THE CONSTITUTIONAL PROTECTION OF ECONOMIC AND SOCIAL RIGHTS IN THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA

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Introduction

Economic and social rights, also called socio-economic rights, are generally those rights that contain claims to an adequate standard of living and include the right to work under just and favorable conditions, the right to social security, the right to health, the right to housing, the right to food, and the right to education.[1] The grouping of rights as socio-economic rights is usually seen in contradistinction with civil and political rights. Theories that use categorization of rights with connotations that make economic and social rights of secondary importance and unenforceable are strongly objected.[2] In this article the rights are named as a group for ease of reference considering their relevance to economic and social aspects of societal life and in recognition of the way they are usually referred to, less the negative connotations. Socio-economic rights have been afforded legal protection in various instruments at different levels. This contribution is about the protection of the rights in the Ethiopian legal system.

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[1] F Coomans, "Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context" in F Coomans (ed.) *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, (Intersentia, 2006), 4. Coomans further identifies the right to property as an economic right. But this right is also associated with civil liberties for its importance as a basis of freedom. See C. Krause, 'The Right to Property' in A. Eide *et al* (eds.) *Economic, Social and Cultural Rights: A Textbook*, 2nd edition (Dordrecht: Martinus Nijhoff 2001), 197. But considering its relevance to the physical aspects of such rights as the right to housing and the right to food, we treat the right to property as a socio-economic right as well.

[2] Professor Karel Vasak's 1979 hypothesis of three generation of rights by which civil and political rights were first generation rights while socio-economic rights were second generation rights is objectionable in so far as it gives the impression that the latter are secondary in status and emerged latter in the development of human rights. For a discussion of the hypothesis, see Carl Wellman, "Solidarity, the Individual and Human Rights", 23 *Human Rights Quarterly* 639 (2000), and J Oloka-Onyango and S Tamale, "'The Personal is Political', or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism" (1995) 17 *Human Rights Quarterly* 691, 711 (expressing misgivings about the idea of generation of rights). See also A Eide and A Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Eide *et al* (n 1 above) (providing that the history of the evolution of human rights at the national level does not make it possible to place the emergence of different human rights into clear-cut stages); and A Eide, "Economic, Social and Cultural Rights as Human Rights" in Eide *et al* (n 1 above), 9, 12-16 (explaining the thesis that economic and social rights found acceptance at the international level before civil and political rights did).

Domestic systems are the primary fora for the effective protection and implementation of all human rights.[3] In the positive law of a particular state, economic and social rights may be protected through inclusion in the Bill of Rights of the Constitution, as Directive Principles of State Policy (DPSP), through constitutional reference to relevant international human rights treaties, and/or through domestic legislation.[4] The enforceability or justiciability of these rights by judicial and quasi-judicial organs is an effective strategy to monitoring their implementation. It should, however, be noted that making rights justiciable (by providing for rights and obligations in legal instruments and subjecting them to judicial enforcement) is only one of the ways of protecting them.[5] Policy and related measures should also be taken to realize economic and social rights. That is why the usage of the term "protection" rather than "justiciability" of rights should be given eminence in relation to steps to realize human rights in general and socio-economic rights in particular.

In laying down framework for the domestic protection of economic and social rights, much attention is given to their constitutional entrenchment, their protection in ordinary legislations and their justiciability before judicial and quasi-judicial organs.[6] These are indeed among the major vehicles of giving effect to social and economic rights. However, the place of relevant international human rights instruments in the domestic legal system, the existence of policy framework which identifies responsible organs and sets time-frame for the implementation of each form of economic and social right, and the availability of a procedure that allows any person or civil society organizations to institute cases on behalf of victims of socio-economic rights violations (*action popularis*) are also determinant factors. Among these factors, the incorporation or otherwise of socio-economic rights in a state's constitution either as part of the Bill of Rights or in DPSP and the place or status of relevant international treaties to a certain extent determine the degree to which the rights may be protected through specific legislation or policies.

This article deals with the constitutional protection of economic and social rights in Ethiopia by reviewing the relevant provisions of the Constitution of the Federal

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[3] This is mainly because of their relative accessibility to the disadvantaged group in a society and that they have more effective enforcement mechanism. See General Comment No. 9 of the Committee on Economic, Social and Cultural Rights on the domestic application of the International Covenant on Economic, Social and Cultural Rights (ICESCR): 03/12/98, E/C. 12/1998/24, para, 4.

