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**JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS:  
AN ETHIOPIAN PERSPECTIVE**



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## TABLE OF ABBREVIATIONS

1. UDHR- Universal Declaration of Human Rights
2. ICESCR- International Covenant on Economic, Social and Cultural Rights
3. ICCPR- International Covenant on Civil and Political Rights
4. CRC- Convention on the Rights of the Child
5. African Charter - African Charter on Human and Peoples' Rights
6. ESC-Economic, Social and Cultural
7. Maastricht Guidelines- Maastricht Guidelines on Violation of Economic, Social and Cultural Rights
8. Limburg Principles- Limburg Principles on the Implementation of the ICESCR
9. Committee-UN Committee on ESC Rights
10. Covenant-ICESCR, unless the context requires otherwise.

11. General Comment is 00. See End note <sup>36</sup> Chapter 1



## INTRODUCTION

That the human rights system lies at the corner stone of any democratic system is undisputed. A number of entitlements are entrenched as human rights and laws are designed and formulated to be interpreted in the most rights-friendly way.

The question is not whether the system of human rights exists. It is about the true benefits they have extended beyond their existence on paper. This calls for a need to examine the extent to which these rights are enforced through courts. Despite the claim of interdependence and interrelationship of all human rights, problems of enforcement of socio-economic rights are huge than other categories of human rights. The involvement of courts in the system of socio-economic rights is very controversial despite various efforts to clarify the point.

The growing emphasis given to socio-economic rights has raised the endless tussle on the justiciability of these rights. These rights have attracted huge attention accompanied by hot debate mainly due to the need for serious budgetary commitments. This paper has attempted to reveal both the arguments for and against the appropriateness of these rights for court inquiry. The paper concludes that objections to the justiciability of socio-economic rights are more of political and overstated.

Chapter one deals generally with socio-economic rights and the basic obligations they impose on governments. The exact elements and contents of these rights are defined. What constitutes a violation is also clarified. The progressive and qualified nature of these rights, which casts shadow on their justiciability, is analyzed. The base of both the arguments for and against justiciability is built here.



Chapter two defines justiciability and compares it with very related but different concepts. More importantly, the objections to the justiciability of socio-economic rights are outlined. The responses to these objections are included. Independent arguments tend to prove the competence and legitimacy of courts in scrutinizing alleged violations of socio-economic rights. The experience of major regional (Continental) courts on the area is reviewed to illuminate the arguments. The chapter asserts and proves the justiciability of these rights.

Chapter three is designed to explore the jurisprudence on justiciability of socio-economic rights in some selected states. The selections and the consequent stance on the issue is reflective of the two self-standing sides of the prevailing debate. It will help Ethiopia to reap the merits of experience.

Amidst a tremendous lack of resource materials, Chapter four is framed to give a taste of the Ethiopian jurisprudence on the area. This section examines the three sources of socio-economic rights in Ethiopia in an attempt to take the desired stance on the justiciability debate. The problems involved in courts enforcing socio-economic rights are revealed and tackled. In addition to the conclusion drawn in chapter two, this chapter proves the presence of laws supporting the role of courts in adjudicating socio-economic rights.

All in all, this paper confirms the ultimate role of courts as guarantor of all human rights including especially socio-economic rights. It affirms the justiciability of socio-economic rights.

# Chapter I

## Economic, Social and Cultural Rights

### 1. Definition, Importance, Distinction, Beneficiaries

The modern law of human rights can be structured in to three groups. The first one deals with civil and political rights. The second, and which is the concern of this chapter covers what are called Economic, Social and cultural (ESC, here after) rights. The third category includes solidarity or group rights. It is these three categories that form the system of human rights. Despite this distinction the modern human rights system is characterized by the recognition of the system as forming a single whole and hence reducing the value of the classification. The concern here is on the second class of human rights law which has become the point of controversy in recent years.

ESC rights are designed to protect and ensure the basic necessities of life of every human being. These rights include the rights to food, to shelter, to health, to education, to work, to freely participate in ones culture etc considered to be the determinants of a complete life. These elements are of fundamental importance to all human beings. Yet hundreds of millions around the world have neither access to these basic needs nor influence the policy decisions that affect their daily survival. Socio-economic rights empower people to take an active role in challenging the source of their impoverishment.

Economic and social rights spell out the indispensable needs of every individual. They provide every human being guarantees of minimal protection and survival. ESC rights provide legal, political and moral framework for people to challenge government policies and programs accountable for failing to provide rights such as those related to housing, food, health, water etc. These rights designate the move far from 'negative' government, from thinking that the poor are a special and natural category of people and are "not the responsibilities of society and government but only of church and charity."<sup>1</sup>



ESC rights primarily benefit those least fortunate citizens of our world. They are founded on concepts of justice and human dignity. They enable people to re-conceive their basic needs as rights they are entitled to claim and not as charity to receive. ESC rights create mechanisms by which the most vulnerable, powerless, voiceless sections of the society in government actions will live free from hunger, for instance, and entitle them participation in government decision making. These rights imply a government that is proactive, intervening and committed to economic and social policy planning for the society, so as to satisfy socio-economic rights of the individual.

The definition of socio-economic rights implies that the rights deemed fundamental include not only freedom which government must not invade, but also rights to what is essential for human well-being which government must actively provide or promote. They imply a government that is active, intervening and deeply concerned with fulfilling the socio-economic rights of the individual citizens under its governance. Those rights declare that all individuals are entitled to have society supply their basic human needs and other socio-economic benefits in case the individual is incapable to get them. They imply that the far reaching gap between the rich and the poor is not the result of the difference in talent and hard work but to a great extent of luck and inconsiderate government policies and programs.

Corruption and mismanagement have no place in a government which strives to respect, protect and fulfill Economic and social rights. They are halls in which the ideals of a democratic government are established. They create legal mechanisms to demand concrete remedies for policies that violate those rights. The respect and protection of these rights results in a more transparent and all-involving allocation of resources. They aim at reducing the unacceptably biased wealth distribution our world is experiencing today. Economic and social rights provide the basic tools by which we can challenge global inequality. The socio-economic conditions of the world are declining through time for millions of our

fellows, the gap between the rich and the poor in rising at a frightening speed with the coming of globalization. It is only through the respect, protection and fulfillment of social- economic rights that a state can achieve its goal of providing its least fortunate citizens with their basic needs. That is why ESC rights greatly matter.

It is possible, though illusory and difficult, to distinguish between what constitutes a social or an economic right. This is because many rights clearly have both an economic and social aspect. In fact, all the rights considered social have significant economic implications.

At the core of social rights is the right to an adequate standard of living. This right articulates the broadest concern of social rights. It requires that people enjoy the bare minimum necessary for a decent and fulfilling life.<sup>2</sup> Now a days there is an approach to consider “adequate standard of living” as to mean the rights to get the “basic needs” of an individual which is a very wide concept. For someone to enjoy an adequate standard of living he/she should at least enjoy the necessary subsistence rights, that is, the right to adequate food, and nutrition, the right to clothing, the right to housing and the necessary conditions of care.

To make the enjoyment of social rights possible, economic rights are needed. Such economic rights are the right to property, the right to work, which is wide and includes the conditions of work, and the right to social security<sup>3</sup>. We can see that economic rights have a two fold function. On the one hand, they are the foundations for the social entitlements, on the other hand they are the bases of independence and freedom, especially the right to property provides a salient example in this respect. These rights need to supplement each other, The right to work provides income which may ensure an adequate standard of living whereas the right to social security supplements, and sometimes substitutes, in case of for instance, unemployment, disability or old age, the income which would otherwise be derived by work.



The right to participate in cultural life is another component which is included under the UDHR,<sup>4</sup> and the ICESCR.<sup>5</sup> Both these instruments contain the right to take part in cultural life, the right to enjoy and share the benefits of scientific advancement, the right to benefit from any scientific, literary or artistic production of which the beneficiary is the author. The ICESCR in addition contains the freedom of scientific research and creative activity.<sup>6</sup> The notion of cultural rights is closely connected to the right to education and the non-discrimination clauses inferred in a number of conventions.

Another important aspect of cultural rights is the right of minority groups to preserve their cultural identity included in the International Covenant on Civil and Political Rights (ICCPR),<sup>7</sup> and the Convention on the Rights of the Child (CRC).<sup>8</sup> It must be noted that this right has implications for civil and political rights as well as socio-economic rights. That is why cultural rights have a place in the non-discrimination and minority provisions of civil and political rights.

The beneficiaries of socio-economic rights are all those that might be subject to violations of their right. In principle, socio-economic rights are granted in the interest of "everyone"<sup>9</sup>. In reality, however, most of these rights protect those who are without jobs, who live in the midst of poverty, with nothing to protect themselves from powerful rains and the wars of the sun. They protect those who have no voice to influence corrupt officials in their decision making. Here, the practical extent of protection is wider in the case of some socio-economic rights than others. For instance, the right to education protects a wider portion of society than the right to food. All in all, socio-economic rights are meant to give a guarantee of life to the least fortunate, the poor, the homeless, the voiceless etc.

In conclusion, the fact that these rights are at the center of good governance makes them worth respecting and protecting. That is why most international human rights instruments have included these rights in the realm of their

protection. More over, a number of national constitutions, including the FDRE constitution<sup>10</sup>, have included enforceable socio-economic rights. Some constitutions have included them not as enforceable fundamental rights but as fundamental “guiding principles” of state policy and programs. The Ethiopian constitution follows both approaches. That is why every government, at least, declares its commitment to provide the conditions for individuals to achieve social and economic well-being.

## 2. Socio-Economic Rights. Real Rights?

### 2.1. Indivisibility and Equality of Rights

The human rights system forms a single whole. It is now a days well settled that human rights and fundamental freedoms are indivisible and interdependent and that equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and ESC rights.<sup>11</sup> This claim of interdependence, indivisibility and interrelation between the two sets of rights has been given emphasis since the adoption of the two major international covenants, the ICCPR and ICESCR in 1966.

Indivisibility means that no single right can be properly enjoyed without the other. Human rights spell out the bare minimum conditions of dignity and that these minimum conditions include both categories of rights. Indivisibility implies that the violation of one set of rights may result from a violation of the other set of rights. This principle provides that human rights could not be clearly divided into different categories, nor could they be so classified as to represents a hierarchy of values. Both groups of rights constitute an indissoluble whole, up on which the recognition of the dignity of the human individual is based. All rights should be protected and promoted at the same time. Without ESC rights civil and political rights might be purely nominal in character; without civil and political rights, ESC rights could not be ensured.<sup>12</sup> The two sets of rights can neither logically nor practically be spotted in an





entirely watertight compartments<sup>13</sup>. Human rights, generally speaking, function to restrain the powerful in order to protect the vital interests of the vulnerable from abusive uses of political, economic and other forms of power.

Another form of indivisibility would be interpreting civil and political rights as including ESC rights. The process of protecting socio- economic rights through civil and political rights is called the *integrated approach*. The right to life, for instance, can be interpreted to include the basic necessities of life such as adequate nutrition, clothing, reading facilities, the right to livelihood, the right to shelter, the right to health care and the right to ~~a~~ education<sup>14</sup>.

The claim that the contemporary canon of human rights forms an indivisible and interdependent system of norms is now well settled. Hence, it is improper for governments to pick and choose among human rights those which they will honor while ignoring other rights as optional, dispensable, non-obligatory or even sometimes as "unreal". There is a lot of evidence to support this view.

There is a proposition that ESC rights are not really law or alternatively, without denying the legal character of ESC rights, it may be alleged that the differences between civil and political rights and ESC rights are so great that the latter are considered second rate human rights<sup>15</sup>. This view is now a days considered obsolete and artificial and only a mechanism by which tyrants and oppressors could simply employ a technique of repression to maintain their system of oppression. It is true that ESC rights have severe budgetary implication. But whether or not an entitlement is a right does not depend on its resource implications. Human rights are intended to achieve the goal of ridding the world of oppression. But it is only through the system of human rights that we can fight systems of oppression. And this requires recognizing the interrelation, interdependence and indivisible nature of all human rights, civil and political as well as ESC rights.

The recognition of the interdependence and interrelation of human rights started long ago when the UN General Assembly agreed to draft two separate covenants containing the two sets of rights in 1951.<sup>16</sup> Despite the decision to have two covenants, all the members agreed that:

*“The enjoyment of civil and political freedoms and of ESC rights are interconnected and interdependent and that when deprived of ESC rights man does not represent the human person whom the universal declaration regards as the ideal of free man”*

The decision to have two covenants was a result of the divergence in opinion which arose from a difference in approach rather than of purpose<sup>17</sup>. Hence, it does not underestimate/ undermine the claim of interplay.

Since the adoption of the two covenants, the ICCPR and the ICESCR, a number of documents and factors support and prove the interdependence and indivisibility of the two sets of rights. Among these are the Tehran Proclamation<sup>18</sup>, and the Vienna Declaration and Programme of Action<sup>19</sup>.

A lot other factors also support the claim of indivisibility. The extent to which newer human rights conventions contain both categories of rights provides an indication of their indivisibility.<sup>20</sup> Most of the core universal human rights treaties such as the Convention of the Eradication of All Forms of Racial Discrimination /CERD/, Convention on the Elimination of All forms of Discrimination Against Women/ CEDAW/, Convention of the Rights of the Child/CRC/ and others include both sets of rights. Moreover, the adoption of regional declarations and conventions that contain references to or are exclusively concerned with socio-economic rights is further support for belief that a world wide consensus of what constitutes the common denominators of dignity includes social and economic rights.



The Vienna declaration and program of action states that "all human rights are universal, indivisible and interdependent and interrelated." This claim is further supported by the General Assembly Resolution which asserts that:

*A) All human rights and fundamental freedoms are indivisible and interdependent ; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and ESC rights;*

*B) The full realization of civil and political rights without the enjoyment of ESC rights is impossible; the achievement of lasting progress in the implementation of human rights is dependant up on sound and effective national and international policies of economic and social development. <sup>21</sup>*

The question of interdependence and interrelation has also gained expression in the preambles of a number of international and regional conventions. The ICESCR, for instance, declares that the enjoyment of both ESC rights and civil and political rights is an indispensable precondition for building a system in which the ideal of free man enjoys freedom from fear and want <sup>22</sup>. The African Charter also puts this idea in a plain language. It declares that the member states take cognizance of the fact that:

*civil and political rights can not be dissociated from ESC rights in their conception as universality and that the satisfaction of ESC rights is a guarantee for the enjoyment of civil and political rights <sup>23</sup>.*

At the national level also, socio-economic rights are gaining more and more recognition. Some have indeed included legally enforceable socio-economic rights with in their lists of fundamental rights. South Africa, Thailand and Ethiopia provide good examples.

All the above facts combine to make me fearless to declare that the human rights system forms an indivisible whole whereby the world should give them equal protection and enforcement thereby giving the system a strong, unshakable base. Indivisibility essentially means applying a holistic right based approach to activities aiming to protect and promote human rights, civil and political and ESC rights. In deed, this proves why socio-economic right are real rights.

The clear implication of the recognition of the interplay and indivisibility of human rights, and the legal status of socio-economic rights is the equality of rights. In human rights law, all entitlements considered rights are equal and there is no hierarchy of rights. Indivisibility necessarily rejects the existence of hierarchy. The violation of one right cannot be justified by the respect for another. Respect for one does not justify sacrifice of the other. All need to be protected.

In conclusion, human rights form a system of norms which function to protect human dignity by thwarting systems of oppression. Though they have individual and particular justifications in themselves, they form a unity. Thanks to the words of the Committee on the ICESCR and the two influential expert meetings conducted in Maastricht <sup>24</sup>, the content of the ESC rights has been elaborated. Hence, the status of socio-economic rights as human rights is now settled. Though different conceptions of human rights may downplay their importance, it is no more disputed that modern human rights law include economic and social rights <sup>25</sup>. At least in formal terms, for the purpose of human rights law, debate over whether socio-economic rights are real rights is settled, whatever the dispute over their nature and consequences. That is why the ICESCR "uses the language of rights, not merely hope, of undertakings and commitment by governments, not merely aspirations and goals".<sup>26</sup>



### 3) Obligations imposed by socio-Economic rights/ICESCR/

The most comprehensive document on ESC rights is the ICESCR though they are sprinkled here and there in various human rights instruments. Whenever a state ratifies a covenant, it undertakes to implement the obligations set out in it. The source of the obligation may be either international treaties or the national constitution. The guide used here is the ICESCR. It must be noted that whatever the source, the obligations are similar as they flow from the nature of the rights.

In this regard, Article 2(1) of the ICESCR is of a pioneer relevance. It is the main component of the covenant in that it identifies the kinds of obligations the states parties recognize to fulfill. It also sets forth the steps the governments must take in order to realize each substantive right. This article sets out:

*Each state party to the present covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures.*

As can be seen from the formulation of this article, socio-economic rights impose obligations which are progressive and qualified. They are progressive in the sense that they are to be achieved gradually, through time. Since they have serious resource implications, they cannot be fulfilled over night, they need time and resource to fully realize. The obligations are qualified in that the resource and wealth of a particular state party determines the extent of its obligations under the covenant. The obligations are not invariable to all states. This is why socio-economic rights are seen as different from civil and political rights. The latter are to be fulfilled immediately and are not resource dependant as such. They have insignificant resource or budgetary implications. In deed, Article 2(1) of the ICCPR imposes the duty to "respect and ensure" the

rights set forth in the covenant. The ICESCR requires states parties to "take steps... to the maximum of available resources" to realize their obligations. Many people argue that this wording of the covenant makes the rights under the ICESCR so vague that it is very difficult, if not impossible, to tell when the rights have been violated.<sup>27</sup> This vagueness claim with its serious resource implication, has been a major source of controversy in the international as well as domestic arena as to the exact legal position of socio-economic rights. But now a days, thanks to the Committee on ESC rights and the works of many academics, their devotion and restless efforts has demonstrated that this kind of obligation is meaningful and that violations of such obligations can be identified. Moreover, the active role courts are playing in the enforcement of socio-economic rights provides abundant evidence of the possibility of identifying violations and rectifying them.

The following parts deal with and examine the conceptual framework implied in the ICESCR for discussing the government's obligations. It also explains how one may address specific kinds of obligations.

### **3.1 Obligations of conduct and Result.**

An obligation of conduct exists where a government must behave in a particular way, but not commit itself to achieving any substantive result.<sup>28</sup> It only requires action reasonably calculated to realize the enjoyment of a particular right. For example, in the right to be free from torture, the government commits itself to order its laws and practices such that it never tortures any individual while carrying on its activities. This obligation is one of conduct. The obligation of result requires states to achieve specific targets to satisfy a detailed substantive result.<sup>29</sup> Jeff King defines the obligation of result as one that commits the government to raising particular state of affairs, but leaves the government with the discretion to adopt its own means of achieving it.<sup>30</sup> With respect to the right to health, for example, the obligation of result



requires the reduction of maternal mortality to a low level (defined level) It may also be to reduce morbidity rate as a result of a particular diseases, say malaria, to a desired level.

In 1977, the International Law Commission /ILC/ declared that the obligations arising under the ICESCR were obligations of result, and not of conduct. This rigid view is, however, rejected now a days. There is also a tendency to consider civil and political rights as obligations of conduct. But if we see the example with respect to torture, while the government has an obligation of conduct to abstain from the use of torture, it is equally the case that it commits to "prevent" the use of torture within its territory. Put simply it, commits to eradicate torture. Like wise, with respect to health there is a conduct dimension. For instance, health services must be provided in a non-discriminatory basis and to every one. The failure may be viewed as the non fulfillment of an obligation of conduct <sup>31</sup>. In fact, it is only through conduct that one achieves any result. That is, all obligations of result always imply some kind of conduct on the actor.

All in all, it should be understood that the tendency to conceive the ICCPR as imposing exclusively of conduct and the ICESCR as imposing exclusively obligations of result is untenable. It is only a baseless attempt to destruct the claim that the contemporary canon of human rights forms an indivisible and interdependent system. The interplay between the human rights system is not undermined by such rigid, extreme classifications. A better way of understanding the obligations imposed by the ICESER and all other human rights instruments is examined next.

### **3.2 Obligations to respect, protect, fulfill.**

Now a days, it is universally accepted that socio-economic rights, just as all other human rights do, impose three types or levels of obligations; that is the obligations to respect, to protect and to fulfill. Each of the obligations has its

own implications. But what is common to all is that failure to perform any one of these obligations constitutes a violation of the entitlements.

### **The obligation to respect /Negative Obligations/**

The obligation to respect requires states to refrain from interfering with the enjoyment of ESC rights<sup>32</sup>. It is one of restrain Any active encroachment upon these rights is, therefore, a violation. This corresponds closely to the traditional conservative view which argues that the obligation of the state is to abstain from arbitrary intervention of the freedom and autonomy of the individual. This provides a shield for citizens from unjust interferences by political authorities. This obligation is violated by proactive measures taken by the government. States must respect, for instance, the resources owned by an individual and the individuals freedom to find work. The government should not engage in arbitrary forced evictions. Banning of trade unions is also another example of violation of the state's duty to respect. Many commentators feel that civil and political rights are exclusively concerned with the obligation to respect<sup>33</sup>. But it should be noted that both categories of rights have this negative dimension in the sense that they require the state to respect the autonomy of the individual in the exercise of his/her rights.

### **The obligation to protect**

This obligation requires states to prevent violations of socio-economic rights by third parties. Governments must prevent third parties from infringing the socio-economic rights of others. This obligation disapproves the stop and watch policies of governments. Here, the state is required to take positive steps towards the effective enjoyment of rights. It presupposes a proactive government. This includes the obligation to enact legislation and create the framework to enjoy the rights without interference from others. Thus, governments have to enact a set of minimum standards for the working conditions in order to prevent third parties from violating human rights. It



gives an extra task more than mere restrain. The role of democratic human rights legislations designed to prevent private actors and human rights commissions charged with administering and ~~encoring~~<sup>enforcing</sup> such legislation should be emphasized here.

