of other rights by being read into those rights.⁶⁴ Therefore, these socio-economic objectives can be taken as guiding principles in the implementation of the provision of the constitution encompassing socio-economic rights provision. It is hence, possible to claim that, the NPPO under chapter ten (art 89 and 90) of the constitution are imposing other additional obligations on the part of organ of the government to implement socio-economic rights. The fact that the constitution does not provide for many socio-economic rights, it does not mean that the constitution cannot be used to claim the enforcement of other latent rights indirectly.⁶⁵ Therefore, one can claim the enforcement of the right to food or housing by invoking the constitution itself. One possible way of exercising these rights is by trying to read the same into the explicitly protected rights.⁶⁶ Note that NPPO does not take away the power of courts totally to adjudicate socio-economic rights impliedly rooted therein in a plain wording of the constitution. However, this induces us to look for the implied right theory in which implicit rights can possibly be derived from explicit rights including civil, political and socio-economic rights through indirect justiciability.

⁶¹See FDRE Constitution Art 85 (1).

⁶²Id, Art 89(2).

⁶³Id, Art. 90(1).

⁶⁴Rakeb, supra note 44, p.29 and see also Dejene, Supra note 9, p.93-95.

⁶⁵Dejene, Supra note 9, p.93.

⁶⁶Ibid.

1. 5.1. Ensuring the Justiciability of Hidden Socio-Economic Matters under the NPPO

According to the notion of implied Right theory,⁶⁷ it is possible to derive, implicit socio-economic rights from the NPPO in the constitution. The FDRE Constitution eluded the direct protection of the right to socio-economic rights embracing right to food, to education, to clean water and housing. This adversely and inevitably affects the right of the beneficiaries to boldly and effectively claim and enjoy their rights on the domestic plane. Indirect Justiciability; however, will remedy the situation at least temporarily to some extent. Hence, the Ethiopian constitution not only accords protection to explicit socio-economic rights, but also to the implied socio-economic rights.

Art 41 of the same constitution help us to derive new rights. For instance, the phrases “publicly funded social services” and “other social services” of sub-art (3) and (4) are too broad and open for interpretation. So, we can come up with the right to housing, social security, food and clean water from the same sub-articles.⁶⁸ Referring to regional jurisprudence will also be supportive.

The most famous case in this regard is the SERAC case (Social and Economic Right Action Center and Another V Nigeria (2001)):

In its decision the African Human Right Commission dealt with the obligation of the state to ensure the realization (also by private parties). The decision also considered with socio-economic rights provided for in the African charter, and finds some ‘implied socio-economic rights’ in the charter.⁶⁹

⁶⁷Heyns and Killander. (ed.s) *Compendium of key Human Rights Documents of the African Union* (3rd ed.s), Pretoria University Press (2007), p.251.

⁶⁸Sisay at note 10, p.140, and see also Dejene at note 9, p.93-95.

⁶⁹Social and Economic Rights Action Center (SERAC) and Another V Nigeria (2001) AHRLR 60 (ACHPR 2001), as cited in Heyns and Killander at note 67, Para. 63.

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

For instance, access to food is only mentioned as part of social objectives in the FDRE constitution rather than the right itself, despite the fact that the right to food is not explicitly mentioned in the FDRE constitution, it is only 20 constitutions in the world which make reference to food.⁷⁰ Art 90 of the same, under the banner of social objectives, states that “to the extent the country’s resources permit, policies shall aim to provide all Ethiopians with access to public health and education, clean water, housing, food, and social insurance.” Food is thus regarded as a social objective rather than a directly justiciable human right.⁷¹ Nevertheless, this is far from saying that Ethiopia does not have international obligation stemming from the right to food. For instance, the country voted in favor of the UDHR in 1948 (Art 25, right to food), as indicated earlier, Ethiopia also became state party to the ICESCR in 1993. Article 11 of the ICESCR (as interpreted by ICESCR General Comment No.12) puts duties on states to respect, protect, and fulfill the right to food.⁷²

Arguably, by reading the NPPO with the fundamental rights and freedoms, the right to food could possibly be implied in the constitution and made justiciable as the minimum core right to free citizens from hunger and starvation. Article 43(1) which deals with the right to improved standard of

⁷⁰Alexander AttilioVadala, ‘The Right to Food in Ethiopia: Challenges and Opportunities’, in *Ethiopian Human Rights Law series*, Vol.1, No.2, Faculty of Law, (2008), p.191.

⁷¹Id, p.192.

⁷²Ibid.

living, art 40(3-5) which covers land possession also indirectly implied the right to food. Therefore, to the extent that these provisions allow, the interpretation of the right to food should be construed in light of the obligation of the Ethiopian state under the ICESCR.⁷³

In so doing, our court can extend protection to the implied socio-economic rights enshrined in the FDRE constitution. This will have untold contribution in advancing the justiciability of economic and social rights on the national fora. Not only this, but Courts can also refer to civil rights that are directly pertaining to socio-economic rights, for example, the right to life may comprises the right to health, food and clean water which are basic necessities for a life.⁷⁴ It is hence possible to argue that a number of economic and social rights are blurred in the constitution which does not give rise to direct justiciability and enjoyment of the same. Thus, the Court should read into the explicitly recognized civil and political rights including right to life, honor, security of a person and some few socio-economic rights within the same family entrenched in our constitution.⁷⁵ In such instances, the means to resolve the same problem is “interpretation” through which it is possible to expand the existing rights in order to cover the untouched boundaries of socio-economic rights.