[4] F Viljoen, "National Legislation as a Source of Justiciable Socio-economic Rights" (2005), *ESR Review*, Vol. 6 No. 3, 7.

[5] M Scheinin, "Economic and Social Rights as Legal Rights" in A Eide *et al* (eds.) *Economic, Social and Cultural Rights: A Textbook*, (Dordrecht: Martinus Nijhoff publ., 1995), 41, 62. See also J Cottrell & Y Ghai "The Role of the Courts in the Protection of Economic, Social and Cultural Rights" in Y Ghai & G Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights*, (INTERIGHTS, 2004) 88 (contending that the classical role of justiciabiltiy is that of last resort – one goes to court when all else fails – and that when used as a last resort in connection with socio-economic rights, adjudication would become less opposed and necessary).

[6] See for instance, S Liebenberg "The Protection of Economic and Social Rights in Domestic Legal Systems" in Eide *et al* (n 1 above), 55-84.

Democratic Republic of Ethiopia (hereinafter FDRE Constitution)[7] and discussing the status of pertinent human rights treaties in the domestic legal system. The justiciability of socio-economic rights in the FDRE Constitution and relevant treaties is also studied. As what is on the papers does not tell the whole story, the practice is also visited. While we recognize the paramount importance of specialized legislation providing for specific rights and procedures, and policy instruments, it is the limitation of this paper that it does not address them. The article does not also have the pretense of exhaustively dealing with all the issues it raises.

I. Economic and Social Rights in the FDRE Constitution

The entrenchment of economic and social rights as fundamental norms of constitutional legal order through their incorporation in the bill of rights with stern amendment requirements and their judicial enforceability[8] provide a very strong basis for the protection of the rights. There have, however, been principled objections to the inclusion of socio-economic rights in the bill of rights of constitutions and their justiciability. The objections relate to the legal nature of the rights (that they entail imprecise obligations that are not amenable for enforcement by courts of law) and the legitimacy and competence of courts and other quasi-judicial organs to monitor their implementation.[9] At the center of the objections is the basic argument that socio-economic rights entail positive and resource dependent obligations for the decision on which courts are not well placed.[10]

The objections nevertheless are based on a 'rigid and formalistic conception of the doctrine of separation of powers'– charging that the judiciary (with its

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[7] Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995 (hereinafter cited as FDRE Constitution). Ethiopia is a federal state and the regional states do also have constitutions which are generally modeled after the FDRE Constitution. As the title may suggest, this article deals with the protection of socio-economic rights in the system established by the Federal Constitution.

[8] The term "enforceability" is often used interchangeably with "justiciability" when they relate to rights. By "judicial enforceability" of rights, we mean their applicability by courts or other organs with judicial power in concrete cases.

[9] See the debate on the inclusion of socio-economic rights in the South African Constitution in the *South African Journal on Human Rights* Vol. 8 (1992), and especially see: E Mureinik "Beyond a Charter of Luxuries: Economic Rights in the Constitution", and D Davis "The Case against the Inclusion of Socio-economic Demands in a Bill of Rights Except as Directive Principles". See also: S Muralidhar "Judicial Enforcement of Economic and Social Rights: The Indian Scenario" in Coomans (n 1 above), 237 257; and D Brand, 'Socio-economic rights and courts in South Africa: Justiciability on a Sliding Scale' in Coomans (n 1 above), 207 225.

[10] It is argued that there may be a range of appropriate policy solutions to realize a particular socio-economic right, and judges are not equipped to decide which is most suited, and that courts cannot always anticipate the 'knock-on' effects of their orders on other areas of budgetary and social policy. See the observations of the South African Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others* (no. 2) 2002 (5) SA 721 (CC), (also called the *TAC* Case) para. 37. Also see, M Pieterse "Coming to terms with judicial enforcement of socio-economic rights" 20 *South African Journal on Human Rights* (2004) 383, 389-399.