Individual's rights should not be infringed by private non state actors such as corporations, land lords etc. Thus, the failure to ensure that private employers comply with basic labor standard may amount to a violation of the right to work or the right to just and favorable conditions of work<sup>34</sup>. The enacting of legislations regulating the amount of rent is in compliance with this obligation. It also includes protection against marketing of hazardous products by means, inter alia, of legislation. The obligation to protect assimilates the acts of private actors in to the state and it is violated by neutrality or omission of the state.

### **The obligation to fulfill**

This obligation requires the state to take positive steps to ensure the realization of the right in question which may include" legislative, administration, judicial, budgetary and other measures<sup>35</sup>. General Comments No. 12 and 13 define the obligation to fulfill to include the obligation to facilitate and provide, while General Comment No.14 includes the obligation to promote as part of the obligation to fulfill<sup>36</sup>. The state has the obligation to fulfill by positively intervening and assisting, especially those who are in a vulnerable position, to make better use of their rights.

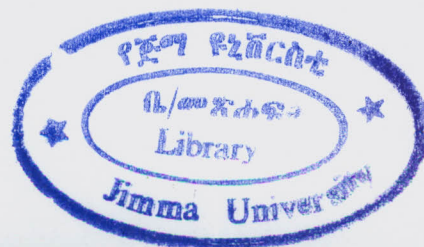
Under this obligation, the government must provide food, shelter, health, education or other necessities of life to individuals without the means to provide for them selves to the maximum possible. Extension of social assistance, public health care and public education forms part of this obligation. It can be easily discerned that the obligation to fulfill has serious resource implications and bears upon government policies and programs. The violation of this obligation includes the failure of states to provide essential

primary health care to those in need. Only by omission can a state infringe these obligations. Similar to the obligation to protect, this obligation presupposes an active, intervening government. The existence of this kind of obligation in socio-economic rights has made these rights a very controversial bit in modern day jurisprudence. The non-justiciability claim has, for instance, its primary base in this obligation <sup>37</sup>.

In conclusion, it must be noted that all human rights need to be respected, protected and fulfilled. The view that socio-economic rights are exclusively concerned with the obligation to fulfill while civil and political rights involve the obligations to respect only is obsolete and has been criticized by scholars who have indicated the extensive range of obligations to protect and fulfill civil and political rights as well as the obligations to respect and protect in socio-economic rights <sup>38</sup>. The involvement of the obligations to protect and respect in socio-economic rights is proved above beyond doubt. To prove the other, if we take the right to protection against torture, for instance, the state may be required to train the police, militia, prison officers and other officials not to engage in such acts. The state will also be required not to let a private actor to torture his fellow individual. Hence, this artificial method of classifying rights as "freedom from" and "freedom to" should be rejected.

#### 4. The Government's obligations under the ICESCR.

Having discussed the general framework of the government's obligations lets now turn to the specific obligations of the government. The fact that socio-economic rights are to be implemented through time and that they are resource dependant is, as mentioned before, a major source of controversy. Not few believe that social rights are mere aspirations and without any judicially enforceable content. That is, they assert that these rights are guidelines rather than legal rights as such <sup>39</sup>. The source of this view is the truth that these rights impose positive obligations and are dependent on the resources available.





This view is, however, becoming weaker and weaker as the Committee on ESC rights and many legal academics have given the admittedly general wording of the covenant an interpretation which clarifies the legal obligations that may be applied with consistency and in predictable ways. As will be seen in the next chapters, many domestic and international courts are developing jurisprudence disapproving the obsolete and artificial view that socio-economic rights are not legal rights.

#### 4.1. Progressive and qualified obligations

The ICCPR under its art 2(1) provides that states are bound to “ respect and ensure” the rights enshrined in it. This is different from the obligation imposed by its counter part in the ICESCR. The ICCPR imposes immediate obligations that are unqualified by the economic capacity of states. Where as the ICESCR imposes progressive and qualified obligations. The ICESCR sets out that states parties are required to “ take steps to the maximum of the available resources...with a view to achieving progressively the full realization of the rights recognized in it <sup>40</sup>. The essence of the legal obligations incurred by any government in this area is to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic human needs.

A progressive obligation is one the full implementation of which requires time. The time needed in fact differs for different countries depending on their economic strength. In this case, it is unrealistic to require immediate compliance with all rights, given the nature of these rights and the specific problems each state must deal with to ensure their full enjoyment. The obligations are qualified in the sense that a state is required to use only the maximum of its available resources. Failure to fulfill due to inability (lack of resources) does not constitute a violation. It is very important to distinguish

between inability and unwillingness to use the materials at hand. The progressive nature of the obligations is in fact the result of their qualified nature. It is clear that the infrastructure necessary to implement all of the rights in the covenant can not be established overnight. The Committee declared with respect to the right to health that:

*For millions of people throughout the world the full enjoyment of the right to health still remains a distant goal.* <sup>41</sup>

This is true even for the most developed countries of the world.

The fact that these obligations are to be fulfilled through time has, however, led some to believe that these obligations have no meaningful content and hence lose their legal nature. This is, however, not true. It should also be noted that states cannot lag behind their potential to delay the implementation of the right indefinitely. It is only a mechanism of creating the necessary flexibility which takes into account the practical realities of different states parties. All states cannot reach the same level at the same time. There are formidable structural and other obstacles resulting from international and other factors which have severe impacts on each state. The Committee has addressed the issue of progressiveness in a detail way. General Comment No.3 provides that:

*The fact that realization over time, or in other words progressively, is foreseen under the covenant should not be misinterpreted as depriving the obligations of all meaningful content. It is on the one hand a necessary flexibility device, reflective the realities of the real world and the difficulties involved for any country in ensuring full realization of ESC rights* <sup>42</sup>.

Hence, the obligation to achieve progressively the full realization of the rights requires states parties to move as expeditious as possible towards the realization of the rights<sup>43</sup>. It should never be interpreted as providing an opportunity for states to defer efforts designed to fully realize the rights. It is



important to, therefore, note that states parties have the obligation to begin to take steps to fulfill their obligations under the covenant immediately.

The progressive nature of the obligations under the covenant may be interpreted in the following way. The government must take steps that are :-

- a) a necessary stage of a long term plan
- b) a substantial contribution/i.e. not of negligible impact/
- c) clearly targeted and
- d) expeditious / i.e. they should not take an unreasonably long time

to effect results<sup>44</sup>. Showing that a government programme does not meet these criteria means, it is in non-compliance with its progressive obligations. The obligation of progressive achievement exists independently of the increase in resources. It only requires the effective use of resources available. Before taking any measures, the government must consider the pros and cons of each of the possibilities at hand. By showing that the government failed to create a coherent strategy, mispent funds or acted in bad faith when implementing the supposed remedial programme, we can prove that the government failed to protect and fulfill the rights concerned<sup>45</sup>. "Available resources" includes both resources within a state and those available from the international community through international cooperation and assistance.

#### **4.2 Immediate Obligations**

Even though the full realization of the rights needs time and resources, it does not mean that there are no obligations that are capable of being implemented immediately. Some obligations under the covenant require immediate implementation in full by all states parties such as the obligations of prohibiting discrimination in implementing covenant rights under article 2(2). In fact there is no clear dividing line between progressive and immediate obligations<sup>46</sup>. The duty to start implementing the progressive obligations immediately creates a sub-obligation that are of an immediate nature.

The difference between the two kinds of obligations lies in the answer to the question when should they be fulfilled. All of the elements in a specific immediate obligation must be realized at once and as a matter of priority. In the case of progressive obligations the state party is only required to go where its pocket allows it to. In the former, delay is a violation but in the latter it is implied in so far as it is reasonable in the sense that the available resources are used in the best possible way. Governments cannot justify the non-implementation of an immediate obligation unless there are extra ordinary circumstances. Hence, since such obligations are not resource dependent, resource constraints are not a factor or excuse in this case. If any of the elements of an immediate obligation are not present within a reasonably short time, the government is in automatic non-compliance. It is for this reason that immediate obligations must be defined precisely.

The existence of obligations which require immediate implementation is witnessed by the Committee. The following are immediate obligations related to the right to housing as the Committee recognized under General Comment No.4:

- a) To adopt a national housing strategy /Para.12/
- b) To monitor the situation with respect to the right be housing  
/Para 13/
- c) To refrain from action that would obstruct access to housing
- d) To facilitate self help
- e) To seek international assistance if immediate obligations  
appear to be beyond the states financial capacity/ para 10/
- f) To ensure that evictions are carried out in accordance with duly  
enacted laws and include resettlement or compensations.

All in all, it can be said that the duties to respect and protect impose immediate obligations on states. But most of the time, the duty to fulfill requires time and hence are progressive.



### 4.3. Core Obligations

The concept of core obligations is a relatively new, modern one. It is based on the idea that at least the minimum levels of each of the obligations should be fulfilled. The Committee developed the jurisprudence on core obligations mainly because most of the states parties were trying to avoid the implementation of socio-economic rights under the pretext that these rights are progressive and hence vague to define their content.

In response to this unacceptable trend followed by states, the Committee developed two answers on this point. First, the Committee has made it clear that progressive obligations impose the duty to start immediately and to move as expeditiously as possible to reach the end though far. Having proved the insufficiency of this robust interpretation of "Progressive obligations" to deal with the problem, the Committee confirmed the idea that the state has an utmost obligation to protect and fulfill the minimum essential levels of each of the rights<sup>47</sup>. The duty to ensure respect for the minimum subsistence rights for all is imposed on states regardless of the level of economic development<sup>48</sup>.

With respect to the concept of core obligations, the Committee has outlined the obligations of states in an understandable way. It declared that:

*"The committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party".<sup>49</sup>*

The clear implication of the above comment is that, violations of the covenant occur when a state fails to satisfy what the committee referred to as 'minimum core obligations'. Thus, for example, a state party in which any significant number of individuals is deprived of essential food stuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, violating the covenant.<sup>50</sup>

The only possible defense available for a state party failing to fulfill these core obligations is to show that the best methods were used to exploit what is at hand in the most effective way to satisfy, as a matter of priority, those minimum obligations. Except in such situations, failure to fulfill the core obligations is a violation irrespective of the availability of resources of the country concerned or any other factors and difficulties<sup>51</sup>. It thus creates a presumption of guilt independent of resource considerations. This has two implications. First, it shifts the burden of proof of violation to the state. Failure to provide the minimum essential levels of each of the rights puts such a state on the line of violators. Hence, the state has to prove that it has made all efforts to reach those minimum levels. The second significance is an implication of the first. Core obligations put a heightened responsibility to care for these rights. The more intense the states obligation to protect and fulfill the rights, the less option to the states discretion in choosing the means of implementation. It should be noted that states parties enjoy a margin of discretion in selecting the best road to the full realization of the right.

In conclusion, failure to demonstrate that “every effort” was made to implement these rights (the minimum levels of each of the rights) is a violation of the covenant. Hence, showing that the government did either nothing, very little, or ignored plausible options shows that it did not make every effort as required and hence is in violation of its duties.

#### **4.4 International Obligations**

This part deals with the obligations imposed on states parties on the respect, protection and fulfillment of socio-economic rights of people in other countries. The root of this obligation is art 2 (1) which requires states to take steps, individually and through international cooperation to realize the right. This obligation, inter alia, requires state to refrain from actions that interfere



directly or indirectly with the enjoyment of the rights of people in other countries. Examples would include harmful embargoes and conclusion of damaging international trade agreements or debt service conditions. With respect to the right to health the Committee declared that.

*“States parties should refrain at all times from imposing embargoes or similar measures restricting the supply of another state with adequate medicines and medical equipment. Restriction on such goods should never be used as an instrument of political and economic pressure”*<sup>52</sup>.

A similar precaution is given by the Committee with respect to the right to water<sup>53</sup>.

International cooperation and assistance aimed at the realization of the rights contained in the covenant is crucial and must be one based on the sovereign equality of states. Such cooperation are encouraged, and in fact ordered, by the Charter of the United Nations.<sup>54</sup> and the ICESCR. According to the Limburg Principles such cooperation and assistance shall have in view as a matter of priority the realization of all human rights and fundamental freedoms, ESC as well as civil and political<sup>55</sup>. It may also be argued that states parties have an obligation to seek international assistance for the fulfillment of a right when they do not have sufficient resources to fulfill it.

This obligation also implies that no state should allow individuals in their territory to engage in activities that violate or might violate the socio-economic rights of people in other countries. Under General Comment No. 14, the Committee recognized that states parties have to respect the enjoyment of the right to health in other countries and to protect people in other countries by influencing third parties which are engaged in violation of rights through legal or political means.<sup>56</sup>

With respect to the right to water, General Comment No. 15 provides that each state party should take steps to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.<sup>57</sup> Moreover, states are further called up on to ensure that their actions as members of international organizations respect and fulfill covenant rights<sup>58</sup>. In this respect, the Maastricht Guidelines provide that member states of such organizations have the duty to make sure that their policies and programs take into account issues of ESC rights especially when these policies and programs are implemented in countries that lack the resources to resist the pressure brought by international organizations on their decision making affecting ESC rights<sup>59</sup>. It is crucial to note that cooperation and assistance must be extended irrespective of differences in political, economic and social systems.

A very controversial area in this respect is whether there is an international obligation to provide aid. The Committee did not give a clear answer to this question, But in General Comment No. 15, the Committee says that where resources are available states "... shall facilitate realization of the right to water in other countries ..."<sup>60</sup> In General Comment No. 14, the Committee writes that:

*"States parties have a joint and individual responsibility ... to cooperate in providing disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and displaced persons"*<sup>61</sup>

It must, however, be noted that during the drafting of art 2(1), the idea that states can claim assistance as a matter of legal right was rejected by general consensus<sup>62</sup>. Jeff King suggests that the Committee is not bound by the drafter's intent though it is relevant. He does not, however, specify his position in this respect.



All in all, states are not free to do nothing; they should work hard for the promotion, respect, protection and fulfillment of socio-economic rights both in their territory as well as in the territories of other fellow states parties. Only then can we achieve the sacred purpose of giving human dignity a real meaning and making life livable.

#### **4.5. Violations**

International human rights instruments, and all treaties in general, impose obligations on states which have ratified them as required by the treaty itself. The result of this is that, any act inconsistent with the treaty undertakings of such a state are considered violations. Failure to do any act which a state is required to perform, or doing something disapproved by the treaty constitute a violation and hence lead to a judicial action at the international, and sometimes at the domestic levels if such duties are made part of the municipal laws of such a state. Violation is the act of breaking, infringing or transgressing the law.

Having said this, we will now see the possible acts which are considered as violations of the rights enshrined under the ICESCR. It must be noted that any act inconsistent with the obligations previously established is contrary to the law. The obligations of states are classified into three as explained before the obligation to respect, protect and fulfill. If any of these duties is not implemented a violation occurs. A failure to comply with an obligation contained in the covenant is, under international law a violation of such covenant. A violation can happen through acts of commission as well as acts of omission. Hence, a failure to avoid promptly obstacles which a state is under a duty to remove to permit the immediate fulfillment of a right amounts to a violation<sup>63</sup>. Also any act of interference with the rights of the covenant not allowed by it are all violations. The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the covenant is an instance of a violation.

Violations of a right can occur through the direct action of states or other entities insufficiently regulated by states. The adoption of any retrogressive measures incompatible with the obligation also constitutes a violation. It may also result from the omission or failure of states to take necessary measures stemming from legal obligations. It must also be noted that a violation occurs when a state fails to fulfill the minimum core obligations of any given right. On the right to food, for instance, General Comment No. 12 States that "Violation of the covenant occurs when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger"<sup>64</sup>. All in all, a violation of ESC right occur when a state pursues, by action or omission, a policy or practice which deliberately contravenes or ignores the obligations of the covenant or fails to achieve the required standards of conduct or result<sup>65</sup>.

In conclusion, in determining what amounts to failure to comply with a states obligations under the covenant, it is important to be careful not to confuse inability from refusal or unwillingness of a state to comply with its treaty obligations A state might fail for reasons beyond its capacity to control. Such a state cannot be said to have violated its duty under the covenant. It is against the requirement of Article 2(1) which imposes a qualified duty dependant on the resources at hand. Therefore, whether there is a failure to comply, or a violation, must be seen in the light of the states parties right or margin of discretion in choosing the means of carrying out its obligations, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.

#### 4.6. Retrogressive Measures

One way by which states violate their duty under the covenant is by taking retrogressive measures. A retrogressive measure is any action or measure taken by the government which results in the removal or rolling back of legislation or



institution previously used to safeguard a right.<sup>66</sup> Retrogressive measures are special forms of violations. They require positive acts on the part of the government. States parties have the duty to respect the rights guaranteed under the covenant. Hence they cannot legally engage in acts that interfere with such rights. But retrogressive measures are clearly acts of interference that create a hindrance in the full realization of each of the rights. States parties can not act in such a way that demolishes an established protective shield. States are prohibited from adopting policies, measures and laws that worsen the situation of socio-economic rights that the population currently enjoys.

Retrogressive measures, example social cutbacks, might result from the attempt to live up to the conditions attached to loan and trading agreements. Since they have the effect of bringing down all previously taken positive measures, emphasis should be given to such serious acts of violations. That is why, the adoption of any deliberate retrogressive measures that reduces the extent to which any right is guaranteed is considered a violation.<sup>67</sup> States are required to move for ward and not to pull the right back.

Be it as it may, sometimes a steady move to the full realization of socio-economic rights might require the deliberate taking of such measures. But it should be taken only as a last resort and only after due consideration of the advancing and degrading effect of such a measure. The Committee dealt with this issue under General Comment No.3. The rule is no retrogressive measures. But if any deliberately retrogressive measures are taken, the state party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the covenant in the context of the full use of the state party's maximum available resources.<sup>68</sup>

The implication is clearly stated in this verse. Any state which has introduced a retrogressive measure is considered guilty or a violator unless proved

otherwise. This shifts the burden of proof from the Committee (or any redress seeking person) to the state. This is similar to the effect of non-compliance with the duty to provide the minimum core obligations. Therefore, any state which tends to introduce any retrogressive measures has the burden of showing that:

- 1) they were introduced after the most careful consideration of all the possible alternatives:
- 2) The measure is justified by reference to the totality of the rights guaranteed in the covenant, and
- 3) Must be reflective of the most effective, optimal use of all the available resources.

In conclusion, states must decline from taking actions that distort the overall structure build for the respect, protection and fulfillment of socio-economic rights. It is only when a better goal can be served that states are permitted to take such measures. In such cases it might even be considered advisable.

#### **4.7. Mechanisms of implementing the rights**

Once a right is guaranteed, the next logical step will be to assess the means that will help realize such rights. States are allowed to select the mechanism best suited to their respective circumstances. The ICESCR states that the rights enshrined there in are to be fulfilled " by all appropriate means". This phrase must be given its full and natural meaning. The steps that must be taken may take different forms. Nevertheless, it is crucial to note that the enjoyment of human rights depend primarily on the state's domestic conduct. It is to be kept in mind that only effective domestic protection can ensure the observance of internationally recognized rights.

Now we will look into the possible choices available for states parties to use as a means to implement the obligations they have undertaken under the Covenant. Different authors usually subscribe specific categories that illustrate



the kinds of things the government should do to implement socio-economic rights. It must be understood that the list is no way exhaustive and states are allowed to follow any mechanism they deem proper in the circumstances of each case.

The first most important means is the enactment of legislations designed to implement the rights. Such legislation is given particular importance and is mentioned as an instance in the Covenant. Legislation is in fact the primary means to incorporate international human rights into domestic law. This is suggested to be the best way to give effect to such rights and greatly facilitates the move to the full realization of socio-economic rights. Legislations may also be adopted on new areas to guide the legal system in the direction compatible with the covenant. Moreover, legislative action is the only way to deal with an existing legislation which inconsistent with the obligations assumed under the covenant. That is, there is a need for a repealing legislation in such cases. Although legislation is the basic for the effective use of the other mechanisms, it is far from being the only measure to fulfill the obligations.

The second most important means is administrative measures. The government is the one that gives effect to and executes the laws made by the legislator. Administrative organs must be structured in such a way that respects and protects the rights under the Covenant. The government should make sure that social security agencies, hospitals, agricultural bureau and regulatory commissions respect the rights when they deal with people. These and other administrative bodies must work together with the legislator and the judiciary to move in the desired direction.

The provision of judicial remedies is another most pressing aspect of "the appropriate means" criteria. A judicial remedy is provided when a complainant brings an action to ensure that his or her right is respected, protected and / or fulfilled by the government. The provision of judicial remedies to violations of rights as one of the measures considered appropriate is recognized by the

Committee.<sup>69</sup> Judicial recourse to seek redress for violations of a right is a natural aspect of all rights. Domestic protection can not be assured without the judiciary which is the ultimate guarantor of rights. The judicial process is a method for enabling citizens to challenge state agencies regarding government policies. If the legislator and the administrative organs are primarily responsible for the fulfillment of the rights, courts are the right organs to watch out the tasks performed by the first two.

Once a case is brought before a court the remedies it orders may take different forms. Restricting the government from interfering with a right is one. This is called injunction in the legal term and is one of the commonest remedies granted by courts in various instances. Sometimes the court may order specific performance against the government for its failure to protect and fulfill its duties. The awarding of monetary compensation (damages) or the giving of a symbolic declaration that a right has been violated (declaration) are the other forms. It must be noted that the court is not excluded from granting one or more of the remedies at once. Other orders may be given in the interim.

The fourth means that can be exploited is the introduction of economic measures. The adoption of economic policies, such as exchange rates, minimum wage provisions and protection in trading agreements and privatization of public services are some of the measures<sup>70</sup>. Regulation of tuition fees also falls in this category. In fact all of these measures need the involvement of either the legislator or the concerned administrative organs or both.