1. 6. CHALLENGES TO THE DIRECT ADJUDICATION OF SOCIO-ECONOMIC RIGHTS IN THE FDRE CONSTITUTION

In this section, the author will try to reveal factors contributing to the underdeveloped local jurisprudence on the justiciability issue in the FDRE

⁷³Id, p.193.

⁷⁴Liebenberg at note 1, p.69.

⁷⁵Id, pp.71-73.

constitution. There are some challenges to direct adjudication of socio-economic rights, but not only limited to the following grounds:

1. 6.1. Vagueness and Generality of the Constitution Regarding SER

It is plain that whenever there is a vague provision in relation to a certain right in the constitution, courts face difficulty in adjudicating the matter and to give a concrete remedy to the right in question. An interview made with Nega Dufisa judge at Oromia Supreme court reveals one of the blame to the constitution which is the source of controversy regarding the ingrained socio-economic rights. That is they are too broad and vague and difficult to give content and determine the scope of their protection.⁷⁶ Hence, the author firmly believes that the only means of alleviating this challenge, until legislation is enacted; is interpretation, to give content to some socio-economic rights. For instance, the right to clean water is lacking under chapter three of the constitution, thus it need a generous interpretation of the constitution dealing with NPPO and publicly funded social services. Thus, the court should accept it with an open mind and ready to do so.⁷⁷ The other aspect can also be deduced from Art 41(5) of the constitution which only talks about duty bearer, but not about the right holder which aptly reveal that it is poorly crafted, because it does not give rise to a right and undermines their justiciability.⁷⁸

⁷⁶Interview with Nega Dufisa Judge of Oromiya Supreme Court, on October 8/10/2011.

⁷⁷Interview with Tadele Nagisho, President of Supreme Court of Oromiya, on October 11/10/2011.

⁷⁸Said that majority of the articles dealing with socio-economic rights are not framed as claimable individual rights; rather as duty of the government which also receives 'ever increasing resource,' hence, the obligation of the government cannot be easily made justiciable rights.

1.6.2. Absence of Subordinate Legislation

Legislation has been central to most national and international efforts to define and implement human rights. The notion of formulating human rights claims as legal claims and pursuing human rights objectives through legal mechanisms is pivotal for effective implementation and enforcement of socio-economic rights within domestic jurisdictions.⁷⁹ Article 2(1) of the ICESCR also places particular emphasis in the adoption of legislative measures to achieve the realization of the rights recognized in the covenant. The Committee on Economic, Social and Cultural Rights recognizes that ‘in many instances legislation is highly desirable and in some cases may even be indispensable in making socio-economic rights justiciable.’⁸⁰ To mention some of them it serves as providing a more precise, detailed definition of the scope and content of the rights encountered in the international human rights instruments and national constitution. For instance, legislation is needed to elaborate on the concept of ‘adequate housing’ in Art 11 of the CESCR⁸¹ and the same is true for Art 43(1) of the FDRE constitution that elaborating the concept of “improved living standards” is possible through legislation. Legislation is also essential in stipulating the financial arrangements for the delivery of the rights, prescribing the exact responsibilities and functions of the different spheres of government at every level to give effect to the rights. And creating a coherent and coordinated institutional framework for the delivery of the rights; preventing and prohibiting violations of the right by

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

⁸⁰See General Comment No. 3, Para.3.

⁸¹Liebenberg, Supra note 1, p.79.

both public official and private parties and providing concrete remedies to redress violations of the rights.⁸²

The demands of most human rights advocates and victims of human rights violations typically involve either direct or indirect appeals for effective legal protection or redress.⁸³ The advantage of legislation is that it is usually more detailed and specific than open-textured constitutional norms.⁸⁴ Thus, the task of concretizing these vague and general rights in the constitution and international human rights adopted by Ethiopia and converting the same into legally consumable commodities arises. And hence, legislation can play an important role in ensuring that both the public and private sector respect these prohibitions and by providing effective, accessible remedies in the domestic fora.⁸⁵

For instance, Ethiopia gave effect to the constitutionally entrenched right to work or labour⁸⁶ with Labour Proclamation that embrace around 191 detailed and specific articles. And Art 41(5) of the constitution is also specifically addressed by legislation in relation to persons with disabilities⁸⁷ by the proclamation that embodies 14 articles totally. It is enacted to enhance the

⁸²Ibid.

⁸³Donnelly, Supra note 79, p.77.

⁸⁴Liebenberg, Supra note 1, p.80.