unelected judges) exceeds its role in enforcing socio-economic rights with often significant budgetary impact and that such decisions should be left to the elected legislature.[11] They are based on the wrong assumption that there is bright line separating the mandates of the legislative, executive and judicial branches of government from one another, and fail to heed to the modern conception of separation of powers that allows 'checks and balances' - the functions of one branch serving to monitor the activities of the other and to place limits on the power exerted by the other branches. They also fail to see that many civil and political rights such as the rights to vote, equality, freedom of speech and a fair trial also involve questions of social policy and have budgetary implications and yet their incorporation in constitutional bill of rights is never objected.[12] While economic and social rights have been incorporated in justiciable bill of rights of some constitutions[13], the objections have in some systems, such as Ireland and India, had the effect of putting them in what are called "Directive Principles of State/Social Policy" (DPSP) – policy objectives that are meant to guide implementation of a constitution and the governance of a state - which are rendered expressly non-justiciable.[14] The FDRE Constitution sets a unique example in enshrining socio-economic rights both in the Bill of Rights and in what it calls "National Policy Principles and Objectives" which are akin to DPSP. The practical application of the constitutional provisions through both legal and non-legal mechanisms ensures the realization of socio-economic rights in the country. The following sub-sections discuss the extent to which the rights are protected by the Constitution.

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[11] See Pieterse (as above), 389. See also J Waldron, "The Core of the Case against Judicial Review" 115 *Yale Law Journal* (2006), 1346.

[12] Liebenberg (n 6 above) 58. The South African Constitutional Court made the same observation in certifying the 1996 Constitution in the case: *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Republic of South Africa*, 1996, 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), paras. 76-78 (the Constitutional court has also observed that at the very minimum, socio-economic rights can be negatively protected from improper invasion). The objections are also premised on the wrong belief that judicial intervention in socio-economic rights cases is directed at budgetary rearrangement. The role of the judiciary in such cases should be seen as one of checking legislative and executive actions against standards derivable from constitutional provisions rather than direct involvement in budgetary decision-making processes.

[13] For example see the Constitution of the Republic of South Africa (1996), sections 26 – 29.

[14] See the *Constitution of Ireland* (1937), article 45 (providing that the principles 'shall not be cognizable by any court under any of the provisions of this constitution'), and the *Constitution of India* (1949/1950), articles 36 – 51 (article 37 provides that the DPSP 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the state to apply the principles in making laws'). See also the *Constitution of Lesotho* (1993), Chapter III; and the *Constitution of the Republic of Ghana* (1993), Chapter 6.

1.1 Rights Protected

The FDRE Constitution is the supreme law of the land and any law, customary practice or a decision of an organ of state or a public official which contravenes it shall be of no effect.[15] Chapter three of the Constitution provides for a long list of fundamental rights and freedoms in which an impressive array of classical human rights are included.[16] Article 105 of the Constitution finally closes with an extremely stringent requirement for the amendment of the Chapter on fundamental rights and freedoms.[17] Among the rights and freedoms, Aarticle 41 of the Constitution, which is entitled "economic, social and cultural rights", provides:

> *(1) Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory. (2) Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession. (3) Every Ethiopian national has the right to equal access to publicly funded social services. (4) The State has the obligation to allocate ever increasing resources to provide to the public health, education and other social services. (5) The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged, and to children who are left without parents or guardian.*

Article 41 does not provide for all the rights falling within the réalm of economic and social rights in black letters as one would hope by looking at its title. Its provisions are so crude that it is difficult to identify the rights guaranteed and the extent of protection afforded to them. Sub-articles 1, 2 and 3, which guarantee freedom to engage in economic activities, the right to choose such engagement and non-discriminatory access to publicly funded services are basic to all sorts of economic and social rights. Sub-article 4 stipulates the state's obligation to progressively realize the rights through the allocation of ever-increasing resources. It does also provide indicative listing of the socio-economic rights, which the state should realize progressively within the limits of its available resources. The usage of phrases like "publicly funded social services" allows us to read many of the conventional economic and social

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[15] Article 9 of the FDRE Constitution.

[16] Articles 14 – 44 of the FDRE Constitution.

[17] As different from the requirement for the amendment of other provisions, article 105 of the FDRE Constitution requires the approval of the majority in all State Councils, and two-third majority of the House of Peoples' Representatives as well as that of the House of Federation for the amendment of the provisions of the Constitution on fundamental rights and freedoms.

rights into Article 41. The same can be said in relation to the provision of rehabilitation and assistance to some vulnerable groups under sub-article 5.