The use of social and educational measures also falls within the ambit of the "appropriate means" phrase. Jeff King suggests that the adoption of public holidays, funding community centers and support for civil society organization, for instance, fall within the social mechanisms that can help implement socio-economic rights in full. The launching of operations designed to help people become aware of and demand their rights is also relevant. Public education, education of children, legal literacy of workers etc all form part of the



educational measures that could be used to achieve the full realization of the rights.

In conclusion, the obligation to fulfill requires states to take appropriate legislative, administrative, judicial, economic, budgetary, social, educational and other measures geared towards the achievement of the objectives of the Covenant. It is crucial to note that legislative measures are crucial behind each of the measures that could be exploited by states parties. It is clear, however, that neither legislation nor effective remedies of a primarily judicial nature will per se be sufficient in the full realization of socio-economic rights. It is only the combination of each of the suggested measures that can produce the best results.

# Chapter one

## End Notes

1. Henry Steiner and Philip Aliston: International Human Rights in Context: Law, Politics, Morals (1996) Page 261.
2. Jeff King: An Activist's Manual on the International Covenant on Economic, Social and Cultural Rights, (2003), Page 75.
3. Some consider it as a social right
4. UDHR, Article 27
5. ICESCR, Article 15(1)
6. id Article 15(3)
7. ICCPR, Article 27
8. CRC, Article 30
9. See Article 41 (FDRE constitution), Articles 7 and 11 of ICESCR.
10. FDRE constitution Article 41
11. The Limburg Principles on the Implementation of the ICESCR UN documents ELCN. 4/1987/17. Paragraph 3. ( Limburg principles After this
12. Henry, Supra 1
13. id page 263
14. The Indian Supreme Court in its various decisions, for instance, Francis Coralie Mullin v. The Administrator Union of Delhi (1982)
15. Henry Supra 1 page 264
16. id page 261
17. ibid
18. First World Conference on Human Rights, Tehran 1968
19. Vienna Declaration and Program of Action, Adopted by the Second World Conference on Human Rights, Vienna, 1993, Para.5.
20. Jeff Supra 2 page. 126.
21. No. 32/130 of 16 December, 1977.
22. ICESCR preamble Para.3.



23. African charter Preamble Para. 7
24. Limburg principles (1987) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1998) (Maastricht Guidelines hereafter)
25. Jeff Supra 2 page 127
26. Henry :Supra 1 Page 255
27. id page 38.
28. Ibid
29. Maastricht Guidelines para.7.
30. Jeff Supra 26.
31. id page 39
32. Maastricht Supra 29 para.6.
33. Jeff Supra 2 page 40
34. Maastricht Supra 29.
- 35 Ibid
36. General Comment is an explanation of the normative contents of the provisions of the ICESCR by the UN Committee on Economic, Social and Cultural Rights (CESCR). It is based on the reports submitted by states. General Comments No.12, 13 and 14 deal with the right to food, education and health respectively.
37. Justiciability relates to the power of courts to give judgment on a particular matter.
38. See C. Scott and P. Macklem” Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in the New South African Constitution” (1992) University of Penn Law Review, Pages 44, 72 and 77-85.
39. Jeff Supra 2. page 42.
40. ICESCR Article 2(1)
41. See General Comment No.14.Para.5
42. General comment Para.9.
43. Limburg Supra 11. Para. 21.
44. Jeff Supra 2 Page 41
45. ibid

46. *ibid*
47. *id* page 42.
48. Limburg Supra 11 Page 42
49. General Comment No. 3 Para 2
50. *Ibid*
51. Maastricht Supra 29.Para.9
52. General Comment Supra 41 para.42
- 53.General Comment No.15 Para 32
54. UN Charter Articles 55 and 56
55. Limburg Supra 11Para 29
56. General Supra 41 Para 39
57. General Comment no 15 Para 33
58. Statement of the CESCR to the Third Ministerial Conference of the World Trade Organization (1999)
59. Maastricht Supra 29 Para. 19
60. General Supra 57 Para. 34
61. General Supra 41 para. 40
62. M. Craven, "The International Covenant on Economic, Social and Cultural rights (Oxford: Oxford University Press, 1994), Page 147.
63. Limburg Supra 11. Para.72 (a)
64. General Comment no 12 Para 17
65. Maastricht Supra 29 Para 11
66. Jeff Supra 2 Page 45
67. Maastricht Supra 29 Para 14 (e)
68. Maastricht Para .9. See also General Comment No 13. Para. 45 on the right to education.
69. General Comment No. 3. Para . 3
70. Jeff Supra 2 page 46.



## Chapter II

### Justiciability of Socio-Economic Rights

#### 4.4. Definition

The issue whether courts have the power to adjudicate on matters of socio-economic rights has raised an endless debate. We can call it the justiciability debate. By justiciability it normally means two things. First, the ability of a court to apply a certain law to a certain situation. Secondly, the right of a person or entity to request that the court make such a ruling. The term "justiciability" is generally understood to refer to a rights faculty to be subjected to the scrutiny of a court of law or another quasi-judicial entity. A right is said to be justiciable when a judge can consider this right in a concrete set of circumstances and when this consideration can result in the further determination of this right's significance <sup>1</sup>. By justiciability it means a process by which a complaint can be launched against state non-compliance with rights in courts.

An issue is justiciable when a court is the capable and legitimate institution for resolving it <sup>2</sup>. If a matter can be argued in a courtroom and if such a court can give a remedy, then such a matter is justiciable. A complainant can bring an action to ensure that his or her right is respected, protected and fulfilled by the government only if the right in concern is justiciable. Justiciability concerns a court determining whether compliance with a law or convention has taken place. The presence of this character in rights entitles beneficiaries to have recourse to judicial bodies in case they think their rights are violated. If a right is not justiciable, it means that it is not capable of being invoked in courts and applied by judges. Justiciable matters are matters which can be appropriately resolved by the courts <sup>3</sup>. Something is justiciable if it is capable of being brought within the legal framework with the possibility of being invoked by an

individual or a group as a cause of action before the courts leading to possible measures of enforcement or the provisions of remedies. When a right is justiciable, it is capable of being decided by a court of justice based on legal principles. If courts can apply their interpretative mind on a matter then it is justiciable.

The question of whether socio-economic rights are justiciable has historically been one of the least clearly understood and hotly debated issues in the literature of rights. The central concerns in deciding whether what rights are appropriate for judicial deliberation can be found in the cores of all justiciability doctrines.

- 1) The concern for judicial economy, efficiency and effectiveness
- 2) The concern for disputes being adequately argued in adversarial forum.
- 3) The concern not to immunize laws and governments actions from judicial review, and
- 4) The concern not to deny worthy parties and issues, both present and future, a proper judicial resolution<sup>4</sup>. These concerns arise out of two central principles which underlay the law of justiciability. First, that courts not adjudicate cases beyond their institutional capacity; and second that, courts not adjudicate cases beyond their legitimacy to resolve disputes. The arguments on whether socio-economic rights are justiciable always try, and of course should, compromise the above central concerns underlying the principle of justiciability. The under coming arguments will take in to account these bases of the debate.



## 2.2. Justiciability Vs Enforceability

It is now the right time to avoid any possible confusion between these two basic elements of human rights law. Justiciability, as defined above, entitles courts to see into a particular law and declare whether a breach has occurred or not. On the other hand, enforceability relates to the power of courts to order and force the government to remedy such a violation. One author explained the difference between the two concepts as:

*Enforcement of human rights deals with the identification of the entitlements and duties created by the legal regime which has to be maintained and executed. Justiciability, on the other hand, presupposes the existence of a review mechanism to determine non-compliance with the terms of the legal regime.”<sup>5</sup>*

The implication is that enforceability comes only after justiciability. That is, enforceability presupposes justiciability. All in all, while justiciability concerns a court determining whether compliance with a law or convention has taken place, enforceability relates to the court's power or ability to grant remedies and compel obedience to.<sup>6</sup> This distinction, though might look technical, is very important since there is a claim that in some jurisdictions, it may be possible to establish that social rights are justiciable without going as far as claiming that courts ought to be able to enforce all valid social claims. Although entertaining a case while being reluctant to issue remedies has a problem, it also has the merit of exposing violations and putting a pressure on the government to live up to its commitments and maximum potential.<sup>7</sup> But whenever possible, courts should not hesitate to enforce a justiciable matter if they have to continue as ultimate guarantors of human rights.

The issue of justiciability of socio-economic rights is, as mentioned before, a very controversial bit. In fact, most courts around the world have been reluctant to make rulings on socio-economic rights. This is attributable to the

relatively underdevelopment of the jurisprudence on the sphere of these rights. This has led to the violation of socio-economic rights without attracting global attention in comparison with their civil and political rights counter parts. It is true that there is a tendency to address aspects of human rights selectively and to neglect socio-economic rights.

A determination of the issue of the justiciability of socio-economic rights is very important as it stands at the soul of whether the rule of exhaustion of local remedies has been met. According to this rule, a matter should first be addressed by the national judicial or administrative body before it is brought before international or regional courts or commissions.<sup>8</sup> If we declare that they are not justiciable, it means no local remedies are available in which case direct action before international tribunals is permitted. But considering the fact that there is no complaint mechanism to the committee, which depends on state reports and its concluding observations, the decision that socio-economic rights are not justiciable will leave them without meaning.

### **2.3. Proofs of justiciability of socio-economic rights**

The fact that socio-economic rights enshrine the basic conditions of human dignity is undisputed. They spell out the minimum elements of a dignified, livable life. That is what we mean when we call them "human rights". The question then is how to secure these souls of our lives. The arguments for justiciability take different direction. Some of them stand by themselves to prove that socio-economic rights are justiciable, while others disapprove arguments which claim to assert that this is not the case. We will see them turn-by-turn.

The first reason to say that socio-economic rights are justiciable is based on article 2(1) of the ICESCR. Under this provision, every ratifying state has undertaken to implement the covenant rights "...by all appropriate means...". But as explained in chapter one, one of the specific means to be used in the



implementation of these rights is the provision of judicial remedies. This is warranted by the Committee which considers the provision of judicial remedies as one of those deemed appropriate <sup>9</sup>. In fact the committee has provided illustrations of rights which should be considered justifiable without any controversy.<sup>10</sup> Moreover states have the duty to prove that domestic local remedies are unnecessary. But in view of the Committee, this is very difficult, if not impossible, to prove and that other mechanisms used will be meaningless without the reinforcement or complementary role of judicial remedies.<sup>11</sup> Hence, the assertion that socio-economic rights should have a place in courtrooms is a sound one. The presumption is the unfolding role of courts and it is for the state to prove otherwise. Moreover, the right of everyone to an effective remedy is also outlined under article 8 of the UDHR. This provision does not discriminate between civil and political and socio-economic rights. The result is the justified right of victims of violations to have a day in courtrooms.

The system of human rights provides mechanisms of dealing with the inadequacies of the political forum.<sup>12</sup> It is precisely about imposing requirements upon government conduct. Hence, to suggest that it is only the political forum that is capable of protecting socio-economic rights is problematic. The political forum does not adequately protect rights. That is the government is the obligation bearer. To say that it is the government that is bound not to violate rights and at the same time it is responsible for ensuring their implementation seems to be a paradox in terms. It is like becoming a judge in a case concerning him/her.

The obligation bearer should not be the obligation enforcer. Otherwise, they will be empty promises to be fulfilled at the mercy of government policies and programmes rather than serious undertakings. Therefore, the involvement of a different organ is a necessity if human rights are really to be respected, protected and fulfilled. This means the judicial body is the reliable organ to achieve the purpose of human rights. Judicial remedies are the natural recourse

for violations of human rights. Human rights delineate a sphere of entitlements that the government or the majority may not invade or disregard. Experience supports the conclusion that the political forum is not a reliable organ for protecting the rights. The very people these rights are most meant to protect, including the impoverished, homeless, illiterate and exploited, are not properly represented in the political arena.

The third argument starts with the assumption that the enjoyment of human rights will depend primarily on the state's domestic conduct. Only effective domestic protection can ensure the observance of internationally recognized rights. But domestic protection cannot be assured without the judiciary, which is the ultimate guarantor of rights. Judicial recourses provide an effective means of protecting social rights. Courts provide an effective and disciplined forum for evaluating evidence, adjudicating adversarial claims, reviewing the unforeseen consequences of policies and laws, giving an official audience to claims about rights violations and more.<sup>13</sup> It is through these procedures that participation of the politically excluded can <sup>be</sup> taken seriously by the concerned organs of the state. The courts power to order remedies allows people to stop or compel government actions that affect their rights. It is this power above all that makes judicial recourses the most appropriate avenue for defending socio-economic rights.

The non-discrimination clause in the ICCPR and other human rights instruments is also another base for the establishment of the justiciability of socio-economic rights. The ICESCR also sets forth the obligation of states to guarantee the exercise of the rights in the covenant without discrimination. Under the ICCPR, the states obligation to prohibit discrimination does not refer to any rights in particular, and therefore is applicable in relation to all rights including socio-economic rights. This means that states are duty <sup>u</sup>bound to provide judicial remedies to cases of violation of socio-economic rights as a result of discrimination.



The relevance of article 26 of the ICCPR as a possible avenue to the justiciability of socio-economic rights was suggested by the human rights Committee on civil and political rights. In *Zwaan -de Vries v. the Netherlands*, the Committee decided that.

*Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to matters that may be provided for by legislation. Thus, it does not, for example, require any state to enact legislation to provide social security. However, when such legislation is adopted in the exercise of a state's sovereign power, then such legislation must comply with article 26 of the covenant.*

The court found a violation of this provision with respect to the right to social security based on marital status. This affirms an independent (self-standing) right to prohibition against discrimination. This means that citizens are not to be subjected to discrimination and any non-compliance can easily be subjected to judicial scrutiny. The Committee on ESC rights has also confirmed that the enjoyment of the rights recognized without discrimination will often be appropriately promoted through the provision of judicial or other effective remedies.<sup>14</sup> Moreover, equality rights may create positive obligations to address needs related to the disadvantaged and it may be breached by an omission or failure to act to address the needs of those disadvantaged or vulnerable groups. It exists not only to prevent discrimination by attribution of stereotypes, but also to ameliorate the position of groups that have suffered disadvantage by exclusion from mainstream society.

Another fact strengthening the judicial protection of social and economic rights is the principle of indivisibility of rights. This also forms part of the integrated approach. According to this principle, socio-economic rights can be accorded

protection by adopting a creative and robust interpretation of civil and political rights such as the right to life. The positive obligation of states under the ICCPR has been acknowledged by the human rights Committee established under this covenant. The Committee has elaborated on the social dimensions of the right to life in its two General Comments on article 6.<sup>15</sup> It declared that the “inherent right to life” cannot properly be understood in a restrictive manner and the protection of this right requires that states should adopt positive measures. This means states should not only refrain from taking lives intentionally but they should also take appropriate measures to safeguard life. This requires fulfilling socio-economic rights.

Hence, by a creative interpretation of rights that are recognized as justiciable, the justiciability of socio-economic rights can be confirmed. By this means the right to life can be interpreted by courts as proscribing acts destructive of the environment, acts or omissions which impede the individuals access to food, shelter and health care as each could lead to the denial of life under conditions not permitted either by national or international human rights law.

In conclusion, it must be noted that claims of non-justiciability of socio-economic rights seem not to have a strong base. The above reasons clearly suggest that our answer to the role of the judiciary in enforcing socio-economic rights must be in the affirmative. And this requires recognizing the fact that courts are both competent and legitimate to rule on cases of violations of socio-economic rights. It is time to take cognizance of the fact that the judiciary is the ultimate guarantor and protector of socio-economic rights in particular and all human rights in general. Without the involvement of the judiciary, the domestic protection of social economic rights will be a dream, a remote one. Justiciability must be seen as an expression of a right.



## 2.4. Arguments against Justiciability and Responses to them

Despite the irresistibility of the reasons established to confirm the justiciability of socio-economic rights, there has been a strong, and sometimes blind, resistance to this claim. In fact the question of whether socio-economic rights are justiciable has historically been one of the least clearly understood and hotly debated issues in the literature of rights.<sup>16</sup> That is why most courts around the world have been reluctant to make rulings on socio-economic rights. They have generally deferred this to the policy makers and politicians. They are very hesitant to interfere with the role of those believed to be the rightful decision makers in these matters. Courts usually are interested in civil and political rights than socio-economic rights. That is reflected in other sections of the government too. That is why the legal terrain of socio-economic rights is not yet well established, despite recent encouraging developments.

This relative selectivity in respecting and protecting human rights has often been criticized. In fact, it was declared in the world conference that:

*2. The principle of equality of the two sets of rights has often been more honored in the breach than in the observance.*

*5. The shocking reality .... is that states and the international community as a whole continue to tolerate all too often breaches of ESC rights which if they occurred in relation to civil and political rights would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial actions.<sup>17</sup>*

This proves the fact that it is not a coincidence that many states have stood against the idea of adopting a protocol to the ICESCR which is designed to provide for individual complaint mechanisms. This is not a happenstance with the prevailing secondary status accorded to these set of rights.

A considerable number of people, particularly in the west, including eminent and influential international lawyers, still had views attributing a second rate

status to socio-economic rights.<sup>18</sup> Some even believe that these rights are not 'real' rights as such rather aspirations intended to serve as policy guidelines and hence not capable of being invoked before national courts. But the main objections to the justiciability of socio-economic rights seem to be more of political rather than based on a true analysis of the nature and implications of these rights. This is evidenced by the fact that the justiciability of socio-economic rights is relative to the jurisdiction in question. This diversity shows that the primary obstacles to the judicial review of these rights are not based on the intrinsic incapacity or illegitimacy of the courts but rather of a heavily political nature.<sup>19</sup> The question of justiciability, therefore, is one of legal creativity combined with political will.

But now a days, thanks to the dedicated works of the Committee and prolific academicians, there seems to be a shift in view. This is supported by recent national and international developments. The idea that the burden to prove lies on those who claim justiciable socio-economic rights no more echoes. The contemporary view is the exact reverse. The universal acceptance of socio-economic rights as forming part of the international code of human rights, together with the committee's endless pressure and comments, suggest that the burden of proof now lies upon those who oppose the justiciability claim.

Now it is time to deal with the common objections that endeavor to disapprove the courts role in enforcing socio-economic rights. Each of the arguments is followed by overruling responses, a disapproval for the disapproval. Before going to the details, it is better to have a sketch of the arguments in brief. In summary the reason can be seen to be:

1. Positive obligations are technically unsuitable for judicial enforcement because courts lack the capacity to decide upon complex policy matters.
2. The rights are very vague, and would amount to judicial legislation



3. The rights are progressive, and thus there is an absence of an enforceable core content.
4. Socio-economic rights would be a massive expansion of judicial review. This would undermine the doctrine of the separation of powers and would involve unelected judges deciding upon the allocation of scarce resources.<sup>20</sup>
5. To agree to such claim would amount to agreeing to provide, for instance, expensive housing for the millions who claim that their present house is not adequate. And this amounts to facing an impossible challenge.
6. Judicial remedies are not effective in realising economic and social rights. They are not the most effective means of achieving these political goals.

Each of these arguments is dealt with below under two broad categories:

- A) Arguments on institutional incapacity
- B) Arguments on institutional illegitimacy

It must be understood, however, that each of the arguments is supplementary to the other and are interrelated. Each flows from and is a necessary expression of the other.

#### **2.4.1. Institutional Incapacity**

The arguments under this topic tend to establish that it is not possible for courts to adjudicate on matters of socio-economic rights. Courts do not have the institutional capacity to rule on these rights. All the arguments flow from the predominantly positive nature of the obligations imposed by these rights.

##### **i. The Unsuitability of Positive Obligations**

Positive obligations require states to take proactive measures to live up to their commitments. Negative obligations, on the other hand, require states to refrain

from acting in a particular way. According to this argument courts have the power to tell the state what the latter cannot do and “to ask them to judge the extent to which a state shall act, rather than at what point it should not, is to force an ill-advised institutional change up on them”.<sup>21</sup> This is because the enforcement of positive rights requires the courts to decide on what constitutes satisfactory government expenditure in administrative and economic matters that go far beyond their ability to comprehend. Judges are specialized in interpreting laws and are not, as a matter of fact, reliable in implementing policies that need understanding complex concepts of economics, public finance, sociology etc and hence they are unable to determine what is appropriate in each of these domains. Courts are not competent to determine the nature or scope of positive obligations.

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This argument is based on a perceived rigid distinction between classical civil and political rights and socio-economic rights as negative and positive rights respectively. But this exclusive classification has been proved to be obsolete, as all kinds of obligations exist in both categories of rights. Traditionally, civil and political rights are seen as not requiring proactive measures by the state.

However, if the states limit themselves to exercising their obligations to refrain from acting, most civil and political rights would not be recognized for a considerable part of the population. That is why we can see court enforced positive obligations arising from civil and political claims of, for instance, life, liberty, security and fair trial.<sup>22</sup> The right to life cannot properly be understood in a restrictive manner and the protection of this right requires that states adopt positive measures designed to safeguard life. Also the enforcement of the right to vote and fair trial both require spending huge money. Moreover, protection against discrimination can be properly enforced without requiring positive action on the part of the state. It is in fact, an example difficult to classify as negative or positive obligation. It requires a third category.





In addition to this, the positive negative distinction falls foul of the modern methodology of considering state obligations. It is proved that both kinds of rights embody the three levels of obligations: the duty to respect, protect and fulfill. This indicates that the “positive rights objection” would not exclude all socio-economic obligations. Moreover, not all the rights categorized as socio-economic fit the mould of state intervention, for instance, the freedom to form trade unions. All in all, given the fact that all rights are indivisible and interdependent, and that there is certain overlap between the two categories of rights, as some rights cannot be clearly classified as belonging to either of categories, but to both of them, it may not in all respects be so helpful to rely on the categories of rights altogether.