⁸⁵Tsegaye, Supra note 23, p.289, see also Liebenberg, Supra note 1, p.78.

⁸⁶Labour Proclamation No. 377/2003, Neg. Gaz. 3. 10th year, No.12, 2004. For instance, the Preamble of the proclamation Para. 1 reads that: ‘...is necessary to guarantee the right of the workers and employers; and the 3rd paragraph states the rights of workers to, health and safety, working condition and work environment. It is further elucidated under Para.4 that “The proclamation was enacted by taking account into the Political, Social and Economic policies of the government and to be consistent with International Conventions and other legal commitments (including, may be Constitution art. 42, 35(5), (a), (b) (8)) to which Ethiopia is a party with a view to translating into practice. It is hence, avowed that one can see, the importance of legislation in giving effect to vague and too general Constitutionally enunciated socio-economic rights including International Human Rights ratified by Ethiopia as per art 9(4) if they are vague.

⁸⁷Right to Employment of Persons with Disability, Proclamation No. 568/2008, Neg. Gaz.14th year, No. 20, 2008.

employment opportunities of persons with disabilities on equal manner and is designed to prohibit discrimination on the ground of their status which is lacking directly under article 25, 42, 41(3), and 35(8) of the FDRE constitution.⁸⁸ Besides that, the proclamation seems to convert the duty of the government under art 41(5) of the constitution.⁸⁹ It also provides for the rights of persons with disability to reasonable accommodation,⁹⁰ to occupy a vacant post in any office,⁹¹ to participate in a training programme⁹² and preferences⁹³ are given to them. One can see the importance of legislation in giving content to some socio-economic rights that are vague and too broad and it can also clearly set concrete remedies as evidenced in the above proclamations. Thus, legislation is undoubtedly instrumental in ensuring the justiciability and enjoyment of the right to work and work related rights when infringed by the government or private parties.

It can also be argued that the constitution merely requires more definitive legislation and that when such a governmental prerogative is rooted in the constitution. These socio-economic rights are, however, simply too broad and vague to form the basis for more detailed legislation.⁹⁴ Therefore, the absence of subordinate legislation aptly impaired the adjudication of socio-economic rights and claim a remedy. Tsegaye also argues that in the course of protecting human rights, including socio-economic rights in domestic fora, the tasks that are involved can thus be summarized as follows, ‘constitutional guarantee’, ‘legislative protection’, ‘judicial application’ and

⁸⁸Id, Art 2(4) and Para. 3.

⁸⁹From duty of the government under Art 41(3) to the Right of the disabled persons to employment.

⁹⁰Id, see Art 2(5) and Para.2 of proc. No. 568/2008.

⁹¹Id, 4(1), (a).

⁹²Id, 41(b).

⁹³Id, 4(2).

⁹⁴Twibell, *Supra* note 11, p.441-442.

‘executive implementation.’⁹⁵ Thus, one can see that the role of legislation in according protection to constitutionally guaranteed socio-economic rights to get application before a court of law and an enabling tool for citizens to claim and enjoy their constitutional rights. Unless, constitutionally guaranteed vague and general socio-economic rights are backed by legislation, their direct enjoyment remains a mere wish which can never be realized. Hence, legislative protection ensures that state usually incurs the duty to proscribe any act or omission that poses a threat to rights.⁹⁶ For instance, accessible and effective national remedies are the primary means of protecting economic and social rights.⁹⁷ Constitutional incorporation of socio-economic rights does not by itself ensure compliance. States are required to ensure appropriate mechanisms for redressing violations of these rights through legislation.⁹⁸ Thus, legislation is crucial in concretizing the exact remedies in the domestic plane so as to enable the victim to get an easy access to the court of law and enjoy his/her right.

1.6.3. Absence of Cases

This is particularly related to the specific individual claims that might arise in relation to the enjoyment of socio-economic rights in particular states. And this is also pertains to lack of normative development.⁹⁹ Meaning, the idea of case law is mainly attached to the absence of law (i.e. an absence of case law frequently being equated with an absence of law).¹⁰⁰ There is no robust adjudication of socio-economic rights cases at local court that really did call for national appreciation and scholarly discussion in our national

⁹⁵Tsegaye, Supra note 23, p.307.

⁹⁶Id, p.308.

⁹⁷Liebenberg, Supra note 1, p.55.

⁹⁸Mathew Craven, ‘The UN Committee on Economic, Social and Cultural Rights’, in *Economic, Social and Cultural Rights: A text book second revised ed.* A. Eideetal (ed.), MartinusNijhoff Publishers (2001), p.456 and See also Shelton at note 54, p.8-9.

⁹⁹Id, p.467.

¹⁰⁰Ibid.

fora.¹⁰¹ This evidences the underdeveloped jurisprudence of our local courts on these rights.

1.6.4. Courts Lack Jurisdiction

In relation to the problem with poor legislative drafting, courts lack jurisdiction to directly adjudicate those implied socio-economic rights enshrined under chapter ten of the FDRE Constitution. This is because these rights are only the guideline for the organs of the government and are not directly justiciable rights which lead to the incapacity of the courts to deal with directly, thus judges should look for indirect justiciability.