Based on the indicative listing under Article 41/4, we may say that the right to health[18] and the right to education are guaranteed. One may also add the rights to housing, to social security, to safe and potable water, to food etc. from the open-ended phrase "...and other social services". Article 43/1 of the Constitution further provides that "The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development". Despite the collective fashion in which it defines the right, this article may be interpreted as including such socio-economic rights as the rights to adequate food, closing and housing that are listed to define "adequate standard of living" under Article 11/1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). But still, however liberal one may be in interpreting the above provisions of the Constitution, there still remains the problem of delimiting the scope of the rights that might be said to have been guaranteed. Talking about the right to health for example, can we say that the right to emergency medical services is guaranteed? Similarly , can we say that the right to free and compulsory primary education for all is guaranteed? What about the right against forced eviction? The letters of Articles 41 and 42 do not provide clear answers to these questions.

The right to work (of labour) is the one socio-economic right that the Constitution defined in some detail. It states under Article 42 that certain category of workers (factory and service workers, farmers, farm labourers, other rural workers and government employees) "have the right to form associations to improve their conditions of employment and economic well-being." The rights specifically guaranteed include: the right to form trade unions, the right to strike, the right of women to equal pay for equal work, and the right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay, to remuneration for public holidays as well as healthy and safe work environment. The relatively detailed and robust constitutional provisions do have some worrying internal limitations though. Firstly, Article 42 provides for the right of those who already have a job and does not actually provide for the right to get one. Secondly, the exercise of trade union rights is limited to specific category of workers "whose work compatibility allows for it and who are below a certain level of responsibility". This is an open qualifier that may be used to make the rights of no practical significance. The rights are also

[18] The official Amharic version of the sub-article shows that the English phrase "public health" is used in lieu of the "right to health".

subjected to laws that determine government employees who enjoy them and establish procedures for the formation of trade unions and for the regulation of the collective bargaining process.

As shall be discussed below, the ratification of the ICESCR and other pertinent treaties and the status given to these instruments by the FDRE Constitution solves many of the problems that arise from the crudity and resulting non-clarity of the constitutional articles discussed above. Progressive interpretation of other provisions of the constitution does also help strengthen the protection of socio-economic rights, i.e., the rights may be read into provisions of the Constitution on such rights as the right to life.[19] It can, therefore, be said in general that the Constitution guarantees economic and social rights.

Chapter ten of the FDRE Constitution is devoted to "National Policy Principles and Objectives" with which any organ of government at both Federal and State levels shall be guided in the implementation of the Constitution, other laws and public policies.[20] Articles 89 and 90 of the Constitution provide for the economic and social objectives, respectively. Under the economic objectives, the Government has the duty to, among others, formulate policies that ensure equal benefit from the country's legacy of intellectual and material resources, and equal opportunity for all to improve their economic conditions. The social objectives require that policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security to the extent the country's resources permit.

The national policy objectives and principles are the DPSP of the FDRE Constitution. While Article 41 and other relevant provisions of the Constitution protect economic and social rights as entitlements of individuals and groups, Articles 89 and 90 extend this protection by requiring the government to develop policies that ensure the enjoyment of the rights by citizens. As opposed to the former, the policy objectives are not directly enforceable by courts, i.e.,

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[19] Articles 14 and 15 of the FDRE Constitution guarantee an inviolable and inalienable right to life which would be devoid of much breath without protection of the rights to food, shelter, health care and other necessities of life (see *Francis Coralie Mullin Vs. The Administrator, Union Territory of Delhi* [(1981) 2 SCR 516]). Article 35 of the Constitution guarantees the right to equality of women in general, which extends to the right to enjoyment of economic and social rights, and the rights of this group of people in relation to work, health, education etc. According to article 35/9, for instance, in order to safeguard their health, women have the right of access to family planning education, information and capacity. Article 36 of the Constitution provides for the rights of children relating to work, education, health and well-being. For example, article 36/1/d provides that every child has the right not to be subjected to work that is hazardous or harmful to his or her health or well-being. Article 40 of the Constitution protects the economic right to property which as indicated hereinabove is pertinent to the physical aspects of such rights as the right to housing.