## **ii. The Vagueness of Socio-Economic Rights Provisions**

According to this argument socio-economic rights are too vague for the purpose of judicial interpretation and application. The rights are too vague or complex as they involve many different economic and social policies. It is often claimed that they represent too vague provisions to be enforceable. They are said to have a variable content depending on the level of economic development of the state concerned. Since courts are asked to identify the kinds of measures that must be taken to fulfill a right, when there is little guidance offered from the text of the rights to help courts do this task, there will be a problem in effectively applying them.<sup>23</sup> This reason is very much tied to the claim that social rights have positive implications unsuited for court determination. This is, however, proved not to be well founded.

M.Craven has given a prime defence /response to this objection. According to him the remedy to vagueness or generality of a legal norm is judicial elaboration. In his words:

*It is clear that in theory, the generality of a legal norm does not impede judicial decision making per se....The justiciability of a particular issue*

*depends, not up on the generality of the norm concerned, but rather upon the authority of the body making the decision. Thus it is apparent that in a number of cases, national courts have undertaken to apply constitutional provisions of an exceedingly broad and general nature.*<sup>24</sup>

Moreover, the vagueness of the terms is itself important as it enables courts to take account of changing circumstances in interpreting rights which are themselves undergoing constant change within each state.<sup>25</sup> The committee has confirmed that the vagueness is an important instrument of flexibility. In addition, "the specific shape and contour of a right is the result of years of repeated applications of practical reasoning to the facts at hand".<sup>26</sup>

This perception has been overcome through different developments related, notably, to the nature, content and scope of socio-economic rights as well as to related state obligations. The works of the Committee in the form of General Comments gives a fine elaboration of the nature of each of the rights to make it easily enforceable. The general comments contain a number of standards that are announced to be capable of immediate application or ones that may be elaborated easily at the national levels. In addition to this the works of UN special reporters, experts, academics and NGO's as well as national and international and regional case law have all significantly contributed to refute the assertion and add clarity to state obligations ensuing from socio-economic rights provisions. In addition, there are recent trends in providing national elaboration of these rights. South Africa provides a good example as it has adopted legislation describing in considerable detail what constitutes "adequate access to water" and adequate housing.<sup>27</sup> These standards assist courts to provide appropriate and incontestable rulings on these rights.

Another reason that disapproves the vagueness assertion is that courts and UN human rights bodies are constantly engaged in deciding upon very vague concepts.<sup>28</sup> Those bodies adjudicating on civil and political rights are used to considering rights claims in the context of complex policies and problems such



as crime or systematic discrimination. Courts can play just as important a role in helping states make themselves accountable to socio-economic rights.

Moreover, the idea that socio-economic rights are “too vague” for the purpose of judicial interpretation runs foul of the fact that all human rights are expressed in bald terms. In addition, to solve the problem of vagueness, it is better to approach it from the angle of the levels of state obligations which provide an easy means to identify a violation. It must also be noted that the ICESCR especially does not merely list these rights, it describes and defines them in considerable detail and frequently sets out the steps that should be taken to achieve their realization. It should be said at last that if all legal provisions were clear and plain, the role of courts would have been greatly diminished. In fact, giving meaning to a vague provision is what makes them worth establishing and reliable.

#### **ii. Absence of Enforceable Core Content**

This objection flows from the progressive nature of socio-economic rights. According to this argument since the rights are to be implemented over time, there is no minimum threshold requirement that judicial authorities can identify and enforce.<sup>29</sup> These rights are thought to have no immediate aspects. The main point of this agreement is that minimum core content is a necessity before courts can enforce such rights. This argument is very much attached to the vagueness objection.

#### **There are two responses to this objection:**

1. That these rights have minimum core contents, and
2. Thea minimum threshold is not a requirement to make a right justiciable.

The fact that the language of rights implies the existence of a core element has led the Committee to declare that a core content is a necessary part of each right in the covenant.<sup>30</sup> The Committee equates core obligations with minimum essential levels of each of the rights. Jeff King argues that it is difficult to argue

that there are no minimum core obligations arising from socio-economic rights when the most authoritative body charged with its interpretation has expressly declared so.<sup>31</sup>

The second argument against absence of core-content claims is that progressive obligations are themselves justiciable. States are duty bound to take concrete and expeditious steps. Many argue that the relative open-endedness of the concept of progressive realization particularly in light of the qualification related to the availability of resources renders the obligation devoid of meaningful content.

But there can be no justification for elevating a 'claim' to a status of a right if its normative content could be so indeterminate as to allow for the possibility that the right holders possess no particular entitlements to any thing. The involvement of courts in the application of these rights necessarily rebuts this objection. The fact that courts can review government conduct without even considering the question of a definite core entitlement provided by a right was displayed by the Constitutional Court of South Africa in the Grootboom case. The court ruled that whether or not a state has failed to meet its positive obligations imposed by socio-economic rights can be tested against the reasonableness requirement, whether or not the legislative and other measures taken by the state are reasonable. This proves that courts can rule on cases even in the absence of core contents.

#### **2.4. 2. Institutional illegitimacy**

The objections under this part are based on the presumed problems involved in courts enforcing socio-economic rights. Pursuant to this argument, it is in principle possible for courts to enforce socio-economic rights, but they suggest



that it is not appropriate for them to do that Unlike the former, the basis of objection is, not incapacity but, illegitimacy.

#### **i. Justiciability Amounts to a Massive Expansion of Judicial Review**

This argument of illegitimacy is based on the perceived predominantly political charter of obligations of states implied by socio-economic rights. Adjudicating on these rights is not an appropriate role for courts since it involves making policy decisions that are properly the functions of the democratically elected parliament. There is a belief that courts can not legally substitute their judgments in social and economic matters for that of legislative bodies. These types of matter must be dealt with by the legislative and not by courts. The principle is that judges should not usurp what is essentially the role of the elected representatives. They argue that legislatures require substantial freedom in designing the substantive content, procedural mechanism and enforcement remedies in legislation of socio-economic issues. The legislature, and not unelected judges, is the appropriate branch of government to make these decisions. The fear is that courts will usurp the policy prerogatives of legislatures and begin ordering governments to spend specific amounts on health or education or implement specific types of policies. This is, however, argued to be against the praised principle of separation of powers,

A Canadian constitutional scholar provides a good summary of the concern of some who oppose social rights. He says that:

*Social rights involve a massive expansion of judicial review since it would bring under judicial scrutiny all of the elements of modern welfare state, including the regulation of trades and profession, the adequacy of labor standards and bankruptcy laws and of course, the level of public expenditures on social programs*<sup>32</sup>.

Despite these justified concerns, however, it must be noted that adjudicating socio-economic rights claims does not require courts to take over policy making

prerogatives of the government. Rather just as in civil and political rights cases, courts and other bodies review government decision making to ensure consistency with fundamental human rights. Holding governments accountable to human rights does not undermine democracy if rather enhances it.

Moreover, this concern is a gross over simplification, which in no way reflects actual practice. It ignores the way in which the enforcement of civil and political rights has constrained policy making and resources allocation, as well as created positive obligations to realize these rights. A policy can be overruled if it poses an unjust encroachment to one or more civil and political rights. Courts can do the same in the case of socio-economic rights. After all, many cases on socio-economic rights in fact involve courts dealing with denial of access to social rights in similar fashion to many civil and political rights, for instance, unreasonable disconnection of water and sanitation services, unfair dismissals or discrimination in access to education and health care.<sup>33</sup> That is, this objection does not affect the claim that socio-economic rights can at least be protected in the negative from state interference through the active participation of courts. The focus of judicial inquiry, it must be recognized, is on the justification for the action and the procedures used.

For cases that involve positive obligations, the judicial inquire is not significantly different, but often requires a substantial deference to the legislative and executive branches of the government. There is a growing trend by adjudicatory bodies to use a "reasonableness" test (explicitly or implicitly) to evaluate the government's efforts to progressively realize socio-economic rights in a particular case. The South African experience offers a good example. With respect to housing, the Constitutional Court explained its role in enforcing the positive aspects of the right to adequate housing as follows:

*The measures by the government must establish a coherent public housing programme directed to wards the progressive realization of the right to access to adequate housing within the state's available*



*means. The programme must be capable of facilitating the realization of the right. The precise contour and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must however, ensure that the measures they adopt are reasonable.*<sup>34</sup>

The clear impetus of this case is that the involvement of the judiciary in the enforcement of socio-economic rights will only facilitate the adoption of a more rights-friendly policies and procedures by the rightful decision makers, the legislature and the executive. This should never be understood as the judiciary improperly invading the legitimate functions of the other two government organs.

Moreover, the system of separation of powers exists to ensure better governance, but when the merits of this can be achieved through a different means, invasion of it should be justified. In fact "to save the bird limbs may be cut". Judicial inquiry should be considered as one means of checks and balances. In addition when states accepted the elevated status of socio-economic entitlements as human rights they have necessarily recognized the application of the rights in courts since justiciability is one of the natural elements of a right.

In addition to the above coherent defenses to the objection that socio-economic rights imply an improper institutional change, it is unacceptable for the following conventional reasons.

Some states confirm the legitimate power of the court through proper authorization of their role. That is, if the parliament or the constitution takes the clear step of enacting socio-economic rights legislations expressly allowing judicial review, then there will be no doubt on the court's role in this area. The perceived transgression of the separation of power doctrine will be justified by

such clear provisions. This, in fact, dismantles any arguments against the justiciability claim.

The fact that socio-economic rights have great fiscal implications is not always true. There can be identified socio-economic rights that courts can enforce without great expense. The right to form trade unions, protection against arbitrary eviction, non-discrimination in access to employment, housing, social security benefits etc and the reversal of decisions amounting to retrogressive measures provide few examples. In fact, the application of the obligations to respect and protect and discrimination and retrogressive measures have no or very little resource implications.

The case-by-case approach is also another alternative. According to this option courts will decide on whether a particular socio-economic right is justiciable or not depending on the circumstances.<sup>35</sup> The merit of such an approach is that it gives courts the discretion to consider cases of some of these rights while reserving the power to reject those that would involve too strong an institutional change.

A fourth option is based on the variety of redresses that can be granted by courts. Judges can declare a violation without enforcing it. Judges may face three options when faced with a socio-economic rights claim that they deem justiciable. They can

- 1) Deny that a violation took place (the easiest one)
- 2) Declare that a violation occurred but no orders regarding a remedy,  
or
- 3) Declare a violation and choose the least intrusive remedial option.

Hence by tailoring their remedies to suit their institutional role, judges can enforce socio-economic rights while at the same time reducing any potential conflict of interest with the role of the legislative and the executive.



The last argument is what Jeff King calls the paramountcy argument. This is based on the true proposition that priority should always be given to the protection of human rights. The problem of courts expanding judicial review and deciding upon resource constraints is outweighed by the unanswered violations of human rights. Primary importance should be accorded to the enhancement of human rights by remedying violations through the participation of courts in the process. The respect, protection and fulfillment of all human rights, however ideal, stands at the heart of good governance and hence social, economic, legal and cultural development.

ii. Judicial Intervention is not the most effective means of implementing social rights.

Here it is claimed that judicial remedies are not effective in realizing full implementation of socio-economic rights.<sup>36</sup> The first object of judicial scrutiny, at the national or international levels, is to provide adequate redress and compensation to victims of human rights violations. They also ensure the cessation as well as non-repetition of such violations. Experience shows that significant gain can be made through litigation. While not all the judgments are implemented, there are many examples of victims securing compensation or restitution and governments implementing planned projects and carrying out law and policy reforms. Litigation on access to medicines in Latin America and South Africa is a noteworthy example.

Moreover, judgment can also have ripple (spreading) effects since a legal precedent concerning one right has implications for others. Legal cases can provide a useful vehicle for building advocacy and political campaigns since they display systematic violations. That is why in many instances the filling of a case created a space for dialogue with powerful actors. It must always be noted that litigation may be the only strategy available, particularly for the unpopular, voiceless minorities, the homeless, the sick, the poor and other marginalized groups. In deed, it is more the conjunction of different actions and factors that

can trigger a change in a given situation and can prove effective in realizing socio-economic rights as well as civil and political rights. In this respect, the crucial role of courts should never be undermined.

### **iii. Making socio -economic rights justiciable implies facing an impossible challenge**

According to this argument socio -economic rights require governments to give everyone houses to comply with the right to housing or 'buy everyone expensive medicines' to comply with the right to health etc. If you fail to provide these rights, you agree to provide monetary compensation. That is what it means for rights to be justiciable. A claim that these rights are justiciable is a false promise because it can not be fulfilled.<sup>37</sup> Making these rights justiciable will bankrupt governments.

The above argument is, however, only a myth. The reality is that, governments have accepted obligations to progressively realize these rights within their maximum available resources. This requires that states only demonstrate in good faith the fulfillment of the rights over time within their capacity. Courts adjudicating socio-economic rights claims have shown considerable deference to government decisions about resource allocation, and intervened only to ensure that governments take reasonable steps, without discrimination, and subject to available resources to respect, protect and fulfill the rights. They only tempt to show the government its inactions and failures. It is important to recall that the state is obliged to provide services to the maximum of available resources. It is unwillingness, and not incapacity that is considered a violation and to which a remedy is needed. All in all, this objection greatly undermines the presumed competence of courts to give meaning to laws.

In conclusion, the role of courts to appraise whether governments have lived up to their commitments to progressively realize social rights must be emphasized. The domestic implementation of socio -economic rights cannot be



assured without the judiciary. We have to recognize the fact that the judiciary is the ultimate guarantor of all human rights. Adjudicating individual claims allows the subjective voice of claimants to break through legal principles and breath life and meaning to human rights.<sup>38</sup> In deed, litigation can spur legislative changes, attend to individuals or group complaints and provide a constant and watchful accountability mechanisms over legislative and administrative spheres. Litigation can also play a useful educative and transformative role in the dissemination and understanding of human rights principles.

It is no longer right to hesitate to challenge and avoid misconceptions surrounding the idea of justiciability of socio-economic rights. That is why the Maastricht Guidelines declared:

*Any person or group who is a victim of a violation of an ESC right should have access to effective judicial or other appropriate remedies at both national and international levels*<sup>39</sup>.

The Committee has also responded very well to the non-justiciability claim. It has rejected the commonly held belief that socio-economic rights are unsuitable for judicial scrutiny and enforcement. It has declared that there is nothing inherent in the nature of these rights, which puts them, by definition beyond courts. In view of the Committee:

*In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to ESC rights. This description is not warranted by the nature of rights or by the relevant covenant provisions... The adoption of a rigid classification of ESC rights, which puts them, by definition beyond the reach of the courts, would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would*

*also drastically curtail the capacity of courts to protect the rights of the most vulnerable and disadvantaged groups in society*<sup>40</sup>.

The Committee has also noted that the need to ensure justiciability is relevant when determining the best way to give domestic legal effect to the covenant rights. This asserts that states are to provide legal remedies through the adoption of legislative measures for violations of socio-economic rights. This, beyond doubt, proves the justiciability of these rights.

## **2.5 Justiciability at the international level.**

Although the justiciability issue has appeared very controversial, regional courts have made a significant progress in enforcing socio-economic rights. They have taken a clear step in clear terms. The African Charter, the European Social Charter and the American Declaration on the Rights and Duties of Man all contain provisions guaranteeing socio-economic rights. Also protocols to some of the conventions have widened the scope of protection of these rights. This part will display how courts and /or commissions established by such conventions have pursued the justiciability of socio-economic rights.

### **2.5.1. The African Commission on Human and People's Rights and ESC Rights**

The African states have gone forward in the promotion, respect and protection of human rights as well as addressing the widespread and systematic violations of human rights by adopting the African Charter on Human and People's Rights. The establishment of the African Commission on Human Rights and recently the African Court on Human rights gives the African human rights system an extra force to fight the protracted human rights problems in the continent. In fact no continent in the world needs protection against human rights violations more than Africa.



The African Charter embodies provisions both on basic civil and political rights as well as on ESC rights. The African Charter entrenches the principle of indivisibility and interdependence of all human rights.<sup>41</sup> The charter proceeds from a novel perspectives that articulates a unified view of human rights as well as slant this expression in a direction that claims to reflect African cultural values. The right to work, the right to the best attainable physical and mental health as well as the right to education are among the socio-economic rights guaranteed by the charter.<sup>42</sup> However, it is to observe that the charter does not include some socio-economic rights, for instance, the right to housing and the right to food. The charter does not guarantee the right to a standard of life. But there are trends to claim some of the rights derivatively. The commission has declared that food deprivation constitutes a violation of the charter because it contravenes the right to respect of the dignity inherent in a human being.<sup>43</sup>

The African Charter established the Commission with a view to promoting and protecting the rights guaranteed under the charter. As a treaty-monitoring body, the commission is charged with broad promotional, protective and interpretative responsibilities, including the examination of states parties reports, and consideration of interstate, individual and NGO communications<sup>44</sup>.

Notwithstanding the African Charter's express recognition of the indivisibility and interdependence of all human rights, socio-economic rights have been largely ignored by states parties' to the charter as well as by the African commission.<sup>45</sup> In fact, the socio-economic rights provisions are the least cited aspects of the charter. Despite the insignificant number of the communications on violations of these rights, the commission has rendered some influential decisions which reflect the stance of the Africa system on the issue. These decisions clearly suggest that socio-economic rights provisions of the charter are subject to the interpretative scrutiny of the African Commission.

A leading case in this respect is the SERAC case decided by the Commission<sup>46</sup>. This decision is a landmark as far as the jurisprudence on socio-economic rights is concerned. The primary rights under consideration were the rights to satisfactory environment (Art 24) and the right to health (Art 16). The Commission not only challenged the assumption that socio-economic rights have far-reaching difference with civil and political rights, it also affirmed the justiciability of socio-economic rights. The commission ruled that:

*The uniqueness of the African situation and the special qualities of the African Charter on Human and Peoples Rights imposes upon the African Commission an important task. International law and human rights must be responsive to African circumstances. Clearly, collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the Africa Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.*<sup>47</sup>

This is how the Commission reacted to the non-justiciability claim. In the case, the Commission found Nigeria guilty of violating the invoked provisions. Moreover, the Commission has in a number of cases found the violation of the social rights to health and others.<sup>48</sup> All these indicate that socio-economic provisions of the African Charter are subject to the complaint mechanisms provided under the charter.

It must also be noted that Articles 47 and 56 of the Banjul charter allow communications alleging violations of any of the provisions of the charter without distinction of any kind as to whether it is a civil and political or socio-economic right. Article 47 allows communications by states if such a state thinks that "another state party to this charter has violated the provisions of the charter". In fact this groundless distinction is ousted from the outset by the



preamble of the charter which confirms the interdependence, indivisibility and interrelatedness of all rights.

Despite these facts the socio-economic provisions are the least cited aspects of the charter. Moreover, although the states reporting guidelines issued by the Africa commission requires the inclusion of specific information on socio-economic rights, states parties' reports to the commission hardly contain any useful information on the implementation of the socio-economic rights provisions of the charter.

In conclusion, it is recommendable that socio-economic rights be permanently presented on the agenda of the commission. The commission needs to perform a more persuasive task on this area. NGO's should also give emphasis to cases of violation of these rights. Only then will the acknowledgment of the indivisibility and the justiciability of socio-economic rights is to achieve its goal and meaning.

#### **2.5.2. Justiciability in the European Human rights system.**

The European Social Charter and its additional protocols are the main instruments of the Council of Europe in the economic and social field. The Additional protocol to the European Social Charter sets out the obligation to submit regular reports and established the procedure of collective complaints<sup>49</sup>. The reports will be examined by the European Committee of Social Rights. The Committee assesses from a legal standpoint the compliance of states parties laws and practice with the obligations arising from the charter. Then it draws conclusions which might be positive or negative depending on whether the state is in conformity or not.

More important is the procedure of collective complaint mechanism through which complaints may be addressed to the committee by some selected organizations.<sup>50</sup> Complaints must, however, relate to a collective situation not an individual. It must also allege a violation of the charter of social rights.

Nonetheless, this complaint mechanism clearly suggests that violations of socio-economic rights under the charter are subject to deliberation by the European Committee of Social Rights. The Committee may declare whether the charter has been violated.

Moreover, the European Committee of Social Rights has derived a genuine and justiciable right to medical and social assistance from article 13(1) of the social charter. Under this provision states commit themselves to ensuring the enjoyment of a certain right. The committee developed a case law on this provision by way of examining government reports and expressing its comments on them.<sup>51</sup> The Committee has emphasized the obligation of states to provide recourse to a court or another independent body in administrative decisions on medical and social assistance, as well as the obligation to secure social and medical assistance to necessitous persons as of right not as they think fit. It declared that this is an obligation which they may be called on in court to honor. The existing case law on article 13(1) of the European Social Charter indicated that these rights are understood as an individual and justiciable right.<sup>52</sup> This has gained support through the collective complaint procedure mechanism.

Finally, the experience of the European Court of Human Rights indicate a different mechanism of protecting socio-economic Rights. The court has extended the protection of the European Convention on Human rights to some aspects of socio-economic rights.<sup>53</sup> This is one aspect of the integrated approach. It is the fair trial clause in Article 6(1) that provides the means of extension. The court interpreted the right to free legal assistance as the social dimension of the right to fair trial.<sup>54</sup> The court extends the right to access to courts aspect of this entitlement to social security disputes.

The court did this in a number of cases.<sup>55</sup> In the Schuler-Zraggen case, the court further extended the procedure protection under Article 6(1). The court



ruled that ". To day the general rule is that Article 6(1) does apply in the field of social insurance, including even welfare assistance". This is an encouraging development in the sphere of protection of socio -economic rights.