1.6.5. Constitutional Reference by Judges

There is also a problem that most of our judges abstain from referring to constitutional provisions because they believe that constitutional matters are under the mandate of the House of Federation (HOF).¹⁰² They refer to Art 83 and 84 of the constitution and argue that it is the HOF that has the duty to deal with constitutional interpretation. And also they justify that involving in such matters is trespassing into other organs duty which politicizes the judiciary; hence, judges should be neutral and should retreat from delving into politics.¹⁰³ But, with the author's view this is not a problem because Art 83 and 84 are about constitutional disputes, but referring to constitutional provision is not a task of interpretation. A reference to constitutional provisions has to be made because there are no legislations that elaborate socio-economic rights guaranteed by the constitution. In addition, adjudicating socio-economic rights is not delving into politics, for instance, if a reference is made to the General Comment No.3, paragraph10, of the UN which states that "a minimum core obligation to ensure the satisfaction of at

¹⁰¹Interview with Almawu Wole, Judge of Federal Supreme Court Cassation Division on Oct.20/10/2011.

¹⁰²Ibid and See also Tadele, Supra note 77

¹⁰³Tadele, Supra note 77, See also Nega, Supra note 76.

the very least, minimum essential level of each of the rights is incumbent on every state party.” Thus, giving power for courts to handle these cases is not involving them into the duty of others organ, rather letting them do what they are legally empowered to do.¹⁰⁴ Also a recent UN publication noted that ‘it is not primarily the nature of economic and social rights that denies judicial enforcement but the lack of competence or willingness of the adjudicating body to entertain, examine and pronounce on claims affecting these rights.’¹⁰⁵ Therefore, it is primarily the failure of national courts to give judicial consideration to economic and social rights, which has meant that those rights have remained largely meaningless in practice.¹⁰⁶ It is the constitutional duty of our courts to identify ways or means and devise the mechanism of ensuring the justiciability and enforcement of international and constitutionally entrenched socio-economic rights on the domestic arena.

1.6.6. Lack of Awareness

This factor is attributed to both judges and the public at large. As has been discussed earlier, the FDRE constitution has only entrenched very few socio-economic rights as directly justiciable rights. The impliedly guaranteed socio-economic rights are far from judicial scrutiny. The public, including, judges are not aware of the existence of justiciable socio-economic rights.¹⁰⁷ This clearly impairs citizens to boldly claim their rights. Hence, it is the duty of the government, to enhance the awareness of citizens through promotion

¹⁰⁴See art 9(2), judges have duty to obey and ensure the supremacy of the constitution, Art 13(1) and (3), empower judges to respect and enforce and even interpret the constitutions in light of international human rights instruments to which Ethiopia is party and art 9(4) further enable courts to boldly cross-refer to ratified treaties and entertain cases involving socio-economic rights, but not yet done by our courts in the area of socio-economic rights.

¹⁰⁵Fons Coomans, ‘Some Introductory Remarks on the Justiciability of Economic and Social Rights in comparative constitutional context’, in *Justiciability of Economic and Social Rights: Experiences from Domestic System: A textbook*, FonsCoomans (ed.), Intersentia (2006), p.3.

¹⁰⁶Ibid.

¹⁰⁷Tadele, Supra not 77, see also Nega, Supra note 76 and Almawu, Supra note 101.

that help them to claim their constitutionally and internationally¹⁰⁸ guaranteed socio-economic rights. The citizens should first claim their right, and then judges will play their second role in the adjudication of the victim's right to food, health, work, education.

1.6.7. Demanding Nature of the Rights

It is submitted that socio-economic rights are demanding rights; meaning, they are resource dependent at their fulfillment stage, which is also undoubtedly true for civil and political rights.¹⁰⁹ This notion is clearly related to the above ground, for the judges with whom I made an interview answered me that socio-economic need state action, which seem to blurred their eyes, to look at them from other duty of the state to respect and protect which are resource independent. For instance, socio-economic rights could be negatively protected, that is prohibiting unlawful eviction (duty to respect on the part of the state) and protecting against others (duty to protect against third party.)¹¹⁰

Thus, the duty to respect and protect are not resource demanding, however, the judges failed to draw a clear line among the duties incumbent up on state parties to ICESCR. It is avowed that the language of progressive realization of the rights set forth in the covenant should depend entirely on the resources availability of a state, and should not be invoked by states as grounds for failing to implement a right when resources were available. Hence, care should be taken not to distort the meaning attached to the language of

¹⁰⁸Art 9(4) the FDRE constitution remedy the situation, when there is terseness of the existing economic and social rights, hence, ICESCR, CRC, ACHPR are part and parcel of the law of the land.

¹⁰⁹Koch, Supra note 20, p.3-4.

¹¹⁰Scott Leckie, 'the Human right to Adequate Housing', in *Economic, Social and Cultural Rights: A Text book second revised edition*, A. Eideetal (ed.s), MartinusNijhoff Publishers (2001), pp155-156.