[20] Article 85 of the FDRE Constitution.

they are not directly justiciable.[21] The latter are, however, to be used as tools that guide the interpretation and construction of fundamental rights and freedoms of the FDRE Constitution that include Article 41 and the other provisions with relevance to socio-economic rights. They could be used to give content to the sparse provisions of Article 41 on socio-economic rights. Policies should also be developed and implemented with due respect to fundamental rights. Detailed policies that identify responsible organs and set time frame for implementation are the major vehicles of giving effect to the policy objectives and principles. By virtue of Articles 89 and 90 of the FDRE Constitution, the Ethiopian government is duty bound to adopt and implement such policies in all areas of economic and social rights.

1.2 The Judicial Enforceability of Constitutionally Protected Rights

Article 13 (1) of the FDRE Constitution puts strong responsibility and duty on all Federal and State legislative, executive and judicial organs at all levels to respect and enforce fundamental rights and freedoms. By imposing the responsibility of respecting and enforcing the fundamental rights and freedoms (including the guaranteed economic and social rights) on the judiciary, this article has given a justiciable dimension to the rights. The duty of the judiciary to enforce the rights is an expression of the subjection of the fundamental rights and freedoms provided by the Constitution to judicial application. Article 37 (1) further provides that everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.[22]

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[21] Note that the FDRE Constitution, as opposed to those of Ireland and India, has not incorporated a clear provision that the policy principles and objectives are non-justiciable. We argue that they are not 'directly' justiciable because Chapter ten of the Constitution does not provide to that effect and also because article 85 of the Constitution says that the principles and objectives guide in the implementation of laws and policies than they themselves be applied by courts. It is submitted, nevertheless, that the inclusion of socio-economic rights in DPSP does not put them out of the total reach of courts. At a minimum, the implementation of the directive principles by the executive should not violate fundamental rights and the latter may be interpreted in the light of the DPSP. If, for instance, a policy adopted to realize the right to health (as a DPSP) happens to be discriminatory (the right to equality and non-discrimination being part of the bill of rights), Courts may intervene. In India the Constitution, as noted hereinbefore, requires all organs of the state to treat the DPSP as fundamental in the governance of the country and the Supreme Court turned the principles to justiciable guarantees by reading them with the fundamental rights. In two cases (*Mohini Jain v State of Karnataka*, (1992) 3 SCC 666, AIR (1992) SC 1858 and *Unni Kkrishnan J P v State of Andhra Paradesh*, (1993) 1 SCR 594, AIR 1993 SC 2178) which concerned the right to education, the Indian Supreme Court held that fundamental rights and DPSP are complementary because what is fundamental in the governance of the country could be no less significant than that which was fundamental in the life of an individual.

[22] The Provisions of article 37 of the Constitution show that justiciability of rights may be ensured through institutions with judicial power other than proper courts of law. In one case, the Federal Supreme Court interpreted the article as including organs such as the National Electoral Board of Ethiopia in respect of its

On the other hand, Article 83 (1) of the Constitution, entitled "Interpretation of the Constitution", provides that all constitutional disputes shall be decided by the House of Federation. According to Article 84, the House of Federation exercises this power upon the recommendations of the Council of Constitutional Inquiry that it is necessary to interpret the Constitution.[23] These provisions have served as ground for the insistence of some courts and lawyers of the country against directly applying constitutional provisions – considering cases in which constitutional provisions are invoked as "constitutional disputes".[24] Ethiopian Courts generally tend to decide cases based on ordinary legislations even where parties to a dispute invoke constitutional provisions. While legislations take primacy in their application to specific cases, they