### **2.5.3. The Inter -American system in the area of socio economic rights**

Socio-economic rights are recognized in the Inter-American system in different instruments adopted by the American states. First, the American Declaration on the Rights and Duties of Man recognizes a number of civil and political as well as socio-economic rights.<sup>56</sup> A rather more extensive range of socio-economic rights is included in the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador).<sup>57</sup> It represents a clear advance in setting forth ESC rights as compared to the Declaration and the American Convention. The content of the rights and obligations undertaken by states is defined with greater specificity. The protocol established the duty to submit periodic reports on the measures taken by states parties. More importantly the protocol provides for a system of individual petitions reserved for certain rights, namely trade union rights (art 8(a) of the protocol, and the rights to education (art 13).<sup>58</sup> The complaints are permitted when these rights "are violated by action directly attributable to a state party to this protocol.". The individual complaint mechanism is thus selective and limited only to the above mentioned provisions.

Under this system, complaints are first addressed to the Inter- American Commission on Human Rights which decides on whether the petition has to be submitted/ transferred to the Inter-American Court of Human Right for judicial determination. The court will in such a way be called upon to adjudicate these specific socio-economic rights. The limitation to the petition mechanism is criticized as representing a backsliding with respect to the possibilities offered by the American Declaration and the American Convention <sup>59</sup>.

The Commission's power to hear individual complaints against member states of the Organization of American States (OAS) alleging the violation of a right protected by the American Declaration was recognized in 1966. Once the Commission establishes that the state has violated the rights recognized in the treaty in question, it issues recommendations to the state to remedy the violation. The states obligation to make most serious efforts to carry out the recommendations made by the commissions is doubtless.

There are some cases where the commission has recognized the violation of socio-economic rights. But it must be noted that in most of the cases the commission starts by taking note of violations of civil and political rights. In a case against Cuba the commission considered that the victim was tortured repeatedly while jailed and held Cuba liable for violating the right to preservation of health and well-being, (Art 11 of the Declaration).<sup>60</sup> Also Argentina was held responsible for violating the right to education (Article 12) where a presidential decree ordered that all activities of Jehovah's witnesses cease.<sup>61</sup> This decision was made in the context of the right to assembly. More over, in a case against Brazil the Commission held the government of Brazil responsible for violation of the right to the preservation of health and well-being.<sup>62</sup> This case is very important is so far as the analysis of the violation of ESC rights separately is concerned.

The Inter-American Court of Human Rights has issued opinions on the justiciability of socio-economic rights in the context of its general pronouncements and under its advisory jurisdiction. The court confirmed the concept of indivisibility of the human rights system, with regard to justiciability the court said:

*The so-called civil and political rights, in general are easier to individualize and make inquiry in accordance with a legal procedure capable of resulting in a jurisdictional protection. The court considers*



*that, among the so-called economic, social and cultural rights, there are also some that act or can act as subjective right jurisdictionally inquirable.*<sup>63</sup>

The Court added that some ESC rights cannot be subjected to protection by a judicial or quasi judicial system identical to the present system to protect civil and political rights. This opinion was given during the drafting of the protocol of San Salvador and its impact is reflected in the limited individual complaint mechanism to very few rights under the protocol.

This clearly implies that the court has not given full recognition to the justiciability of socio-economic rights. It rather adopted a discriminatory way of dealing with the issue. The general lines offered by the court are contrary to the doctrine that is being established by the UN Committee on ESC rights.<sup>64</sup>

All in all, internationally, the justiciability of social-economic rights has developed mainly by means of the complaint procedures to commission and/or courts established by instruments protecting ESC rights. There is also a developing trend in pursuing an approach of protecting socio-economic rights through civil and political rights. These mechanisms have improved the promotion and protection of these rights though the world has still to go far to achieve its tremendous goal of fully realizing these rights. The availability of remedies at the international level also provides a useful incentive to ensure the development of effective remedies at the national level, however. This is certain.

In conclusion, it is an important aspect of the effective protection of socio-economic rights that these rights are understood as legally binding individual and collective rights. Recognizing the status of socio-economic rights as justiciable entitlements is crucial to honoring the political, moral and legal commitments undertaken by states when the international bill of rights was adopted. The acknowledgment of their justiciability gives new impetus to a

general understanding of their legally binding nature and hence to the new realization of positive state obligations flowing from them.<sup>65</sup> Courts are playing an increasingly vital rôle in enforcing socio-economic rights, making clear the transition from need and charity to meaningful entitlement and binding obligations of states to ensure protection of ESC rights administratively, judicially or legislatively. But the combination of these organs is a must. Nonetheless, in the face of non-performance it is the justice system that should set it motion the machinery to guarantee the rights. Under the domestic law, it is the judiciary, which is the ultimate guarantor of person's rights. The main objections to justiciable social rights are political.<sup>66</sup> Justiciability is the natural implication of a right. Courts are, beyond doubt, both capable and legitimate institutions for enforcing them. Only the involvement of courts gives the human rights system lungs to breathe violations out and ensure their ultimate full realization.



## Chapter two

### End Notes

1. Kitty Arambulo: Giving Meaning to Economic, Social and Cultural Rights: A Continuing Struggle, Human Rights and Human Welfare (2003) Vol-3, issue 1, Page. 114.
2. Jeff King: An Activist Manual on the International Covenant on Economic, Social and Cultural Rights (2003) page 137.
3. Bryan.A.Garner : Black's Law Dictionary, (Sixth ed. (2000)
4. L. Sossin, Boundaries of Judicial Review: The Law of Justiciability in Canada (Creswell: Toronto,1999).
5. Micheal Addo. " The justiciability of Economic, Social and Cultural Rights (1998 Common Wealth Law Bulletin)
6. Bryan Supra 3
7. Jeff Supra 2 Page 138
8. See, for instance, article 56 (5) and article 50 of the African Charter on Human and Peoples' Rights.
9. General Comment No.3. Para. 5.
10. Ibid
11. General Comment No.9 and 3.
12. Jeff Supra 2 Page 139.
13. Ibid
14. General Comment No.3. Para 5.
15. General Comments 6 (on the right to life) and 14 on the right to life and nuclear weapons, Reports of the Human Rights Committee
16. Module 22: Strategies for Enforcing ESC rights through Domestic Legal Systems, available at <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm>. Page 3

17. Statement to the World Conference on Human Rights on behalf of the CESCR UN. Doc E/1993/22 Annex III)
18. Henry Steiner and Philip Aliston: International Human Rights in Context: Law, Politics, Morals (1996). Page 279.
19. Jeff Supra 2 Page 138.
20. id page.140
21. Ibid.
22. C. Scott and P. Macklem "Constitutional Ropes of sand or Justiciable Guarantees? Social Rights in the New South African Constitution" University of Penn Law Review, (1992). Page 48-71.
23. Jeff Supra 2 page 143.
24. M. Craven "The Domestic Applicability of the ICESCR", 1993, Netherlands International Law Review, Page 45.
25. id at 23
26. C. Scott Supra 22 Page 72.
27. Jeff Supra 2 Page 144
28. Ibid
29. Ibid
30. General Comment No.3. Para. 9 and 10
31. Jeff Supra 2 Page 145.
32. Professor Hagg: Constitutional Law of Canada (Toronto Creswell, 1999)Page 905
33. Malcolm Langford: Judging Social Rights, @ at <http://www.hri.ca/tribune/onlineissue/V11-3-2005/socialrights.html>. Page 2.
34. Grootboom V. The Republic of South Africa Case (2001)
35. Jeff Supra 2 Pages 147 and 148.
36. Malcolm Supra 33. Page 3.



37. Statement of the USA, 59<sup>th</sup> Session on Human rights. Item 10. ESC rights, delivered by Richard Wall, Public delegate, April, 7, 2003.
38. Bruce Porter: The right to be heard: The optional protocol to the ICESCR: What is at stake?  
[http://www.hri.ca/tribune/onlineissue/V11-3-2005/optional\\_protocol.html](http://www.hri.ca/tribune/onlineissue/V11-3-2005/optional_protocol.html).
39. Maastricht Guidelines Para.22.
40. General Comment No.9 Para 3.
41. African Charter Preamble Para.9.
42. Articles 15,16 and 17 respectively
43. Felix Morka: Module 28: The African Commission on Human and Peoples' Rights and ESC Rights,  
[http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module\\_28.htm](http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module_28.htm).
44. See articles 47 -54 and 62 of the African Charter
45. Felix Supra 43. Page3
46. Communication 155/196. The Social and Economic Rights Action Centre and Another V. Nigeria 2001.
47. id Para.68.
48. See for instance, Communications 25/89, 47/90, 59/91, and 100/93, Free Legal Assistance Group and others V. Zaire, Purohit and others V. The Gambia (2003).
49. The protocol was adopted in 1995 and entered in to force in 1998.
50. See, for instance, Article 27 Para. 2. of the protocol
51. Martin Scheinin: Economic and Social Rights as Legal Rights, Chapter3 of A. Eide, C. Krause and A Rosas: Economic, social and Cultural Rights. A Text book. (2000) Page 72.
52. id Page 73.

53. Felix, Supra page 34
54. Airey V. The republic of Northern Ireland case, Judgment of 9 October, 1979.
55. Feldbrugge case, judgment of 29 may 1986, for instance
56. See Articles of and 11-16.
57. Adopted in 1988 in El Salvador, in force since 1999.
58. Article 18(6)
- 59 Julieta Rossi Module 30: The Inter America System for the Protection of Human Rights and ESC Rights (Circle of Rights),  
@<http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module30.htm>.
60. Inter American Court of Human Rights Case No. 6091
61. Inter American Court of Human Rights ase No.2137
62. Inter American Court of Human Rights Case No. 7615.
- 63 Inter-American Commission on Human Rights Annual. Report, 1991.
- 64.Julieta Supra 59
65. Martin Supra 51
66. Jeff Supra 2 page 137.



## Chapter III

### 3. Comparative Analysis / Selected National Experiences/

Most states include within their constitutional or legislative system clauses, provisions or sections embodying human rights standards. National legislation or constitutional enactment guaranteeing human rights characteristically reflect priorities or values treasured within that particular system and may or may not reflect the content of international human rights guarantees. In some countries, a wide range of rights may be constitutionally protected including civil and political as well as ESC rights. In others, only a limited range of civil rights are recognized.

The status of human rights enactments within different systems also varies considerably not only in terms of extent of protection but also in terms of their hierarchical position within the constitutional structure and in terms of the remedies made available. In some countries, a human rights clause in legislation may be directly invoked by an individual beneficiary as a cause of action before courts leading to possible measures of enforcement or the provision of remedies. In other countries, however, the human rights clauses may take the form of "directive guidelines" whose purpose is to guide governmental policy makers rather than give rise to enforceable individual rights. Such directive principles will not normally be invocable before courts though exceptionally this might happen but only in their inspirational and interpretative role. Their invocability is provided expressly in some countries while others exclude their enforceability through silence depending on the principle that policies are beyond court interpretation.

Now a days, the vast majority of countries have domestically recognized socio-economic rights, either through the application of international treaties in domestic law or through constitutional or human rights provisions which refer to socio-economic rights to be accorded with the same mechanisms for review

or enforcement as civil and political rights or both. Despite this, it is uncommon to see socio-economic rights to be accorded with the same mechanisms for review of enforcement as civil and political rights. There is a common view that these rights are non-justiciable or 'policy oriented' and hence unsuited to judicial enforcement in any form. This claim/objection is based on the perceived exaggerated characteristic differences between civil and political and socio-economic rights. This idea, however, ignores the well-founded view that what is common to both categories highly exceeds the more technical differences between the two. Both of them stand at the heart of human dignity. This is what is implied by the principle of indivisibility of the indissoluble human rights system. That is why in recent years there has been a trend to accept the possibility of judicial enforcement of such rights, but to confine it to areas that do not entirely usurp government decision making.

This chapter is intended to cast light on the recent national developments in the jurisprudence on the justiciability of socio-economic rights in some countries.

### 3.1. The Indian Experience

The Indian Constitution guarantees "fundamental rights" to all citizens. These include the right to life (article 21) and the right to equality. The constitution makes the civil and political rights expressly enforceable through courts. A person can seek enforcement of fundamental rights and seek redress for their breach. Socio-economic rights are set out in a section of the constitution entitled "Directive Principles of State policy" (DPSP here after). Many of the provisions in this part correspond to the provisions of the ICESCR. The match between the constitution and the prevailing view on Socio-economic rights should be observed. This should not be taken as a happenstance.

These Socio-economic rights are expressly declared to be unenforceable in court. The constitution provides that the DPSP:



*Shall not be enforceable by any court but the principles there in laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making law.*<sup>1</sup>

It is important to note the overlap in the apparent distinction between the two set of rights has also gained expression in the Indian context between fundamental rights and the DPSP. The bar to justiciability of the DPSP, and hence socio-economic rights, is spelled out in some sense in the constitution itself.

Despite this clear constitutional hurdle, the Indian Supreme Court has tried to give protection for aspects of socio-economic rights through its constitutional right and duty of protecting the “fundamental rights” provisions of the constitution <sup>2</sup>. The Indian judiciary has overcome this apparent limitation by a wisdom full and creative exercise of its interpretative power. The Supreme Court is probably the first organ to finely apply the integrated approach in the most comprehensive way.

The Supreme Court settled the heightened tussle for primacy between fundamental rights and the DPSP declaring the two to be complementary and preconditions for each other. It is now accepted that what is fundamental in the governance of the country cannot be less significant than what is significant in the life of the individual <sup>3</sup>. In the same case, it was declared that “in building up a just social order it is sometimes imperative that the fundamental rights should be subordinate to the directive principles”. This view that the fundamental rights and DPSP are complementary, “neither part being superior to the other”, has held the field since.<sup>4</sup> Hence, the distinction drawn by the constitution has not barred the court from declaring the equal status and importance of the two set of rights.

The DPSP have, through important constitutional amendment become the benchmark to insulate legislation enacted to achieve social objectives, as enumerated in some of the DPSP, from attacks of invalidation by courts.<sup>5</sup> But here the court has the power of judicial review to examine if in fact, the legislation is intended to achieve the objective it is adopted for. More over, courts have used DPSP to uphold the constitutional validity of statutes that apparently impose restrictions on the fundamental rights as long as they are stated to achieve the objective of the DPSP.<sup>6</sup> To conclude, the DPSP are seen as aids to interpret the constitution, and more specifically to provide the basis, scope and extent of the content of a fundamental right.

Following are explanations of decisions of the Indian Supreme Court on matters of socio- economic rights. Despite the express constitutional preclusion of the directive principles from judicial enforcement, the Supreme Court has given indirect effect to the directive principles by interpreting civil and political rights, such as and mainly, the right to life. The right to an adequate quality of life is ruled to include the right to adequate nutrition, clothing and shelter. The Court has repeatedly interpreted the right to life in the most robust way. To mention one, in the **Francis Coralie Mullin** case the court decided that:

*The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading , writing and expressing one self in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as to constitute the bare minimum expression of the human self.<sup>7</sup>*



Hence the government cannot deprive its citizens of these essential elements of their right to life unless done under reasonable, fair and just procedure.

This expanded interpretation of the right to life combined with the use of public interest litigation, where by the rules of standing and procedure <sup>are</sup> ~~were~~ very relaxed and hence creating access to the majority of the population who were unable to access the justice system on account of their social, economic and other disabilities, led the court into areas where there was a crying need for social justice.<sup>8</sup> By reading, in to the ambit of the right to life, the rights of dignity, living conditions, health etc, the court overcome the difficulty of justiciability of socio-economic rights which were considered policy guidelines and hence unenforceable.

In one, case, with respect to the right to work, the court relied on the prohibition of discrimination to order the government to stop classifying workers as permanent and causal for purpose of paying less to the latter. Every worker is entitled to the minimum pay payable to employees in regular cadres. The court ruled:

*We are of the view that on the facts and in circumstances of this case the classification of employees in to regularly recruited employees and causal employees for the purpose of paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where pay scales are the lowest is not tenable.*<sup>9</sup>

The court employed the phrase "hostile discrimination" and suggested the non-discrimination clause as providing a room for protection of socio- economic rights.

The right to shelter, which forms part of the right to an adequate standard of living under article 11 of the ICESCR, has found no corresponding expression in the DPSP. But the court has read this right in the right to life. The court has

gone as far as to say, "The right to life... would take with in its sweep the right to food... and a reasonable accommodation to live in".<sup>10</sup>

In another case, *Banwasi Seva Ashram V. State of V.F.*, the attempt of the National Thermal Power Corporation Ltd. /NTPC/ to oust "tribals" from their traditional forest lands, which provided them with food and shelter was challenged by the court which ordered the NTPC to find alternative dwellings for the tribals and have them approved by the court before continuing.<sup>11</sup>

In a more recent case, the court confirmed the duty of the government to provide incapable citizens with the resource to build their own houses. The court based its decision on the right to life. The issue involved the eviction of encroachers in a busy locality of Ahmedabad city. The court held that:

*Though no person has a right to encroach and erect structures or otherwise on footpaths, pavements or public streets or any other place reserved or earmarked for a public purpose, the state has the constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful.*<sup>12</sup>

The Supreme Court has also entertained cases concerning the right to health. The duty of the state to improve public health is enshrined under the constitution in the part dealing with DPSP.<sup>13</sup> Nevertheless, the right to health has been the least difficult area for the court in terms of justiciability. The court has always read the right to health in the right to life.<sup>14</sup> In another case, where government hospitals in Calcutta refused to admit a person in need of emergency treatment as they did not have vacant beds, the Supreme Court declared the right to health to be a fundamental right and enforced the right of the victim by asking the government of West Bengal to pay him compensation for the loss he suffered. It directed the government to devise a mechanism to establish a primary health care with particular reference to treatment of



patients during an emergency.<sup>15</sup> The Court mandated compulsory health insurance for every worker in an asbestos industry as enforcement of the worker's fundamental right to health.<sup>16</sup> Moreover, the court has had occasions to examine the quality of drugs and medicines being marketed in the country and even ask that some of them be banned.<sup>17</sup>

The Court has, however, cautioned that the duty of the government to ensure the fundamental right to health was subject to the economic capacity of the state. The court emphasized:

*No state or country can have unlimited resources to spend on any of its projects. That is why it only approves its projects to the extent it is feasible. The same holds good for providing medical facilities to its citizens including its employees. Provisions of facilities cannot be unlimited. It has to be to the extent finances permit.*<sup>18</sup>

In this case, the court found the principle of fixation of rate and scale under the government's policy justified.

Another area which deserves talking about is the right to education found under Article 47 of the DPSP. But the right to education as a fundamental and enforceable right as such was confirmed by the Supreme Court.<sup>19</sup> Here again, the court used the right to life to recognize the right to education. The court declared that private educational institutions that are accredited by the state could not charge exorbitant tuition fees for educational courses. Once more, the court applied an expansive definition of the right to life and brought private institutions within the ambit of the bill of rights.

In another case, where private medical and engineering colleges challenged the state legislation regulating the charging of "Capitation" fees from students seeking admission as enforcement of their right to business, the court

expressly denied the claim. In addition, the court explained the right to education as meaning:

*That a citizen has a right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development... we have held the right to education to be implicit in the right of life because of its inherent fundamental importance...*<sup>20</sup>

In conclusion, it can be clearly observed that under the Indian legal system, Socio- economic rights are no less important than fundamental rights. Some times they are even considered justifications to limitations to the latter. The judiciary is not fettered by any apparent injunction in the constitution against judicial enforceability of the DPSP.

The Supreme Court has never hesitated to project them as enforceable supplying the content of the fundamental rights themselves. The court has pointed out, in unequivocal terms, the state's obligations towards individuals by referring to the directive principles.

The introduction of the concept of public interest litigation combined with the court's robust interpretation of the fundamental rights has resulted in the ESC rights, symbolized by the DPSP, being constantly claimed and enforced by the court. The Indian experience clearly demonstrates that the agenda and policies of the state can be shaped to a considerable extent by a creative and activist judiciary.<sup>21</sup> These achievements illustrate the merits of allowing judicial review in socio- economic cases.

*The court has apparently not opened massive floodgates of litigation, nor has it ordered enormous remedies that are unaffordable for the state. Rather, it has given protection where it could by means of progressive, liberal and soundly reasoned interpretations of the right to life*<sup>22</sup>



This is how Jeff King praised the leading role the court has played and its worth to follow.

### 3.2. The South -African Experience.

Another country with a relatively developed jurisprudence on socio-economic rights is South Africa. South Africa's final constitution lists a broad range of socio-economic rights such as access to adequate housing, health care services, including reproductive health care, sufficient food and water and social security including appropriate social assistance. Some components of these rights are subject to limitations related to availability of resources in the same way as the ICESCR. What makes the constitution modern and unique is that it provides for a wide range of civil and political as well as socio-economic rights and that all these rights are subject to judicial review. The classification in the Indian constitution, adopted long ago, has no place in the South African constitution. In some cases, it might even be possible to follow socio-economic rights claims against private entities. The decisions of the Constitutional Court confirmed that in appropriate circumstances the courts can and should enforce the socio-economic rights.

The challenge against Socio- economic rights as being non-justiciable was rejected by the Constitutional Court when it was brought before it by some petitioners. The court declared that:

*We are of the view that these rights are, at least to some extent, justiciable. As we have stated in the previous paragraph, many of the civil and political rights entrenched in the new constitution will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio- economic rights can be negatively protected from improper invasion.*<sup>23.</sup>

The court decided, inter alia, the fact that courts were engaged in enforcing positive obligation gave them the reason to believe that continuing to do so with socio-economic rights would not result in the feared drastic institutional change. It seems that the court was highly influenced and inspired by the creative interpretation and agile involvement of the Indian Supreme Court in the sphere of socio-economic rights enforcement in the face of constitutional hurdle. In recent decisions, the Constitutional Court confirmed that the constitution obliges the state to act positively with respect to socio-economic rights.