“progressive realization” which by itself has a limitation.¹¹¹ The other issue is that minimum threshold, is an immediate obligation that can be enforced and guilty of states in such instances are established independent of resources.¹¹² It is clear therefore that Ethiopian courts should boldly move towards enforcing these rights. In doing so, the country has to exhaust the available resources and even in the absence of resources should claim for international assistance and cooperation.¹¹³ Simply blaming socio-economic rights only on the demanding nature of the rights, by putting aside the other duty of a state cannot relieve the state from responsibility. Thus, socio-economic rights should not be seen only from duty ‘to fulfill’ angle rather other duties of the state to ‘respect’ and to ‘protect’ should also be taken into account.

Here in above, it has been well elucidated that there are factors contributing to the underdeveloped judicial scrutiny of economic and social rights. This problem will be alleviated using the indirect justiciability temporarily. It is thus better to look at whether our courts have played any role to boost the justiciability of socio-economic rights using their constitutional mandate.

The role of courts in the enforcement of human rights enunciated in the constitution is one of the controversial issues in Ethiopia.¹¹⁴ Yet, it is promising that the Federal Supreme Court Cassation Division has in the case

¹¹¹Philip Alston and Gerard Quinn, ‘The Nature and Scope of State Parties Obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol. 9 (1987), p.174.

¹¹²See General Comment No.3, Para. 10.

¹¹³Mathew C.R Craven, *The International Covenant on Economic, Social and Cultural rights: A perspectives on its Development*, Claredon Press, Oxford (1995), p.141.

¹¹⁴AssefaFiseha, ‘The Concept of Separation of Powers and Its Impact on the Role of Judiciary in Ethiopia’, in *Ethiopia Constitutional Law Series* Vol. III, Faculty of Law, (2010), p.24.

of *Tsedale Demise V Kifle Demise*¹¹⁵ boldly interpreted expansively best interest of child clause of the supreme law of the land and the Child Rights Convention. And also in the case of *AbaditLemlem V Municipal City of Zalanbasa and others*¹¹⁶ the same Court in the cassation division, courageously decided on the issue of justiciability of ‘right to housing’¹¹⁷; in which the court protected the victim from unlawful interference on the side of the government and private party; however, it did not directly refer to provisions dealing with socio-economic constitutional provisions, but decided the case on the basis of art 79(2) and 37 of the FDRE constitution. It is whether the issue is a justiciable matter or not pertaining to the decision of the lower Court (Tigray Supreme Court’s decision). It gives us a quick glance that to note the statement made by the lower court and how they viewed socio-economic rights that is: “one cannot get house and money from the government and the matter is clearly administrative matter, hence, cannot be seen by regular courts.”¹¹⁸

One can see that, how the Tigray Supreme Court willingly relinquished its constitutional mandate.¹¹⁹ It is therefore, possible to argue that judges are retreating from adjudicating or applying constitutional provisions to the contrary what the constitution itself provides.¹²⁰ However, the court seemed

¹¹⁵Tsedale Demise V. Kifle Demise Federal Supreme Court Cassation Division File No. 23632(2000).

¹¹⁶Abadit LemlemV.MunicipalCity of Zalanbasa and Others Federal Supreme Court Cassation Division File No 48217(2003).

¹¹⁷‘Right to housing’ is used by the author and not directly pointed out as of ‘right to housing’ by the Cassation Division, still this shows there is a retreat by judges to boldly claim the right as directly justiciable. This can be inferred from the failure of judges to cite the provision that directly addresses the issue as well. However, by any means the decision of the cassation division vindicated the victim to claim back her money and house snatched by the municipal city officials and third party (private persons). (File NO.48217/2003).

¹¹⁸ See at note 116, File No 48217(2003).

¹¹⁹ Takele Soboka, ‘Judicial Referral of Constitutional Disputes in Ethiopia: from Practice to Theory’, in *Ethiopia Constitutional Law Series*, Vol. 3, Faculty of Law, (2010), p.74.

¹²⁰Art 10, 13(1) of the FDRE Constitution aptly tells us that the court at least, has a role in interpreting the provisions of human rights entrenched in the constitution.

to have been overly willing to restrict its own jurisdiction, and ignored cases that squarely fall in its normal adjudicative power.¹²¹ The judiciary's duty in 'respecting and enforcing' the rights and freedoms cannot be meaningfully enjoyed by the right holders unless it is involved in interpreting the scope and limitation of those rights.¹²² Besides, the existing means that may help the court to enhance the justiciability of economic and social rights they are not boldly utilizing the potential of integrated approach. Therefore, courts need to be bold enough to keep doing what it can respect, protect, promote and fulfill in the field of all human rights.¹²³

This could be done through; first, courts should utilize the indirect approach to justiciability. Second, they should shoulder their constitutional obligation. Finally, they should draw lessons from others jurisdictions jurisprudence, if it is of great importance in enhancing the justiciability of socio-economic rights. Our courts are not utilizing the indirect approach to justiciability¹²⁴ so as to enhance the justiciability of the rights in their day to day activities. This was due to the belief that making socio-economic rights justiciable as claimable individual right seem to imposing unbearable burden on the government.¹²⁵ This can be evidenced and rebutted that other civil and political rights have budgetary implication, for instance, right to voting,¹²⁶ fair trial; legal assistance and etc are rights that need positive state actions at their fulfillment level.¹²⁷ And also judicial application of these rights gives

¹²¹Takele, Supra note 119, p.74.