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jurisdiction to decide on electoral complaints. See *National Electoral Board v. Oromo Federalist Democratic Movement*, Appeal, File No. 21387, judgment of 27 September 2005. Such other institutions also include the Human Rights Commission and the Institution of the Ombudsman which were established by Proclamation 210 /2000 (a Proclamation to Provide for the Establishment of the Human Rights Commission, Proclamation No. 210 /2000, Addis Ababa, 4 July, 2000) and Proclamation 211 /2000 (a Proclamation to Provide for the Establishment of the Institution of the Ombudsman, Proclamation No. 211 /2000, Addis Ababa, 4 July, 2000), respectively. Article 6 of the proclamation that established the former states that it has the powers and duties to ensure that the human rights and freedoms recognized by the Constitution are respected by all citizens, organs of state, political organizations and other associations as well as by their representative officials; and ensure that laws, regulations and directives as well as government decisions and orders do not contravene the human rights of citizens guaranteed by the Constitution. It is interesting to see also that article 1(5) of the Proclamation defines "Human Right" as including fundamental rights and freedoms recognized under the Constitution and those enshrined in the international agreements ratified by Ethiopia. According to article 6(1) of the Proclamation that established the Institution of the Ombudsman, it shall have powers and duties to ensure that directives and decisions given by executive organs do not contravene the constitutional rights of citizens. The establishment of these institutions with the mandates given to them would definitely contribute to the justiciability of the constitutionally recognized socio-economic rights. While it had to wait until 2005 for the two institutions to start actually functioning, they recently have adopted strategic plans and have begun operating through field offices as well. These quasi-judicial institutions and their mechanisms reinforce the justiciability of human rights, including economic and social rights, in Ethiopia.

[23] The provisions of articles 83 and 84 of the FDRE Constitution basically define the mandate and procedure for "constitutional review" - power to control the constitutionality of laws and decisions. This article is not interested in dealing with constitutional review in Ethiopia in any detail. For discussions on the Ethiopian approach to constitutional review, see Y T Fessha "Judicial Review and Democracy: a Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review" (2006) 14 *African Journal of International and Comparative Law*, No. 1, 53-82; and A Fiseha "Federalism and the Adjudication of Constitutional Issues: the Ethiopian Experience" (2005) 52 *Netherlands International Law Review*, No. 1, 1-30.

[24] See Fessha (n 23 above), 79-80 (observing that there is a practice of shying away from considering the provisions of the Constitution including those in the bill of rights even when parties invoke them). See also T Regassa, "State Constitutions in Federal Ethiopia: A Preliminary Observation, A Summary of the Bellagio Conference", March 22-27, 2004, page 3, available at <http://www.camlaw.rutgers.edu/statecon/subpapers/regassa.pdf> (accessed on 27.04.2007). In one workshop (Training of Judges, organized by the Federal Supreme Court in Cooperation with USAID, summer 2001, Adama, Ethiopia) in which this author took part, most judges of the Oromiya Regional State took the position that articles 83 and 84 of the Constitution in effect debar them from directly applying constitutional provisions, especially when the constitutionality of a law or decision is in issue.

should be placed in their proper constitutional context and in some cases (including cases involving socio-economic rights) it may be imperative to apply constitutional provisions owing to the absence of pertinent ordinary legislation. Courts have also referred cases in which constitutional provisions (including the ones in which fundamental rights and freedoms) are invoked, especially those in which the constitutionality of a law or decision was an issue, to the Council of Constitutional Inquiry which in one instance went to the extent of finally deciding the case as presented to the court.[25] The general practice of avoidance by courts of adjudication of cases based on constitutional provisions is symptomatic of what would befall economic and social rights cases that invoke the relevant provisions of the Constitution though such cases have so far been rare, if not absent.

A deeper scrutiny of the relevant laws shows that the mandate of the House of Federation (and the Council of Constitutional Inquiry) "to interpret" the Constitution does not exclude courts from applying constitutional provisions on