In the Grootboom case, the court reiterated its recognition of the justifiability of Socio-economic rights.<sup>24</sup> This decision settled the tussle on the issue. The court ruled that the government has failed “to make reasonable provision of temporary shelter within its available resources” for people with “no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations” In this case, the court suggested the reasonableness criteria to evaluate whether the government’s measures are targeted to achieve the dicta of the constitution in socio-economic spheres.

In another case<sup>25</sup>, the request of the applicant to treatment of an emergency health problem was refused by the court. The ground of objection by the hospitals was that the machines were reserved for a class of patients that were not on the verge of death which the claimant was. The court held that he did not have the right to treatment based on their definition of ‘emergency’ and a narrow interpretation of the protection offered by the right to health.<sup>26</sup> The court has impliedly recognized the measures by the hospitals as reasonable in granting medical assistance only in cases of emergency. That is, as a means of effectively using the resources at hand. Another implication is that the court does uphold its views on justiciability.

Although both the Grootboom and Soobramoney cases have been criticized for not providing the substantive relief sought by the petitioners, they demonstrate



that accepting judicially enforceable socio- economic rights will not lead to the judicial excess ~~same~~ had expected.<sup>27</sup> The South African Constitutional Court has got the widest field to directly enforce these rights compared to the Indian Supreme Court. This little but encouraging experience shows the future is bright and that courts are cautiously entering the domain of social rights adjudication.

### 3.3. The Experience of the United States

In the United States, there is a conventional view that socio- economic rights are not justiciable. The primary reason suggested is the difficulty in identifying a violation of such rights.<sup>28</sup> Official policy has been explicitly against the concept of socio-economic rights. More over, the US did not yet ratify the ICESCR though it has signed it. In fact, during Reagan's administration the Department of State on Human Rights policy endorsed the unqualified rejection of these "rights" as rights. Human rights were to be explicitly defined for the purposes of future US policy as "meaning political rights and civil liberties"<sup>29</sup> In fact, the constitution of the U.S does not contain any express provision guaranteeing socio-economic entitlements.

One exception to the rule of non-justiciability of these set of rights has been with regard to the right to education where courts (especially at state level) have been actively engaged in the question what state obligations are in meeting the right to education. This started with the declaration by the Supreme Court that segregated schools were inherently unequal which promised a remedy that has never been fully realized in any state.<sup>30</sup> Segregated education was ruled to be a violation of the right to equality enshrined in the constitution.

In another case, the Supreme Court unanimously approved a sweeping judicial remedy to the failure of integration (desegregation efforts).<sup>31</sup> The remedies

granted were fixing the boundaries of school districts and busing of students between intercity and outlying schools. This allowed courts to provide for remedies- even those that would involve the expenditure of huge amounts of money- for violations of children's right to education. The creation and enforcement of the busing remedy thus, in some ways, represents a high point in the protection and justiciability of the right to education and all socio-economic rights in general though opponents might say that the cases were brought under a civil and political rights framework, namely equal protection clause, and not as a socio-economic right enforcement.<sup>32</sup> It must be noted that the method represents the integrated approach of protecting these rights.

However, in a latter case the Supreme Court made it clear that no federal right to an adequate education exists.<sup>33</sup> Though the Brown case proclaimed education to be important, in this case adequate education was ruled not to be a fundamental right protected by the constitution. This decision suggests that publicly funded education is provided not as a right but at the mercy of the government.

What is worth mentioning here is the liberal development in the inclusion of the right to education in the constitutions of most of the states. The language of the clauses providing for the right and the affirmative duties imposed by the state legislative differs however. In most state courts, the claim that education should be adequate has gained acceptance. Judges have uphold increased state obligations in about 70 percent of the cases avoiding the conventional wisdom that, socio- economic rights are unenforceable and non-justiciable in the U.S at least at the state level. Courts facing legal challenges to states funding system have ordered such states to reform the way they pay for schools. Most of those cases were based on adequacy arguments and hence giving tangible content to the perceivably non-justiciable Socio-economic right to education.<sup>34</sup>



The West Virginian Supreme Court has declared the right to education a fundamental right of every American as opposed to the decision of the US Supreme Court in the Rodriguez case<sup>35</sup>. The New York's highest court rejected an "eighth grade education is enough" standard and added all public school students statewide are entitled to a meaningful high school education.<sup>36</sup> It did so by emphasizing that the constitution (of New York) requires a "Meaningful high school education". Moreover, the court affirmed the trial courts conclusion that students must be provided with skills they need today to function capably as civil participants. Litigation is under way in a number of states where courts are putting pressure on legislatures to spend from 15 percent to 40 percent more on education.<sup>37</sup>

The above discussions clearly prove the recognition of the right to education as a justiciable socio- economic right in the United States. This, it is hoped, will facilitate the ultimate acceptance of the whole system of Socio-economic rights in the US. It is important to note that the model set forth above assert that the non- justiciability of socio-economic rights in the US is the rule at present, but it is a rule waiting to be broken.<sup>38</sup>

#### 3.4. The Experience of Argentina

Argentina is possibly the first country where the courts passed the most influential and intrusive decision on a matter of socio-economic rights. Argentina is a monist state where any ratified treaty automatically becomes part of domestic law Argentina provides a fruitful and sparking example of using courts for direct enforceability of socio-economic rights.

The prominent example in this respect is the Mariela Viceconte case.<sup>39</sup> which concerns the right to health. The case was designed by Argentinean groups to ensure that the state would manufacture a vaccine against Argentina hemorrhagic fever, which threatens the lives of 3.5 million people who live in endemic area which includes the Moist Pampas of Argentina. The disease is

difficult to diagnose quickly and affects a population that does not have easy access to preventive medical services. A vaccine, candid I, is proven by the World Health Organization. The production of this vaccine is not profitable for commercial laboratories. Some 200,000 doses were obtained from the Salk Institute in the United States for an experimental program. 140,000 doses were administered from 1991-1995 to residents of the endemic zone. The state was unable to carry out a massive vaccination campaign due to the lack of an adequate quantity of the vaccine.

A judicial action was filed to protect the right to health of the persons living in the affected areas. The Court of First Instance rejected the case. However, in 1998 the Court of Appeals ruled favorably on the same case. The judgment established the state's obligation to manufacture the vaccine. The court also set a legally binding deadline for the obligation to be met. It also imposed a special duty on two officials of the government. The appellate court's judgment was based on the American Declaration on the Rights and Duties of Man, the UDHR, and article 12 of the ICESCR. All these instruments are incorporated into the domestic law in Argentina and are considered to form part of the constitution.<sup>40</sup> The court has thus ordered the state to manufacture this vaccine by itself. This clearly implies the acceptance of socio-economic rights as justiciable and enforceable under the Argentinean system.

Despite the guarantee of the manufacture of this vaccine, the case is very important for raising other issues relevant to the content and meaning of socio-economic rights:

- It reaffirms the judicial process as a method for enabling ordinary citizens to challenge state agencies regarding the merit of environmental and health policies. It recognizes citizen's standing to request a vaccine for 3.5 million people in the affected area. It reinforces the role of the collective writ of amparo (a constitutionally remedy providing for a relief) as a means of citizen participation in and review of public affairs.



- Direct application by a domestic court of international standards on the right to health expands the scope of activism for ensuring the realization of ESC rights.
- The imposition by the court of personal responsibility on two ministers for the manufacture of the vaccine with a specific deadline demonstrates that the obligations arising from ESC rights are legal in nature and entail legal liabilities.
- The judgment also affirms the role of the state as guarantor of the right to health when certain services turn out to be unprofitable or otherwise ill- advised for the private sector. In this way, the judgment seeks to strike a balance between the state and market, as the only way to ensure respect for human rights.
- In response to the finding that a constitutionally guaranteed right had been violated, the judges set a limit on the discretionary authority of the executive by ordering that it carry out what it had committed to under the constitution.
- Finally, the judgment defines the role of the judiciary when authorities fail to act. In this case the court did not hesitate to assume its role as the ultimate guarantor of fundamental rights even though it involved socio-economic rights <sup>41</sup>.

All in all, this case manifests the unfolding truth that courts are tubes through which the voice of the voiceless and the least fortunate citizens of the state impact on state agenda and policies. Enforcement of ESC rights through courts ensures the merits of both direct and indirect democracy to be exploited by the state. The failures of indirect democracy (ignorance of the excluded) should be fixed by the involvement of the needy society through the mouth of courts. The theoretical objections to the dignified role of courts have no place in Argentina.

### 3.5. The Canadian Experience

The non-justiciability of socio-economic rights has been the trend in Canadian jurisprudence. With respect to claims that the government action (or inaction) has resulted in a violation of a section of the Canadian Charter of Human Rights, the right to Life, liberty or security of the person, the tendency of courts has been to conceptualize the claim as being the "enhancement" of benefits, and therefore purely economic interests. Most lower courts have tended to accept the notion that as a general rule the charter does not encompass positive socio-economic rights, and that social policy is not an appropriate domain for judicial application.

In one case, an Ontario Superior Court accepted the uncontroversial evidence that cuts of social assistance rates would have a significantly adverse impact on vulnerable groups:

*The daily strain of surviving and caring for children on low and inadequate income is unrelenting and debilitating. All recipients of social assistance and their dependents will suffer in some way from the reduction in assistance. Many will be forced to find other accommodations or make other living arrangements. If cheaper accommodation is not available many may soon be homeless...*<sup>42</sup>

Despite this expression of the dire consequences of the cut and the argument that the applicants rights to security of the person and equality right under the Canadian Charter should be interpreted in light of Canada's international human rights undertakings, the court rejected the claim and relied on the principle that socio-economic rights are not justiciable. One judge commented that "Much economic and social policy is simply beyond the institutional competence of the court"<sup>43</sup>. It was suggested that the court has no jurisdiction "to second guess policy/ political decisions".



All in all the, Canadian view is that Socio- economic rights are not included in the charter and that they are non- justiciable and that courts are not empowered and capable to review the adequacy of provincial social security measures. The same view prevails with respect to other aspects of socio-economic rights, too. In relation to the right to health it was decided that the charter did not protect against economic deprivation or guarantee "additional benefits" which might enhance life, liberty and security of the person.<sup>44</sup> The non- discrimination clause is however being exploited even in cases of provision of socio-economic right.

All in all, Canadian courts have refused socio- economic rights as part of the charter and not justiciable as such. The view is that courts cannot substitute their judgment in social and economic matters for that of legislative bodies. Courts have constantly held that the charter does not guarantee Socio-economic utilities as part of the right to life or security of the person and that these types of matters must be dealt with by the legislature and not by the courts. Courts are not, it is said, competent to determine the nature or scope of positive obligations. The principle is that, legislatures require substantive freedom in designing the substantive content, procedural mechanisms and enforcement remedies in legislation of this kind. The legislative and not the courts are the appropriate branch of government to make these decisions. Where governments dispense with Social programs or benefits to remedy disadvantage, the trend is for the courts to refuse to intervene on behalf of beneficiaries. Courts will grant governments a wide berth when setting programs to address complex problems in the face of fiscal constraints. Judges are reluctant to usurp what they see as the role of the elected legislatures. Courts have been deferential to government decisions. They have adopted an extreme view of the doctrine of separation of powers. Even when the government action is against the purpose and vows of it, courts should remain silent and apart.

In conclusion, this variety in the trend to the understanding of the justiciability of socio- economic rights is reflective of the diversity in the domestic approach to the issue. That it is an area of hot debate and controversy is uncontroversial. The creative exercise of their narrow interpretative powers by some courts is encouraging and a model and highly facilitates the move to confirm the legal status and justiciability of socio- economic rights. The trend of non-justiciability in some countries is criticized by the ICESCR Committee as relying on an out dated and artificial distinction between positive and negative rights.<sup>45</sup> In fact, the UN has, for instance, identified the failure of Canadian courts to provide remedies for violations of social and economic rights as a significant concern.

Now a days, the world has understood the diversity in states' approach to these issues as reflective of the predominantly political nature of the non-justiciability objection. Whether or not socio-economic rights are justiciable depends on the will of the political organ and not on the outdated categorization of rights. In fact, the judicial remedies give meaning to the lives of the poor and the helpless to the extent the state can achieve. The more appropriate approach is to permit judicial consideration of these rights if their guarantee under the international as well as in many domestic arenas is to be given life. Refusal of justiciability of these rights denies them the legal character they are clothed in to day.



## Chapter III

### End Notes

1. Article 37 of the Indian Constitution
2. The Supreme Court has the final word on the interpretation of the constitution.
3. Keshavananda Bharati V. State of Kerale (1973)
4. State of Kerale V. N.M Thomas. (1978)
5. .Justiciability of ESC rights-the Indian Experience  
@<http://wwwl/umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>, page 2.
6. Ibid
7. Francis Coralie Mullin V. The Administrator Union Territory of Delhi (1981)
8. Supra 5 Page 3.
9. Daily Rated Casual Babour Employed Under P and T Department V. Union of India (1988)
10. Shanti Star Builders V. Narayan K. Totame (1990)
11. Jeff King: An Activist Manual to the International Covenant on Economic, Social and Cultural Rights (2003)
12. Ahmedabad Municipal Corporation V. Nawab Khan Gulub Khan (1997)
13. Indian Constitution Article 47
14. Permanand Katara V. Union of India (1986)
15. Paschim Banga Khet Majoor Samity V. State of West Bangal (1996)
16. Consumer Education and Research Centre V. Union of India (1995).
17. Vincent Pannikulangura V. Union of India (1987)
18. State of Punjab v. Ram Lubhaya Bagga (1998)
19. Mohini Jain V. State of Karnataka (1992)

20. Unnikrishnan J.P V. State of Andhra Pradesh (1993)
21. Justiciability Supra 5. Page 9.
22. Jeff Supra 11 page 150.
23. Re Certification of the Constitution of the Republic of South Africa (1996)
24. Government of Republic of South Africa V. Irene Grootboom (2001).
25. Soobramoney V. Ministry of Health, Kwazul Natal (1998)
26. Jeff Supra 11 Page 152.
27. Ibid
28. The Justiciability of ESC Rights in the United States, A Plan for Action, Global Rights 2004, Page 7.
29. Ibid
30. Brown v. Board of Education case (1954)
31. Swann V. Charlotte Mecklenburg Board of Education (1971)
32. Jeff Supra 26 page 11.
33. San Antonio Independent School District V Rodriguez (1973)
34. Supra 28 Page 15
35. Pavley V. Kelly (1979)
36. CFE V. State (2003)
37. Diane Carroll, States Under Pressure to Boost School Funding, Kansas City Star, February 22, 2004. (News Paper)
38. Supra 26 Page 27.
39. Mariela V. Vicecoante V. Ministry of Health and Social Action, 2 June 1998.
40. Module 22: Strategies for Enforcement of ESC Rights Through Domestic Legal System,  
@[http://wwwl/umn.edu/humanrts/edumat/IHRIP/circle/Modules/module 22.htm](http://wwwl/umn.edu/humanrts/edumat/IHRIP/circle/Modules/module%2022.htm), Page 4.
41. id page 5.



- 42.Masse V. Ontario ( Ministry of Community and Social Service)  
(1983)
- 43.O' Brien. J
- 44.Brown V. British Columbia Minister of health (1985)
45. General Comment. No. 9. para 3.

## CHAPTER IV

### Justiciability of Socio-Economic Rights in Ethiopia

The human rights system establishes norms and principles touching on virtually all facets of life. These norms and principles are established through international human rights instruments as well as by national constitutions and legislations. The unity of purpose of all the human rights laws establishing the minimum conditions for human dignity, has led to the consistent reaffirmation by the international community of the indivisibility and interdependence of all human rights whether civil, cultural, economic, Political or social. Despite this, the arena of human rights discourse and practice has been dominated by attention to the classical civil and political rights compared to the rare voices echoed with respect to socio-economic rights. This contradicts the fact that the two set of rights are placed at a par with each other, needing equal attention and protection.

Socio-economic rights are given wide attention and strong support in the international arena than in domestic legal systems. That is why in most constitutions of the world such rights does not form part of the fundamental rights guaranteed. There are, however, recent developments both in the guarantee and enforcement mechanisms of such rights. Some countries have incorporated enforceable socio-economic rights in their constitutions and other legislations. A look into some modern constitutions reveals this fact, the nearest example being the Ethiopian constitution. About one third of the constitution is devoted to enshrining fundamental rights and freedoms. In fact, one of the main reasons behind the very existence of the constitution is the need for the full respect of individuals and peoples fundamental human rights.

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The Ethiopian constitution enshrines the fundamental rights and freedoms in two parts: the first dealing with " human rights" and the other with



“democratic rights”. In the part of “ democratic rights” are included what are called socio- economic rights. We can say the constitution includes a third unrecognized part dealing with socio- economic rights as a separate article is used to deal with these rights.

#### 4.1. Socio- economic rights under the constitution (FDRE)

Ethiopia is one of the countries which has exploited the method of protection of socio-economic rights through constitutional provisions. This is the primary method for the domestic implementation of such rights as the constitution is the basic law of the state. The Ethiopian constitution recognizes that the protection of individual liberties and the meeting of social needs are equally important values. This is evidenced by the fact that the constitution integrates civil and political as well as socio-economic rights. The approach taken by the constitution with respect to civil and political rights, which are imitations of the UDHR, is different from that with respect to socio-economic rights. The latter provisions are far from a verbatim of the said standard of achievement.

Moreover, socio-economic rights are defined as to benefit a relatively narrower group of individuals than the civil and political rights. They are guaranteed for the benefit of “every Ethiopian” and sometimes very narrow groups. Article 41 (5) of the constitution provides an example. Here, the beneficiaries are the physically and mentally disabled, the aged and children who are left without parents or guardian. It should be noted that none of the rights under article 40 and 41 are formulated for the benefit <sup>of</sup> “everyone”. This clearly excludes non-citizens from claiming the socio- economic rights in the Ethiopian bill of rights. The difference in formulation of article 42 should also be noted. It is meant to protect factory and service workers, government employees etc without referring to Ethiopians as such. This opens a possibility where non- citizens can be beneficiaries of the right to work.

A very important point to emphasize is the relatively loose obligation imposed by the ICESCR on developing countries in fulfilling ESC rights of non-citizens.<sup>2</sup> Such states are given the power to determine the extent to which they would guarantee the socio-economic rights of non-citizens. The Ethiopian constitution seems to have gone far in excluding, almost completely, the benefits of article 41 from non-nationals.

It is now the right time to deal with the rights included in our constitution under the broad term socio-economic rights. Following is an analysis of the contents of the provisions of article 41 of the constitution as this is the main provision on these rights.

Article 41(1) ensures the right to free engagement in economic activities and the right to pursue a livelihood of one's choice anywhere within the national territory. This provision can be explained to be one of restraint in that the government should not meddle with the choice of individuals. It is individual freedom that is envisaged. Respect and recognition of the elections of each individual is guaranteed. Moreover, the state is duty bound to protect individuals from acts of third parties who might deprive her/him of their right to choose. This is implied in the tripartite typology of state obligations. In addition, the fact that this right is to be exercised "anywhere within the national territory" means that regional states cannot discriminate against the nationals of other member states of the federation. The right to choose the means of livelihood, occupation and profession imposes a more or less similar obligation with the first (Article 41(2)). But it should be recognized that the choice must be supported by the capacity of the applicant which makes him/her fit for his selection. Dreaming an occupation inconsiderate of capacity is unacceptable.

The third sub-article reiterates the right to equal access to publicly funded social services. Accessibility may take different dimensions. One aspect of it is non-discrimination, ensuring access to all without discrimination on the basis



of the prohibited grounds. The other aspect is physical accessibility whereby the safe physical reach of individuals to such services is maintained. Economic accessibility requires that the enjoyment of these services be affordable to all especially the disadvantaged. Article 41(3) clearly refers to the non-discrimination aspect of the right to accessibility. This linkage only requires the state to overrule laws or policies that have the effect of excluding groups from the full and equal enjoyment of publicly funded social services. This provision does not, however, impose an obligation on the state to provide social services to all Ethiopians for free or even for payment. But the positive aspects of the right to equality should not be disregarded. Equality of treatment usually requires positive measures to help the disadvantaged<sup>3</sup>. Hence, the duty of the state to create an enabling environment which makes it possible for people to gain access to these rights and improve their lives is implicit. The duty to protect imposed on states should also be noted.

The real socio- economic rights, like that envisaged by the ICESCR, are to be found under Article 41 (4) and (5). The main character of socio-economic rights is that they presuppose a proactive government. These two provisions are fair indicatives of this nature of such rights. The qualified duty of the state to strive to provide to the public health, education and other social services has gained expression in the constitution, too. Health and education are only illustrative and the term "other social services" may include housing, food, water, social security and others.. The obligation is qualified in that the state is required to assign an "ever increasing resources" to achieve such socio-economic goals clothed as human rights. There is, however, no indication as to the level of increase. Nor is there any sign as to the priority that should be accorded to the different social services in the face of budget constraint.

As far as I can see, Article 41 (4) does not guarantee an individual right to health or education, for instance. It only imposes a general promotional duty on the government in providing these services. The formulation is different from

that in the ICESER in that, the constitution does not include the term "everyone" or "every Ethiopian" as entitled to the right to health, education etc.

The constitution also includes a provision dealing with the rights with respect to groups traditionally called the vulnerable. The right of the physically and mentally disabled, the aged and children without parents or guardians are guaranteed the right to rehabilitation and assistance. It is important to note that victims of disasters, the unemployed, the poor and other vulnerable groups are not designed to be beneficiaries. Moreover, quite understandably, the obligation of the state is only to the extent its resources permit. This acknowledges the practical impossibility of giving every one what he needs. It is only ideal to think otherwise as it is not affordable even to the most developed states. Compared to article 41 (4), 41 (5) is relatively very individualized and may be the subject of separate/ individual rights actions.