¹²²Assefa, Supra note 114, p.25.

¹²³Tsegaye, Supra note 23, p.306.

¹²⁴Tadele, Supra note 77 and Almawu, Supra note 101.

¹²⁵Ibid, see also Tsegaye, Supra note 23, p.309.

¹²⁶Ethiopia in the 2010 "National Election" invested 189.5 million Ethiopian birr, to 'fulfill' the "right to vote" of its citizen at large, from Ethiopian Television at 7:00 PM, May 2010.

¹²⁷Liebenberg, Supra note 1, p.58, See also Koch, Supra note 20, p.3.

an assurance that in cases of violations; there is a possible remedy by taking one's cases to courts.¹²⁸

1.7. DRAWING ADEQUATE LESSONS FROM THE JURISPRUDENCE OF OTHER JURISDICTIONS: THROUGH CONSTITUTIONAL REFERENCE TO INTERNATIONAL TREATIES

This section is devoted to explain and reveal what lessons can be learnt from the jurisprudence of other jurisdictions for general discussion about socio-economic rights. In doing so, it will attempt to address the issue that whether the Ethiopian courts can draw inspirations from other jurisdictions' jurisprudence. There is sound justifications for courts to draw inspiration in the interpretation of Bill of Rights and substantial benefit derived from such an approach. This notion is rightly put by Rudolf Von Jhering as follows:

*The reception of foreign legal institution is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from a far when he has one as good or better at home, but only a fool would refuse quinine just because it did not grow in his back garden.*¹²⁹

As has been discussed in the foregoing sections the FDRE constitution is not comprehensive for there are some socio-economic rights missing from. One can thus easily deduce from the above statement that the need for analogies arise because they help courts to elucidate the scope and content of a certain vague right in question. In doing so, courts better understand their constitutional system that is; it may identify a doctrine of foreign law and

¹²⁸Tsegaye, Supra note 23, p.308.

¹²⁹Rudolf Von Jhering, *geist des römischenrechts auf den verschiedenestufen seiner Entwicklung* [the spirit of Roman law at different stages of its development], part i, 8f (b.schwabe 9th ed. 1955), cited in Jack Tsen-Talee, *Interpreting bill of rights: The value of a comparative approach*, Vol. 5, No.1, Oxford University Press and New York University Press (2007), p.122.

apply it in articulating the meaning and text of a domestic bill of rights, with suitable modifications if necessary.¹³⁰

The interplay between domestic and international law depicts a relationship of dependence of the latter on the former for its implementation. Thus, the domestic legal system must provide a conducive legislative, judicial and administrative framework if treaty-based guarantee are to be translated into reality for domestic beneficiaries.¹³¹ International law complements and overrides contrary domestic law in matters involving the protection of human and peoples' rights. There is, therefore, a need to bring domestic legislation, administrative rules and practices into concordance with international treaties.¹³² This aspect of conformity is truly evidenced by Art. 13(2) of the constitution which obliges courts to interpret the bill of rights text in conformity with international human right treaties ratified by Ethiopia. The only benchmark to be met by treaties to be part of Ethiopian law is their ratification by the House of Peoples' Representatives. The notion that law passed by the same house will have a legal effect irrespective of their signing by the president warrant the conclusion that the publication, which is made after signature is one of formality but not mandatory precondition of validity.¹³³ It is therefore possible to conclude that the only vital procedure for the incorporation of the international and regional treaties in the Ethiopian law is ratification.¹³⁴ This paves the way for our courts to directly apply ratified treaties made part and parcel of the law of the land.¹³⁵

¹³⁰ Id, p.130.

¹³¹ Takele Soboka, 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia', *Journal of Ethiopian Law*, Vol.23, No.1, (2009), p.138.

¹³² Id, p.141.

¹³³ Gebreamlak, supra note 6 p.45 and See also Sisay, Supra note 10, p.147.

¹³⁴ Ibid.

¹³⁵ Sisay, Supra note 10, p.147

By cross-reference, the Ethiopian court will alleviate the problems surrounding the fact that socio-economic rights provision of the constitution are very scant, vague or too general in their formulation.¹³⁶ Ethiopia has ratified a number of international and regional human rights treaties which explicitly recognizes the right to health, education, food, adequate standard of living; among others, including UDHR, ICESCR, ACHPR, CRC, ACWRC and etc. Above all, the constitution bolsters that these treaties shall be utilized as a guideline for interpretation in maintaining the uniformity of the Bill of Rights text with.