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[25] The judgment of the Federal First Instance Court in the case taken by an opposition political party called Coalition for Unity and Democracy (CUD) against the ban of assembly and demonstration by the Prime Minister of Ethiopia in Addis Ababa and its vicinities after the May 2005 elections stands as one good example. See *Coalition for Unity and Democracy v. Prime Minister Meles Zenawi Asres*, Federal First Instance Court, File No. 54024, decision of 3 June 2005. CUD argued that the Court has jurisdiction over the matter by reciting constitutional (articles 13(1) and article 37) and legislative provisions that establish that the human rights provisions of the Constitution are enforceable by courts. It further argued that ordinary legislation have constitutional bases and, with the express wish to preclude the court from referring the case to the Council of Constitutional Inquiry, it stressed that the suit was based on the Proclamation to Establish the Procedure for Peaceful Demonstration and Public Political Meeting (Proclamation No. 3/1991, *Negarit Gazeta* 50th Year No. 4, Addis Ababa, 12 August, 1991). The Court framed the issue as: whether the directive of the Prime Minister, whose constitutional power as the chief executive it underlined, was in contravention with the Constitution. It then referred the matter to the Council of Constitutional Inquiry by invoking the provisions of articles 17 and 21 of Proclamation 250/2001, according to which courts may refer cases in which the constitutionality of the decision of a government official is disputed and the interpretation of the Constitution is needed – without considering the issue in light of Proclamation 3/1991 and the clarity or otherwise of the relevant constitutional provisions. Neither did the Council of Constitutional Inquiry consider whether there was a "constitutional dispute" giving rise to its jurisdiction. It rather took it upon itself to decide the case as presented to the court by concluding that the directive issued by the Prime Minister was not unconstitutional. See *Council of Constitutional Inquiry, decision taken on a regular meeting of 14 June 2005* (on file with author). This decision was sent to the Court, but the case was not reopened on the same matter as the contested ban of assembly and demonstration had expired. Surprisingly, from the records of the Court and the Council, the matter was not referred to the House of Federation. As can be gathered from articles 83 and 84 of the FDRE Constitution and also the provisions of proclamations discussed below, this is lamentable. Though suggestive of the Council's erroneous understanding of its mandate, this is not the general practice in the exercise by the Council of its power in relation to constitutional disputes as there is evidence that the House of Federation gives the final decision. See, for instance, the *House of Federation of the Federal Democratic Republic of Ethiopia, 1st Term 5th Year, Minutes of Extraordinary Meeting, Addis Ababa*, 7 July 2000 (on file with author). The representative of the Council of Constitutional Inquiry submitted recommendations on two issues of constitutionality which were referred to it by the House of Federation itself (which received them from the sources first) and the latter took final decision.

fundamental rights and freedoms. A close look at the provisions of Article 84 of the Constitution and Articles 6, 17 and 21 of the Council of Constitutional Inquiry Proclamation shows clearly that "constitutional disputes" are those in which the constitutionality of laws or decisions is contested and/or those which make the interpretation of some constitutional provisions necessary.[26] It may be that the precise meaning and scope of a constitutional provision is disputed or that a legislation invoked by parties or relied on by the court, or a decision given by a government organ or official is contested or considered to be inconsistent with the Constitution. Such instances may give rise to "constitutional disputes" that make constitutional interpretation necessary. When such disputes arise in a case already before a court of law, the court is not precluded from entertaining and ultimately deciding the case.[27] The court will submit a legal issue to the Council of Constitutional Inquiry only if it believes that there is a need for an authoritative constitutional interpretation in deciding the case. If the court believes that the constitutional provision in question is clear, it can apply it without referral to the Council.[28]

The above show that the mandate of the House of Federation to interpret the Constitution does not affect the power of the courts to adjudicate disputes that are based on the provisions of fundamental rights and freedoms including those on economic and social rights. The duty of the judiciary to enforce the rights

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26 Council of Constitutional Inquiry Proclamation, Proclamation No. 250/2001, Federal *Negarit Gazeta* 7th Year No. 40, Addis Ababa, 6 July 2001. See also Proclamation to Consolidate the House of Federation of the Federal Democratic Republic of Ethiopia and to define its Powers and Responsibilities, Proclamation No. 251/2001, Federal *Negarit Gazeta*, 7th Year No. 41, Addis Ababa, 6 July 2001. According to articles 6 and 17 of Proclamation No. 250/2001, the power of the Council of Inquiry is to investigate constitutional disputes (including disputes relating to constitutionality of laws) and submit recommendations to the House of Federation if it finds that it is necessary to interpret the Constitution. These articles as well as article 21 indicate in essence that for the mandate of the Council to be invoked, there should be an issue that necessitates constitutional interpretation in the first place. For an argument that both Courts and the House of Federation should have power to decide on constitutionality of laws and decisions, see A Fiseha (n 23 above), 19-22 (this author fails to address the issue of whether there should be a need to "interpret" specific constitutional provisions - for lack of clarity or some other reason - for the jurisdiction of the House of Federation to come into the picture).