The constitution also implies a duty on the state to choose job expansive policies for the unemployed and the poor. Part of this is the duty of the state to undertake programs and public works projects.<sup>4</sup> The poor and the unemployed have gained expression here, "All measures necessary" to provide citizens with gainful employment should also be taken by the state.<sup>5</sup> What is appropriate may change with the surrounding circumstances. The government has a margin of discretion in this respect. The right to work with its several dimensions is also guaranteed.<sup>6</sup>

The constitution also includes basic socio-economic rights under the policy principles and objectives. The policies of an economic nature include equitable wealth distribution, assistance to victims of natural disasters.<sup>7</sup> Access to public health, education, clean water, housing, food and social security are the social objectives to be achieved in the long term.<sup>8</sup> It should be noted that "access" as used here refers to all aspects of the term including physical and economic accessibility. Moreover, the phrase "to the extent the country's resources



permit” should be emphasized. These policy principles and objectives are very relevant in that they guide the implementation of laws, the constitution and other policies.<sup>9</sup>

Policies and guiding principles of state policy are in principle not enforceable in courts or any other extra judicial organs. But they have proved their worthiness in many respects. First, they play important interpretative role by being read into those rights which are considered enforceable. The experience of India is worth mentioning in this respect. How the Indian Supreme Court changed those guiding principles, despite the clear constitutional hurdle, into enforceable rights was explained in detail in chapter III of this paper. Another relevance of these policy guidelines is that they serve to insulate laws and legislations which tend to interfere with or limit a right otherwise protected. Consideration of socio-economic goals is accepted as a legitimate reason to limit civil and political rights. Social justice sometimes requires interfering with individual freedoms. The European Court of Human Rights decided in this respect that:

*Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially societies consider housing of the population a prime social need the regulation of which can not entirely be left to play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the state or the community at large.*<sup>10</sup>

In this case, the Court considered the right to housing as a legitimate aim for restricting the right to peaceful enjoyment of one's possession. This has a highly inspirational power on the roles of the House of Federation in entertaining on cases of constitutionality of a particular law at least in the future.

All in all, it can be said that the Ethiopian constitution has recognized a number of socio-economic rights. The policy principles and objectives are also far sighted to include many aspects of such rights. However, the rights expressed before as real-economic rights are not well elaborated. The general and unclear nature of the terms used in the constitution with respect to socio-economic rights might raise complexities. It is even doubtful, at first view, if the House of Federation can entertain cases based on articles 41 (4). and (5). Nevertheless, Ethiopia has gone far in providing for enforceable socio-economic rights under the constitution which only few modern laws has done. It is also understandable that the constitution uses qualified terms such as " ever increasing resources" and "within available means" which take in to account the enormity of challenges these rights pose on any government.

In addition to the constitution, Ethiopia has adopted legislations intended to give effect to the general socio-economic rights provisions of the constitution. A legislation for the protection of the environment and the safeguarding of human health and wellbeing exists.<sup>11</sup> This proclamation imposes a positive obligation on the state agencies to achieve its objects. <sup>12</sup> More importantly, this proclamation restrains the government, inter alia, from engaging in activities that might cause serious environmental damage. There are also laws formulated to protect individuals from arbitrary government interference in their enjoyment of their right to housing.<sup>13</sup> This law allows expropriation/ appropriation only in limited circumstances and also provides for compensation to victims. There also exists a public health proclamation which sets certain standards designed to protect the health of consumers .<sup>14</sup> All these laws are mechanism of discharging the duty to protect of the government with respect to the said socio-economic rights.

Most importantly, the Ethiopia legislature has ratified a number of international and regional human rights instruments incorporating a bundle of socio-economic rights and a consequent obligation on the state. The principal and



most comprehensive instrument in this respect is the ICESCR.<sup>15</sup> This covenant imposes unequivocal obligation on states to respect, protect and strive to fulfill the entitlements clothed with the authority of a right. Similar to the constitution, the Covenant limits the obligation of states to the resource capacity of states parties. In addition to the ICESCR, Ethiopia has ratified the CRC, the African Charter on Human and Peoples Rights, the African Convention of the Rights and Welfare of the Child and others.<sup>16</sup> All these instruments include aspects of both civil and political as well as socio-economic rights.

All these instruments are meddled in to the Ethiopian legal system through Article 9(4) of the constitution. This provision suggests that ratification, without any additional criterion, throws such instruments into our integral legal system. Moreover, the constitutionally higher status accorded to ratified human rights instruments is expressed in bald terms.<sup>17</sup> One can surely say that those instruments are given a status above, or at least equal to, the chapter of fundamental rights and freedoms (note that the constitution uses the word<sup>18</sup> "adopted" suggesting that it includes not only ratified but also signed instruments). They stand higher in the vertical ladder of laws in Ethiopia.

The Ethiopian baggage of socio-economic rights, therefore, consists of these three sources: the constitution, scattered legislations and a number of international human rights instruments ratified by the legislature. The power to rule on matters stemming from the constitution lies with the House of Federation<sup>18</sup>, an organ outside the ordinary court structure. It is a political organ composed of members representing the Nations, Nationalities and Peoples.<sup>19</sup>

Since the task of this paper is to reveal the power of Ethiopian courts in ruling on socio-economic rights, the emphasis then is on the few legislations and the ratified human rights instruments. Since these rights are scattered in a number of international instruments ratified by Ethiopia, any problems courts may face

in enforcing such human rights instruments necessarily bears up on socio-economic rights. It is, therefore, crucial to consider and tackle the principal hindrances casting a shadow on the role of courts in their attempt to prove as ultimate guarantors of such rights. This leads me to the next brief but highly invaluable part dealing with problems of enforcements of international human rights treaties ratified by Ethiopia.

#### 4.2 Problems of Enforcement of Ratified International Human Rights Instruments through Courts in Ethiopia

As noted earlier, Ethiopia is a party to a number of universally recognized and adopted human rights instruments. The constitution has also secured them a fairly high rank in the hierarchy. Quite surprisingly, however, the judicial enforcement of these entrenched rights is very minimal. No mention of some of the ratified instruments has so far been observed at all in courts. This back sliding can be attributed to a number of problems surrounding the Ethiopian human rights system. The main reasons suggested for the under scale performance of courts in this respect are:

- Ignorance of the high constitutional status of ratified human rights instruments in the Ethiopian hierarchy of laws
- Problems associated with the authority to interpret the constitution.
- The prevailing views surrounding Ethiopian lawyers especially judges, which seem to be ignorant of international human rights instruments and their status in Ethiopia.

All these problems stem from the failure of our legislature to ensure that ratified human rights instruments are given wide publicity so that the whole population in general and lawyers and judges in particular will take notice of them. The responsibility of the president to proclaim in the Federal Negarit



Gazeta international agreements approved by the House of Peoples Representatives ~~is~~ constitutionally imposed.<sup>20</sup> The practice in this respect is awful though. It is only the fact that a particular instrument is ratified by the legislature that gains expression in the law Gazeta. No details containing the whole content of such instruments can be found. Some instruments are even denied this loose procedure.<sup>21</sup> The repetition of the practice indicates that the procedure is deliberate and not a result of excusable ignorance. This seems to be being inconsiderate of the constitutionally imposed duty on the legislature as well as on the president.

The absence of full publication of the instruments coupled with the debatable issue on the constitutional requirement of publication as a validity factor has worsened the complexities. The House of Federation, the organ with a final say on constitutional issues, has not taken a clear stand on the publication debate yet. Moreover, the reluctance of Ethiopian lawyers and judges in particular to pressure this House to settle this debatable issue continues. The controversy is constitutional which has hindered the development of Ethiopia human rights jurisprudence in courts.

Be this as it may, my stance on the issue is clear. Article 9 (4) of the constitution will be meaningless if it was not meant to do away with the publication requirement. Had it been a requirement, the constitution could have done that in unequivocal terms by adding, for instance, "up on publication" at the end of this provision. Moreover, the purpose behind publication of laws does not support the presence of the requirement with respect to human rights instruments which are designed to provide for entitlements to individuals by imposing obligations on the government. Individuals are right holders. It is the government, the obligation bearer, which publication is meant to inform. But the government has taken notice of the instruments through the process of pre-adoption deliberations, during adoption, signing and ratifying such

instruments. Hence publication adds no validity to the conventions which are already valid through ratification.

Moreover, it can equally strongly be argued that the existing system of publicizing ratified instruments constitutes one form of publication. No extra forms are needed. Publication might take different forms and the existing procedure is one of them. Hence the requirement is fulfilled for courts to give effect to such instruments.

These arguments should not, however, be taken as belittling the precious role that publication can play. Quite the contrary, it creates informed citizenry. That is why, while ratifying a human rights instrument, a state is obliged to take all appropriate measures leading to the full realization of the convention within its territory. Bringing the instruments to the knowledge of the public is necessarily one of the commitments. Publication is the key then. It creates an informed and right demanding population thereby contributing to good governance. Nevertheless, the fact that such instruments gain validity through ratification and not through publication, needs to be recognized by our courts. This implies that the power of our courts to apply ratified instruments without the need for publicity has a firm legal base which in no way ignores the role of publication.

To make the situations worse, the environment around courts discourages the invoking of international human rights provisions. Judges are ironic towards those lawyers who want to stress on international human rights instruments. This shows the lack of awareness on the part of judges. This coupled with the lack of awareness of the population about human rights and the reluctance of those having knowledge of them to be assertive of their rights in courts, protracts the problems. This calls for the necessity to a country wide operation to raise the level of awareness of the population of their rights and the redress available to remedy any violations.



The idea of what constitutes a violation should also be inculcated into the minds of the judges. It will be very helpful in this respect if human rights education is given more emphasis in all law schools of our universities in particular. The duty to launch human rights instruments underlies every ratified human rights instrument. One of the commitments undertaken by states is bringing human right conventions in to the knowledge of the public through different means, of which education and publicity are vital ones.

The lack of awareness on the part of the judges have made them allergic to evolutions in the human rights field. The solution in this respect is clear. If the sacred merits of the human rights system are to benefit our move to good governance, the government must direct its undertakings to human rights operations. In addition, the two houses should not be irresponsible to discharge their constitutional duties. The Federation should as fast as possible settle the publicity debate and the HPR must, inter alia, ensure that ratified human rights instrument are publicized in the law gazette in a very understandable and Ethiopian way. All in all, the Ethiopian legislature and the judiciary should be positive to human rights protection and ready to learn from the developing experience of the international community.

#### 4.3. Justiciability of Socio-Economic Rights in Ethiopia

The question whether socio-economic rights are appropriate for judicial determination in a particular country may be answered based on three different approaches. The first primarily looks for law that clearly (explicitly or impliedly) deals with the matter. Such a law may answer the question either expressly by referring to the matter or even impliedly. The second emphasizes on the practice in the state concerned. It searches for the experience of courts of such a state on the area. But this method is very important especially when the matter is debatable from the perspective of the existing laws. It has also a tremendous role in settling vague or ambiguous issues on the matter. It further presupposes a developed jurisprudence on socio-economic rights matters.

Resort for the third method is relevant when the above suggested answers cannot adequately solve the matter. It is based on the opinion of the legal academics of the state concerned in particular and the international community as a whole. This however, only plays a facilitating role since it is not binding on courts.

#### A) The Law

This part wonders for the answer primarily in the constitution and other legislations that significantly support a wise conclusion

##### i. The FDRE Constitution

That the constitution gives emphasis to the promotion, protection and respect of human rights is uncontroversial. The constitution exhausts about a third of its whole part to human rights. It further extends the realm of our human rights system by making reference to adopted human rights instruments.<sup>22</sup> Any organ engaged in the application of human rights is constitutionally required to give them meaning conforming to the spirit of such instruments. Moreover, the duty of all branches of the state or federal government to respect and see to the protection of human rights is enshrined in unequivocal terms.<sup>23</sup> All these are in fact extensions of the recognition of the invaluable import of the full respect of the fundamental rights and freedoms early in the preamble as a precondition for achieving the entire constitutional objective.<sup>24</sup> The deep rooted concerns of the constitution to establish a government based on the rule of law and respect of human rights provide a reason for the constitution's existence.

The constitution has devised a mechanism to ensure that its reason to existence are not empty vessels. The human rights provisions are more than mere promises or hopes. Rather they are undertakings crying for respect, protection and fulfillment. That is, the duty to respect and protect these rights is imposed on the legislature, executive and the judiciary of both levels of the government. That success in this respect is a result only of the combined and



committed efforts of the federal and state governments as well as the three components of each level of government is cautioned in the constitution. The concern of this paper is, however, limited to the extent to which the constitutional duty of the judiciary is given emphasis and how the judiciary can fulfill its constitutional commitment.

The Ethiopian constitution does not contain any clear provision on whether socio-economic rights are justiciable or not. The fact that these entitlements are rights is, however, evidenced by the fact that they form part of the fundamental rights and freedoms enshrined in the constitution.<sup>25</sup> They have also gained expression in the part dealing with national policy principles and objectives.<sup>26</sup> Unlike the Indian constitution, these rights form part of both groups. This suggests that Ethiopian courts are faced with a relatively easier hindrances in enforcing them. However, since the power to see in to the provisions of the constitution is reserved for the House of Federation, courts can not make rulings based on the constitution. This forces me to stress on international covenants ratified by Ethiopia and legislations adopted by the legislature to analyze the role of courts in the protection and full implementation of socio-economic rights.

Except constitutional interpretation, all judicial power is reserved to courts.<sup>27</sup> The traditional power of courts to settle disputes is maintained with such exception. Judicial power can be exercised based on all laws forming an integral part of the Ethiopian law. There may be express reservations of such power to administrative agencies or other non-judicial bodies. In the absence of similar provisions, judicial power remains with the courts. In addition to the judicial power granted to courts, courts are given the right and the duty to ensure respect for and protection of all human rights together with other organs. Judicial power is a precondition and the only way through which courts can discharge their constitutional responsibility. Judicial power is the power of courts to entertain disputes and order redress when deemed fit.

The right of everyone to judicial access and remedy is entrenched in our supreme law.<sup>28</sup> The matters which can be the subject of judicial determination are not, however, clarified. The constitution says any "justiciable matter". The criteria to identify these disputes are not, however, set out. The definition needs to be sorted out in some future legislation. Some suggest that what is justiciable is more or less well recognized<sup>29</sup>. This, however, ignores the difference in state approaches on what constitutes justiciable disputes. The political view on the matter is impact full. Nevertheless, the role of courts in determining the boundaries of these matters is enormous. The theoretical justifications dealt with under chapter two are relevant in this respect. Whether the definition of justiciable matters includes socio economic rights still waits to be settled by Ethiopian courts and the legislature.

The constitutional duty imposed on courts to protect and fully realize human rights provisions clearly suggests that, courts should be ready to order redress to human rights violations. Only through judicial power can courts discharge their duties. The duty is imposed to the extent of all human rights and no discrimination is made to the kind of human rights, civil and political and ESC rights. As long as an entitlement is recognized as a right, courts are expected to play their role. It is imperative for courts then to see in to violations of socio-economic rights recognized by the constitution and international instruments ratified by Ethiopia. This clearly implies that the right of everyone to seek redress to possible infringements of their socio-economic rights is constitutionally established. It should be noted that, these rights have got a place in the constitution. Moreover, Ethiopia is a party to a number of human rights instruments incorporating these rights.

The fact that the right to equality imposes a positive obligation on the state to help the disadvantage groups in the society is constitutionally evidenced. The right of women to affirmative action provides an example. The right to



affirmative action should in no way be seen as an exception to the right to equality of treatment. It rather is an integral part of it. The traditional view that equality relates to formal treatment of everyone in the same way is no more acceptable. This view supports the idea that the law should regard all human beings as equal bearers of rights and treat them accordingly by extending the same rights and entitlements to all pursuant to the same neutral norm or standard of measurement.<sup>30</sup> The law per this view should not take into account the social and economic disparities between people and individuals which might be directly attributable to systematic discrimination in previous regimes. This is inconsiderate of the pre-human rights regime.

That is why the constitution has impliedly rejected it by accepting the view that equality needs to be substantive where the state plays an active role to fill the gap between people, traditionally or due to some natural or social anomalies, are disadvantaged and others. The right of disadvantaged individuals to special assistance and that of disadvantaged Nations, Nationalities and Peoples' provide extra examples.<sup>31</sup> Enforcement of the right to equality, therefore, presupposes enforcement of those positive obligations which form part of socio-economic rights of individuals and groups.

Another mode of protection provided by the right to equality is the prohibition of discrimination. This requires that any benefits of socio-economic nature granted to individuals or groups should not be discriminatory. In case a legislation is adopted to grant social assistance, for instance, it must not be limited to certain groups based on the grounds set out under Article 25 of the constitution. Any such discrimination can be challenged as unconstitutional.

## ii. Legislations

Other indicators of the possible justiciability of socio-economic rights in Ethiopia can be found in some legislations adopted by the Ethiopia parliament. In this respect, the federal courts proclamation is worth mentioning.<sup>32</sup> This law

is intended to delineate the power of federal courts of different levels in settling disputes on matters considered to be under the federal jurisdiction on the basis of the constitution.

Disputes arising under ratified international treaties fall under this category. Suits based on international human rights instruments form part of international treaties<sup>33</sup>. No mention is made as to the nature of rights recognized by such instruments. This implies that suits based on instruments recognizing socio-economic rights can be litigated in courts which in turn suggests that these rights are justiciable. It should be noted that international treaties ratified by Ethiopia are determined to provide a basis for our courts in settling disputes.

This proclamation, therefore, outlines the duty of courts to take note of international treaties while settling disputes.<sup>34</sup> This clearly suggests that international treaties including human rights instruments can be made bases of court judgments. Courts have the right and duty to adjudicate on claims based on such instruments. Since no distinction is made as to the nature of the rights, civil and political or socio-economic rights guaranteed by the instruments our. Courts can rule on instruments incorporating socio economic rights.

This legislation is, however, very unclear and incomplete to determine the specific court entitled to hear cases based on international treaties providing a cause for action. In other jurisdictions a specific level of court is assigned for human rights cases. In most of them, it is the High Court which has first instance jurisdiction on the matter. Assuming that compensation will be claimed against such violations, the court having jurisdiction can be identified based on the limits put under articles 11 (1) and 14(1) of the same proclamation.

But human rights issues are very difficult to express in money terms. One can not tell how much the right to health or the right to life costs. This makes the



issues far from money claims although compensation is the commonest remedy granted by courts. Under article 14(1) such cases involving matters which can not be expressed in money terms fall within the jurisdiction of Federal First Instance Courts if the matters are not expressly reserved for Federal High Courts or Federal Supreme Court. But no such reservation exists in cases of human rights matters. This means that claims of human rights are to be entertained by Federal First Instance Courts. This, however, is an unwarranted deviation from the practice in other countries. No special reasons exist in Ethiopia that make First Instance Courts first choices. Our specialities in fact support at least the Federal High Court taking into account the practical incompetence of judges at First Instance Courts to give specific meaning to human rights provisions which are expressed in bald terms. Nevertheless, there still exists a confusion and it is very important to plainly locate the court having jurisdiction to adjudicate on claims based on human rights instruments as well as other ratified international treaties.

Incidentally, it is desirable to see the implication of this proclamation on the publication debate. This legislation is clear in declaring that cases based on international treaties fall within the jurisdiction of federal courts. In my opinion this assertion presupposes the existence and possibility of such matters in courts. I do not think that in the face of the fact that very few treaties have been fully published, this law is only designed for future application when the time comes in which such treaties are published. This law, hence, suggests that claims can be based on treaties to which Ethiopia is a party irrespective of the need to refer to their publication.

Another legislation having implications on the area of justiciability of socio-economic rights is the Proclamation of Appropriation of Land for Government Works and Payment of Compensation for Property.<sup>35</sup> This law governs expropriation proceedings recognized under the constitution.<sup>36</sup> Both the proclamation and the constitution emphasize that expropriation appropriation

must be for public purpose/interest. It is when such act is required by the interest of the totality. Moreover, under both laws the duty to pay compensation is imposed on the appropriating government agency.<sup>37</sup> The decision of the committee, or the municipality as the case may be, on the amount of compensation is appealable to a court with jurisdiction.<sup>38</sup>

The striking fact is that the decision of the "Implementing Agency"<sup>39</sup> on appropriation is incontestable. Decisions on what constitute public purpose/interest lie wholly within the unlimited discretion of this agency. This means that no potential victim has a right for a court action to show that public interest will be better served with a different mechanism, for instance, or even to challenge the involvement of public purpose in a particular situation. Under this proclamation, large evictions can be carried out without any one challenging such decision. This, however, is against the right to housing of individuals guaranteed under the constitution as well as a number of international human rights instruments to which Ethiopia is a party. Legal appeals aimed at preventing planned evictions or demolitions through the issuance of court ordered injunctions does not exist. (General Comment No.4. para.17).

It is also possible to argue equally strongly otherwise. Judicial review of administrative decisions is an inherent power of courts. Administrative organs are required to follow fair procedures and make considered decisions. This innate power of courts to reverse unacceptable decisions of such organs survives except for an express provision otherwise. Under the present proclamation, even though there is an express complaint mechanism to challenge unfair compensation assessments, there is no provision governing the presence or absence of such mechanisms to contest allegedly unfair decisions to expropriate. That is there is no express or even implied rejection of the courts inherent power to judicial review. The legislator through its silence,



in can be strongly argued, has recognized the possibility of such complaint against the decision of the agency empowered to decide on the appropriation.