It is the power of courts to interpret rights, to decide their exact content and treaty provisions, this was further rejuvenated by art 3(1) of Federal Courts Proclamation that stipulates ‘federal courts shall have jurisdiction over international treaties and settle disputes on the basis of the same.’¹³⁷ This Proclamation further bolsters and extends the jurisdiction of Ethiopian Courts to apply international and regional human rights treaties ratified by Ethiopia. This aspect of cross-reference to international treaties via art 9(4) of the constitution was well grounded in the case of Tsedale Demise V Kifle Demise;¹³⁸ the Federal Supreme Court expansively interpreted the best interest of the child by directly applying art 3(1) of CRC and 36(2) of the constitution and vindicates the victim.

One can boldly claim that the argument that a treaty ratified should be published in the Negarit Gazeta to be implemented and claimed is rebutted by the Federal Supreme Court cassation division in the decision of the above case. It further reveals the realization of the duty of the judiciary to enforce those fundamental rights and freedoms in Bill of Rights text through judicial

¹³⁶Id, p.1 48.

¹³⁷Federal Courts Proclamation, No. 25/1996, Federal Neg. gaz. 2nd year, No, 13, Addis Ababa (1996).

¹³⁸See, supra note 115 and see also Assefa, Supra note 114, p.24-25.

application.¹³⁹ The direct incorporation or application of international instruments recognizing socio-economic rights within the domestic legal order can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.¹⁴⁰

The following discussion will point out some instances in which courts should refer to international treaties.

1.7.1. Providing Remedies

The power of the courts to grant, any order; that is, just and equitable, paves the way for the developments of a number of creative remedies. This is to redress violations of socio-economic rights.¹⁴¹ However, the Ethiopian constitution on the issue of substantive remedy is silent; hence, the need for drawing inspiration arises in such instances. Thus, Courts should look into the other means remedy via cross reference. There are also a number of Comments on ICESCR which are used as an authoritative interpretation guideline. For instance, General Comment No.9 avowedly stated that states have to take legislative, administrative and judicial remedy to redress violation of socio-economic rights. This enables our courts to turn human rights (socio-economic rights specially) from mere rhetoric to legally claimable rights.¹⁴² ‘Everyone should have the right to an effective remedy in case of an alleged violation of his/her fundamental rights as laid down in Art 8 of the UDHR.’ “At the minimum, national judiciaries should consider the

¹³⁹Sisay, Supra note 10, p.142; see also art 13(1) of the FDRE constitution.

¹⁴⁰ ‘The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol.20, (1998), Rule 26, Art 9(4) of Ethiopian Constitution rejuvenates this approach by making international and regional human rights instruments part and parcel of the law of the land and putting them within the ambit of the judiciary, this undoubtedly enhance socio-economic rights justiciability and enforceability(art 13(1) of the same and art 3(1) of federal courts proclamation also strengthen the same concept.

¹⁴¹Liebenberg, Supra note 1, p.70.

¹⁴²Tsegaye, Supra note 23. P.312.

relevant provisions of international and regional human right laws as an interpretative aid in formulating any decisions that are pertaining to violations of socio-economic rights.”¹⁴³

The other means of ensuring constitutional remedy is through referring to civil and political rights by courts at the time of adjudicating cases on violation of socio-economic rights. In this case most of civil and political rights are dependent on the fulfillment of economic and social rights. For instance, the most fundamental right i.e. right to life to be enjoyed one has to have best attainable mental and physical health and also to have this health status one has to at least get access to adequate food, clean water and shelter because without the fulfillment of these rights, it is more unlikely to survive. This is also what has been revealed by the South African Constitutional Court in the case between the governments of South Africa v Grootboom.¹⁴⁴ The same court also has drawn inspiration from the General Comment of the Committee on Economic, Social and Cultural Rights and the ICESCR provision relating to the right to housing.¹⁴⁵ Therefore, Ethiopian courts in interpreting the constitutionally guaranteed socio-economic rights should consult the ICESCR, ACHPR and other international instruments so as to give effect to treaty-based obligation. This enables the courts to give concrete remedies by referring to both international and regional human rights texts ratified by Ethiopia.

1.7.2. Norm Clarification

It is plain that as Bill of Rights are often embody broad statements of principle; it is arguably imprecise to conclude that foreign law can shed no

¹⁴³ See the Maastricht Guidelines at note 140, Rule 24.

¹⁴⁴HlakoChoma, ‘Constitutional Enforcement of Socio-Economic Rights’(South African case study) School of Law University of Venda, Thohoyandou 0950, south Africa, Vol.6, No.6(serial No.55) *US-China Law Review* (2009), ISSN 1548-6605, USA, p.44, for further reference see also Constitutional Court of South African Case CCT 11/00).

¹⁴⁵Ibid and see also Steiner, Supra note 9, p.333-339.

light on their text.¹⁴⁶ The ICESCR and other regional and international treaties protecting socio-economic rights may be a source of interpretation for relevant constitutional norms.¹⁴⁷ The Committee on Economic, Social and Cultural Rights developed a number of General Comments on the issues of substance, namely, the right to housing, food, forced evictions, the right of persons with disabilities, the right of the elderly, the right to health and two on the right to education. These all were developed as a result of the Committee's perception of the difficulties facing states in the implementation of the rights in question. This is hence aimed at assisting state party to the ICESCR and other bodies in the implementation of the same. Thus, the General Comment has been the principal tool for normative development of socio-economic rights.¹⁴⁸ It therefore help national judiciaries to determine the scope and content of the rights protected under the constitution.¹⁴⁹

In Ethiopia under art 43(1) one can indirectly claim the right to food which deals with the right to improved standard of living and also art 41 which generally talks about socio-economic rights. If Courts face difficulty in the normative content of the rights and their scope of protection they can refer to the Committee's normative development which are authoritative interpretation that serve as a guideline though not binding. This entirely depends on the attitude of judges toward self-executing nature of international and regional human rights treaties. Article 9 (4), 13(1), (2) of the FDRE constitution and Art 3(1) of Federal courts proclamation plainly remedy the situation.

¹⁴⁶Von Jhering, Supra note, 129, p.129.

¹⁴⁷Liebenberg, Supra note 1, p.76.

¹⁴⁸Mathew Craven, 'The UN Committee on Economic, Social and Cultural Rights', in *Economic, Social and Cultural Rights: A text book second revised ed.* A. Eideetal (ed.), MartinusNijhoff Publishers (2001), p.468.

¹⁴⁹Id, P.469.

General Comment No. 12 claims for state to protect, promote, respect and fulfill the right to food. It is therefore possible to boldly claim that making cross-reference so as to draw inspiration from international and regional human rights treaties in such instances by Ethiopian courts to vindicate the victims of violation.¹⁵⁰ This inspiration has much help for our courts to afford an adequate protection to the citizens to whom the right is guaranteed and makes a judicial sense of human rights.¹⁵¹

A sort of relevance exists between the Ethiopian constitution and international and regional human rights that induces the Ethiopian courts to import a comparative jurisprudence and apply it. That is for instance, interpretation should be made in consonant with the ratified treaties which is designed to maintain a sort of similarity and better protection of the rights on the domestic fora. That is the ‘permissible clause’ one can comprehend from art 9(4) and 13(1) and (2) of the FDRE Constitution.

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

*Legally binding international standards should be operated directly and immediately within the domestic legal system of each state party there by enabling individuals to seek enforcement of their rights before national courts and tribunals.*¹⁵²

Therefore, arguably, the Ethiopian courts as per art 9(4) and 13(1) and (2) of the constitution are justified and hence, the FDRE constitution provided a workable environment for our courts to draw inspirations from other jurisdictions’ jurisprudence.

¹⁵⁰Id, P.192.

¹⁵¹Tsegaye, Supra note 23, p.310.

¹⁵² See General Comment No.9, Para. 4.

1.8. CONCLUSIONS AND RECOMMENDATIONS

In conclusion, economic and social rights are newly emerging areas of human rights that developed at the international arena and far from judicial scrutiny. However, these rights are about the well being of an individual and even are basic rights for the realization of civil and political rights. For instance, a starving man does not care about voting and seeking information.

The protection accorded to one set of the rights directly enhances the enjoyment of other categories of rights. By the same token, when a certain right is deprived, it undoubtedly marginalizes the enjoyment of the other categories of rights.

The FDRE Constitution has ingrained a very scant number of socio-economic rights as directly justiciable human rights. It also seemed too adhered, towards civil and political rights, thus one can safely say that there is no balanced protection accorded to both sets of rights i.e. the FDRE constitution seems selective in the recognition of socio-economic rights. This aspect of Selective justiciability eludes the direct protection of classical socio-economic rights.

Courts' lack jurisdiction to directly adjudicate socio-economic matters under NPPO that embraces implied socio-economic rights and failed to see the means enshrined in the constitution.

Accordingly, specialized trainings on indirect justiciability socio-economic rights protected by the constitution and ratified treaties should be arranged and given for judges and lawyers of the country.

Ethiopian judges should also approach economic and social rights from the civil and political rights dimensions that will help to elucidate the scope of protection and clarify the content of these rights in the FDRE Constitution.

Judicial activism by the Ethiopian judges should be courageously claimed so as to realize the constitutionally guaranteed rights of citizens.

The other basic obstacle to the direct justiciability of socio-economic rights is lack of subordinate legislation. Therefore, there should be subordinate legislation for the following reasons:

- To give effect to the treaty-based obligation.
- To give content and determine the scope of protection of the vaguely worded constitutional socio-economic rights.
- To enhance the protection of socio-economic rights.
- To provide with concrete remedies in case of violation of the rights in question established by the victim.

Judges should also refer to constitutional and treaty-based human rights guaranteed to the beneficiaries when the need arises in order to dispose the case at hand and remedy the victim without retreating from constitutional interpretation in the areas of chapter three. This would have countless contribution in utilizing the indirect justiciability which boosts the justiciability of socio-economic rights.