To me, this position should be given priority for two reasons. One thing the right to appropriation is limited only in cases when the general interest requires it. Courts should be there to see if this requirement is indeed fulfilled in each of the cases. Most importantly, any law must be interpreted in a manner which makes it rights-friendly. This recognizes the paramount significance accorded to human rights. Such interpretation will be in line with the nature and constitutional right and duty of courts to protect the rights of those in need. This implies one aspect of the right to housing, the right to respect, can be enforced through courts. Government nuisance can be brought to an end through court injunction orders if they are unfair and not earmarked for public purpose.

From the perspective of the first argument, it can be said that even the negative aspect of the right to housing is denied access to court/ justice. The implication in this proclamation tends to destroy the idea that courts can provide an overwhelming protection to human rights in general and socio-economic rights in particular. Under this proclamation, let alone the positive right to housing not even government interference is subject to judicial scrutiny. When generalized it can be said that socio-economic rights can not be subject of judicial inquiry in Ethiopia as implied by this proclamation. This, however, will be against the right of courts to entertain on matters based on international treaties containing a bundle of these rights. It must also be noted that international human rights instruments are the major sources of human rights in any domestic jurisdiction and Ethiopia is no exception to this. This means that the right to judicial remedy guaranteed under our constitution and international instruments is given no place under this proclamation. This necessitate that we should stick to the second position.

The Environmental Pollution Control Proclamation has also some implications on the present claim.<sup>40</sup> This legislation is intended to safeguard human health and wellbeing through the protection of the environment. Most of the provisions are designed to regulate the activities of non-state actors. This law is reflective of the government's duty to protect the health and life of its citizens. However, the government will not be liable for acts damaging or likely to damage the environment unless it is the actor. That is there can be no violation of the duty to protect of the government under this proclamation.

An exception is provided where urban administrators are required to ensure the collection, transportation and as appropriate the recycling, treatment or safe disposal of municipal waste through an integrated municipal waste management system.<sup>41</sup> The duty to ensure that adequate and suitable toilets and containers and other required facilities are provided for the disposal of waste is imposed on the person in charge of administering premises accessible to the public<sup>42</sup>. These provisions clearly impose positive obligations and their enforcement, therefore, constitutes the implementation of the right to health and a healthy environment. These duties are subject to the complaint mechanism entrenched under this legislation, first in the Environmental Protection Authority, and in case the complainant is dissatisfied or when no decision is made within thirty days, in court within sixty days from the date the decision of the Authority was given or the deadline for decision has elapsed.<sup>43</sup> This shows that some aspects of the right to health are judicially enforceable but only a limited aspect of them.

The duty of any person (including government agencies) to live up to the relevant environmental standard in any of its activities is sanctioned under this proclamation<sup>44</sup>. Administrative or legal measures may be taken by the Authority or the relevant Regional Environmental Agency against those who in violation of the standard (set by the Authority) release any pollutant to the environment.<sup>45</sup>



<sup>45</sup> If the measures taken by the authority are not satisfying, then a complaint may be lodge in a court as provided under article 11(2). This demonstrates that the right to health of individuals is protected, judicially as well as through administrative measures, from the interference of the government, inter alia. This means the right to health is protected in the negative from government encroachment which makes it justiciable under this law. But still it is only few activities of the government that affect the health of individuals that are subject to judicial scrutiny under this legislation. And as mentioned earlier the reluctance or failure of the government to ensure that private actors float within the standards provided therein are not the subject of judicial inquiry.

All in all, it can be said that some aspects of the many dimensions of various socio-economic rights may be protected in scattered legislations like the aforementioned ones. Most of them impose a duty on the government or other persons (Physical or juridical) not to interfere with the rights protected under the realm of socio-economic rights. Protection and fulfillment aspects of such rights are not at all mentioned let alone judicially enforced. This clearly reflects the naive ness of our jurisprudence on socio-economic rights in particular and all human rights in general.

It is not a choice, therefore, to rely on international instruments on human rights providing a comprehensive system of socio-economic rights. In fact it is undeniable that the law on human rights is much developed in the international arena than any domestic system. But even in this sphere, as discussed before, there are a number of problems involved in Ethiopian courts enforcing international human rights instruments as a whole. Socio-economic rights conventions are no exceptions to this rule. The idea of enforcing Socio-economic rights in courts is even much more controversial than courts enforcing civil and political rights.

Problems surrounding the publication debate worsened by the reluctance of the population to rely on courts and be assertive of their rights, are not settled yet.

In case a dispute arises based on international treaties, the easiest task for the respondent will be to raise the publication issue. Courts with cloth this a constitutional dress which needs the word of the legitimate organ, the House of Federation. This is very much discouraging for the complainant which tempts him to drop the case. Hence, the corresponding naive domestic jurisprudence on the area.

What is true as the law stands to day is that, it is very difficult (if not impossible) to take a clear position on the issue of justiciability of socio-economic rights. The publication debate has made it even very doubtful if the Ethiopian domestic legal system has a place for socio-economic rights. This is the logical result of the confusion surrounding all human rights instruments ratified by Ethiopia. The Constitution does recognize these rights but only in few very vague words and without an answer to the question of their judicial subjection. And if so it is the legitimate jurisdiction of the Federation, a non-judicial body composed of members appointed by the political leaders of each region. The presence of only few laws designed to give effect to socio-economic rights of individuals recognized under the constitution and international instruments has made it illusory to take a stand.

Even assuming that publication is not a requirement and that courts have the duty to give effect to ratified but unpublished international human rights instruments (Which, of course, is my view) the defense of non-justiciability is sure to be faced with respect to socio-economic rights. This is evidenced in the experience of fellow countries with a relatively developed jurisprudence on this area. Some countries have gone to the extent of giving constitutional expression to the non-justiciability of these rights.<sup>46</sup> The case laws of some other countries also prove the very bigness of this defense standing at the front of any petition of the respondents (usually the government).

The answer to the question of justiciability of socio-economic rights in Ethiopia is better waived. The present situations do not provide adequate premise for a



sound and concrete conclusion on the issue. One thing is true though. The development of the jurisprudence on socio-economic rights in any jurisdiction necessarily encompasses the justiciability debate. No country can be an exception to this. Prior developments on the area in other countries will also be very impact full on junior countries in this aspect. The developments in major international treaty tribunals and Committees or Commissions, as the case may be, will also have a great bearing in domestic jurisdictions. Ethiopian courts surely need to resort to the above to take the desirable stance on the matter.

The conclusions asserted by the writer are all based on implications. This is not further supported by our case laws which are very scarce on the matter. Nevertheless, these conclusions suggest the problems that courts face in enforcing socio-economic rights can be broken through the intense involvement of the right holders as well as the willingness of our courts to reach at decisions and follow approaches cognizant of their premier role as ultimate guarantors of the rights of individuals.

Despite the illusory domestic legal situations in Ethiopia, it must be clear that the arguments set out in favor of and against the justiciability of socio-economic rights under chapter II of this paper should inspire our legislatures and the judiciary in taking the appropriate step towards giving effect to the constitutionally and internationally entrenched socio-economic rights. This invariably requires the recognition and implementation of the justiciability of these rights. We are living in the century of human rights where priority is, and should be, accorded to the paramount significance of the respect, protection and fulfillment of these rights. Only this can improve the intolerably sub-human existence of the large majority of the population of the world as a whole and Ethiopia in particular living in conditions of abject poverty.

It should be recognized anywhere that one of the best tests of the efficacy of the fundamental rights provisions of our constitution and international instruments and other laws is the extent to which the least fortunate, the poor,

the oppressed, the defenseless... (The list is unending) are accorded effective entitlement and protection from the rich and the powerful including the government. This necessitates the involvement of our courts. Justiciability stands at the crux of all human rights. A right whose violation does not entail judicial action is not a right as such. It is nothing but an empty promise.

Case laws of Ethiopia are also unable to clarify this illusion. Some countries are lucky in that the legislation as well as case laws provide immense support to analyze their human rights situations. It is even very rare to see court decisions based on some internal legislations providing for some aspects of socio-economic rights. Moreover, it is very uncommon to see cases based on international instruments in Ethiopia. Some, including the ICESCR, have never been invoked in our courts.<sup>47</sup> This poses a question without a solution. This suggests the insignificant value given to human rights law both by the government as well as by individual holders of these rights.

Since the power to interpret and see into violations of constitutionally entrenched human rights lies with the House of Federation, it can be said that these rights are not benefiting individuals the way they are expected to be. In fact, all these human rights provisions are justiciable in this House. Socio-economic rights guarantees are no exception to this. But taking into account the physical inaccessibility of the House to majority of the right holders, it is easy to discern the little practical significance of the constitutional guarantees to those who need them most. The difficulty involved in forming branches of the Federation in different cities of Ethiopia protracts the problems. This coupled with the immediate solutions that human rights violations need, leaves a number of dehumanizing violations unquestioned. More over, Ethiopia is one of the poorest countries of the planet. This implies that remedies to human rights violations are also financially inaccessible.

This calls for the need to stress on parliamentary legislations and international human rights instruments ratified by Ethiopia. The practical problems involved



with the Federation necessitates reliance on these laws as providing a protective shield against atrocities that could be committed. The deprived and the bruised should have a day in court. But considering the fact that the number of such legislations is insignificant and the endless debate on the publication issue with respect to ratified instruments, it is even more difficult to tell if the human rights system exists in Ethiopia. The fact that most judges are in favor of the need to publicize those instruments adds complexities to the idea.

## Chapter IV

### End notes

1. Preamble (Constitution of FDRE) Para 2.
2. Id. Article 2(3)
3. Id Article 35 (3) and 89 (4)
4. Id Article 41 (6)
5. Id Article 41 (7)
6. Id Article 42, for socio-economic rights see Articles 40-44.
7. Id article 89
8. Id Article 90
9. Id Article 85 (1)
10. The European Court of Human Rights, James and Others V the United Kingdom, Judgment of 21 Feb. 1986.
11. Environmental pollution control proclamation, Proclamation No. 300/2002.
12. Id Article 5 (3), for instance
13. *Land Appropriation proclamation,* Proclamation No. 401/2004
14. Public Health proclamation No.200/2000.
15. Ratified in 1993
16. Ratified in 1992,1998, 2002 respectively
17. FDRE Constitution Article 13 (2)
18. Id Article 62 (1)
19. Id Article 61(1)
20. Id Article 71(2)
21. The ICCPR, the ICESCR, for instance
22. FDRE Supra 17.
23. FDRE supra 1 Article 13 (1)
24. FDRE supra 1
25. See Articles 40-43.
26. See Articles 89 and 90
27. Id article 79(1)



28. Id Article 37
29. Fasil Nahom, A Constitution for a Nation of Nations, an Ethiopian Perspective (1997), Page 150.
30. Johan de Waal, Iain Currie and Gerhard Erasmus. The Bill of Rights: Hand Book (3<sup>rd</sup>ed) in association with Lawyers for Human Rights and Law Society of the Republic of South Africa (2000), Pages 32 and 33.
31. See Articles 41 (5) and 89 (4) respectively
32. Federal Courts Establishment Proclamation, Proclamation No. 25/1996
33. Id Article 3(1)
34. Id Article 6(1)
35. Land Appropriation proclamation Supra 13
36. Article 40 (8) of the FDRE constitution
37. Article 9(1) of the proclamation and 40 (8) of the constitution.
38. Supra 35 Article 11
39. Id Article 2 (4) for definition
40. Proclamation Supra 11
41. Id Article 5 (1)
42. Id Article 5 (3)
43. Id Article 11 (1) and (2)
44. Id Article 3(1)
45. Id Article 3(2)
46. Nigeria provides an example, Section 6 (6)c of the 1999 Nigerian Constitution.
47. Fitih Lehulum, vol. 9. No.1, a magazine prepared by Action professionals' Association (APAP), June 1998 E.C

## CONCLUSION

It can be said that the level of recognition of socio-economic rights is rising both at the national as well as the international level. The number of constitutions guaranteeing these rights is increasing each day. Most importantly, the justiciability of these rights at the domestic level is moving at a slow but encouraging speed. Different courts have outlined their own contours in claiming their right and duty to decide on socio-economic rights.

Some countries have constitutional provisions entitling courts to see cases of violations of socio-economic rights. There is an express recognition of individual rights to assert their socio-economic rights in courts. Other countries have no such provisions but their courts have been active in entertaining cases of alleged violations of these rights. What is fascinating is the approach in some countries where courts entertain cases of violations of socio-economic rights against a clear constitutional hurdle. Such courts are very active in confirming their role as ultimate guarantors of human rights. Most of these courts have followed an integrated approach to human rights protection. The principle of indivisibility of human rights has opened wide floodgates to such courts.

It is still undeniable that there are countries where courts are very reluctant to see cases of violations of socio-economic rights. Yet there are certain developments in these countries where the principle of non-discrimination is enforced through courts even in cases of socio-economic guarantees. This knocks the closed doors of justiciability showing sparks through them and waiting to be broken. All in all, there is a very promising trend in confirming the justiciability of socio-economic rights.

No doubt, Socio-economic rights form a significant part of the Ethiopian human rights system. The enforcement of these rights through courts has, however, an awful record encircled with some strong but surmountable hindrances. It can be said that any stance concerning the justiciability of socio-economic rights in



be said that any stance concerning the justiciability of socio-economic rights in Ethiopia is very slippery. No strong internal base can be established based on the law as it stands. There is no express provision capable of settling the problem. The constitution leaves the definition and elements of justiciable disputes unsettled. There are no plain criteria to decide whether socio-economic rights are judicially inquirable. As part of the human rights system, socio-economic rights face the problems trapping the system in Ethiopia. Solving these problems necessarily facilitates the clearing of the illusion prevailing in the system

Nevertheless, it can be said that socio-economic rights are justiciable in Ethiopia depending on the available unreliable internal legislations. The arguments for the justiciability of socio-economic rights operates every where the issue is not settled in clear terms. Ethiopia is one. These arguments and the implications of the invoked legislations prove the justiciability of these rights in Ethiopia.

The absence of an explicit law settling the matter necessarily opens the door for debate and hence a variety of stands each having their own reasons. It is the view of the writer that the enforcement of socio-economic rights judicially crowns courts as ultimate guarantors of each right. Ethiopia has moved with the international community in acknowledging these rights as imposing legal obligations and not merely programs or goals with no enforceable content. Their acceptance as a right entails their justiciability for this is what a right connotes.

## RECOMMENDATIONS

The ultimate end of this paper is to reveal holes that exist within the Ethiopian human rights system. A beautiful Ethiopia, from the perspective of human rights can only be created if certain minimum arrangements are made within its domestic system. If Ethiopia is to walk along this century of human rights; if international human rights instruments are to breath life in to our poor record on human rights respect, protection and fulfillment; if meaning is to be given to the life of the least fortunate, the sick, the unemployed, the defenseless portions of our society; if the level of the system of socio-economic rights is to be raised higher; if courts are to prove themselves as ultimate guarantors of rights....., the following observations must be considered and implemented. The orders should not be considered as expressions of levels of significance for all are equally important and complementary to each other.

1. The House of Federation which is in charge of interpreting the constitution must settle the publication debate. A final say on the matter is necessary as most of the complications in our system are in one or another way tied to this debate. In my opinion, it is also very important to transfer the power of interpreting, at least, the human rights provisions of the constitution, in to ordinary courts. Courts are by far more accessible to potential victims both physically and financially than the Federation which is fixed at the center beyond the reach of those who need it most.
2. The House of Peoples Representatives must give a clear and comprehensive definition of justiciable matters under article 37 of the constitution. A list of or criteria to determine the matters considered appropriate for judicial adjudication is imperative. All the poor, the voiceless.... will pray to the end so that the justiciability of these rights is confirmed in clear legal terms. A legislative recognition of the justiciability



of socio economic rights should be given. An express mandate is essential to illuminate any illusion.

3. More domestic legislations designed to give effect to socio-economic rights recognized under the constitution and the international code of human rights should be adopted. These legislations must recognize the subjection to judicial scrutiny of the government for its acts (or omission) constituting a violation of socio-economic rights. Unlawful interferences should be judicially contested. The protection and ultimate fulfillment of these rights necessitates the judicial inquiry of government measures taken in this respect.
4. A clear law providing for the specific court having jurisdiction to entertain cases based on international instruments is essential. As the law stands today, there is no uncontroverted stand on this issue. It is highly advisable that any violations of human rights have their first day at the Federal High Court. This warrants efficient and effective determination of these rights.
5. NGO's and legal professionals must attempt to establish the tradition of reliance on courts as well as help individuals to be assertive of their rights. Raising the awareness level of individuals about their rights and the availability of redress in courts is very important. In fact, this is one of the obligations of the government while ratifying any human rights instrument. This can be done through launching educational operations on human rights. The introduction of civic education into the educational curriculum is a step forward in this respect.
6. Another most important task will be bringing about a revolution around courts in their views on international human rights instruments. The high status accorded to these instruments should be divulged to each individual lawyer. Judges must be made aware that courts are the

fountains of justice where all can have equal days. That they are ultimate guarantors of all human rights must be inculcated in their minds. This invariably requires that human rights law must be given a significant concern in the future in legal studies. A time to time release of developments in the sphere of human rights to judges and lawyers is very imperative.

7. The socio-economic rights provisions of the constitution must be formulated in a way that establish separate justiciable rights. The way it stands now, it is very hard to say they are entrenched to everyone. They are rather very general and vague to be called rights. The constitution must follow the formulation used in the ICESCR as well as other human right provisions in it.

In the end, the realm of human rights and the problems associated with them are far reaching. The problems identified and the solutions suggested are in no way exhaustive. They only represent the major ones on the area of socio-economic right. Full realization of human rights requires the best combination of commitment and willingness of the government and the means of the Ethiopian society.



## BIBLIOGRAPHY

### BOOKS

1. A. Eide, A. Rosas, C. Krause(eds): Economic, Social and Cultural Rights: A Text book (2<sup>nd</sup> ed, the Hague: Martinus Nijhoff Publishers, 2000)
2. Fasil Nahom: A Constitution for a Nation of Nations, The Ethiopian Perspective (Red Sea Press Inc, Asmara, Eritrea, 1997)
3. Henry Steiner and Philip Aliston(eds): International Human Rights in Context: Law, Politics, Morals (Oxford: Claredon Press,1996)
4. Jeff King: An Activist Manual on the International Covenant on Economic, Social and Cultural Rights (A Paper by Law and Trust Society and Center for Economic Social and Cultural Rights, March 2003)
5. Johan de Waal, Iain Currie and Gerhard Erasmus: The Bill of Rights: Hand Book (3<sup>rd</sup> ed) in association with Lawyers for Human Rights and Law Society of the Republic of South Africa (2000).
6. L. Sossin: Boundaries of Judicial Review: The Law of Justiciability in Canada (Creswell, Toronto, 1999)
7. M. Craven: The International Covenant on Economic, Social and Cultural Rights (Oxford: Oxford University Press, 1994)
8. Professor Hagg: Constitutional Law of Canada (Creswell, Toronto, 1999)

## LAWS

### INTERNAL LAWS

1. Federal Democratic Republic of Ethiopia Constitution, Federal Negarit Gazeta Year.1. No.1 1995)
2. Environmental Pollution Control Proclamation No. 300/2002, Federal Negarit Gazeta Year 9. No. 12
3. Federal Courts Proclamation No. 25/1996, Federal Negarit Gazeta Year 2. No. 13.
4. Appropriation of Land for Government Works and Payment of Compensation for Property Proclamation, Proclamation No.401/2004, Federal Negarit Gazeta Year 10. No. 42.
5. Public Health Proclamation No 200/2000, Federal Negarit Gazeta Year 6. No. 28.

### INTERNATIONAL LAWS

1. Universal Declaration of Human Rights; Adopted and Proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948.
2. International Covenant on Economic, Social and Cultural Rights; Adopted by General Assembly Resolution 2200 A (XXI) of December 1966. Entered in to Force on 3 January 1976.
3. International Covenant on Civil and Political Rights: Adopted by General Assembly Resolution 2200 A (XXI) of 16 December 1966. Entered in to Force on 23 March 1976.
4. Convention on the Rights of the Child: Adopted by General Assembly Resolution 44/25 of 20 November 1989.
5. African Charter on Human and Peoples' Rights: Adopted in 1981, entered in to force in 1986.
6. African Charter on the Rights and welfare of the Child Adopted in 1990, entered in to force in 1999.



7. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa; Adopted in 2003 and Entered in to Force in 2005.
8. Limburg Principles on the Implementation of the ICESCR. UN Documents ELCN. 4/1987/17.
9. Maastricht Guidelines on Violation of Economic, Social and Cultural Rights, January, 1997, Maastricht.
10. Vienna Declaration and Programme of Action; Adopted by the Second World Conference on Human Rights, Vienna, 23 June 1993 (A/ CONF. 157/24 ( Part I), Chap, III),
11. First World Conference on Human Rights, Tehran 1968.
12. General Comments on the Rights Included in the ICESCR by the UN Committee on Economic, Social and Cultural Rights, Since 1989.

#### **JOURNALS**

1. From Micheal Addo "The Justiciability of Economic, Social and Cultural Rights," Common Wealth Law Bulletin Vol. 14, 1998.
2. From C. Scott and P. Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in the New South African Constitution," University of Pennsylvania Law Review, Vol. 1992.
3. From Kitty Arambulo "Giving meaning to Economic, Social and Cultural Rights: A Continuing Struggle," Human Rights and Human Welfare, Vol. 3, Issue 1, 2003.

#### **WEBSITES**

1. <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm>.
2. <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module28.htm>.

3. <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module30.htm>.
4. <http://www.hri.ca/tribune/onlineissue/v11-3-2005/socialrights.html>.
5. [http://www.hri.ca/tribune/onlineissue/v11-3-2005/optional\\_protocol.html](http://www.hri.ca/tribune/onlineissue/v11-3-2005/optional_protocol.html).
6. <http://www1.umn.edu/humanrts/edumat/IHRIP/circle/justiciability.htm>





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