27 See article 21, Proclamation No. 250/2001 (n 26 above). The court forwards only the legal issue that, it considers, needs to be interpreted and keeps the case pending before it for final decision after receiving the authoritative interpretation of the House of Federation. According to article 22, even when an interested party believes that there is a need for constitutional interpretation, the party shall first present his request to the court that has handled the case and can only go to the Council of Inquiry by way of appeal.

28 The Supreme Court of the Amhara Regional State has demonstrated a perfect understanding of the type of issues that call for the mandate of the Council of Inquiry in one exceptional case that concerned the right to bail (*State V Haile Meles and other*, Supreme Court of Amhara Regional State, File No. 21/90, decision of 1998 (1990 E.C.)). The defense argued that the Criminal Procedure Code of Ethiopia is unconstitutional in as far as it denies bail for suspects accused of crimes that entail imprisonment for fifteen years or more. The court decided that the contested provision (article 63) of the Criminal Procedure Code was not unconstitutional because the right to bail under article 19(6) of the FDRE Constitution has clear exceptions.

enshrined in the Constitution definitely extends to applying the provisions to concrete cases. While this provision of Article 13(1) makes the fundamental rights and freedoms of the Constitution justiciable, Article 37(1) makes bringing justiciable matters before judicial and quasi-judicial organs and getting decision thereon a right. That ordinary courts have jurisdiction over cases arising under the Constitution is further confirmed by Article 3(1) of the Federal Courts Proclamation.[29] The position of the courts of the country that they have no power to entertain and decide cases in which constitutional provisions are invoked is therefore wrong and hence should be changed.

II. Relevant Human Rights Treaties

Out of the international human rights instruments relevant to the protection of economic and social rights, Ethiopia has acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) on 11 September 1993, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 10 October 1981, and the Convention on the Rights of the Child (CRC) on 13 June 1991.[30] While the first of these instruments is wholly devoted to socio-economic and cultural rights, the latter two respectively enmesh women and children specific economic and social rights. At the regional level, the State has ratified the African Charter on Human and Peoples' Rights (ACHPR) on 15 June 1998, and the African Charter on the Rights and Welfare of the Child (ACRWC) on 27 December 2002.[31] Both these African instruments protect economic and social rights with other group of rights. Ethiopia is bound by all the above human rights instruments and its citizens are entitled to the socio-economic rights they provide for.

Under its supremacy clause, the FDRE Constitution provides that all international agreements ratified by Ethiopia are an integral part of the law of the land (Article 9 (4)). This means that the relevant provisions of instruments like the ICESCR, CEDAW, CRC, ACHPR[32] and ACRWC, with the standard of

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29 Federal Courts Proclamation, Proclamation No. 25/1996, Federal *Negarit Gazeta* 2nd Year No. 13, Addis Ababa, 15th February, 1996. Article 3(1) enounces "Federal Courts shall have jurisdiction over cases arising under the Constitution, Federal Laws and International Treaties".

30 See Office of the United Nations High Commissioner for Human Rights, available at <http://www.ohchr.org/english/countries/ratification> (accessed on 18.04.2007).

31 See African Commission on Human and Peoples' Rights, available at <http://www.achpr.org/english/_info/index_ratifications_en.html> (accessed on 18.04.2007).

32 The list of economic and social rights guaranteed by the ACHPR is not exhaustive as it fails to provide for the rights to housing, food, social security etc. The African Commission on Human and Peoples' Rights, the monitoring organ established by the ACHPR, has however read the right to housing and the right to food into the Charter. See *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001), African Human Rights Law Reports 2001

protection they accord to economic and social rights, are part of the laws of Ethiopia. Accordingly, in addition to the rights protected by Article 41 of the Constitution, the provisions of the above listed instruments on economic and social rights are part of the laws of Ethiopia and hence the argument that such rights are duly protected in the Ethiopian legal system.[33]

The protection of socio-economic rights through Articles 41 and 9 (4) of the Constitution is further strengthened by Article 13 (2) which provides that "the fundamental rights and freedoms shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia."[34] This means that the economic and social rights enshrined in the Constitution shall be interpreted in line with the relevant provisions of instruments like the ICESCR, CEDAW, CRC and the Universal Declaration of Human Rights (UDHR) which also incorporates socio-economic rights.[35] Such interpretation helps alleviate the problems resulting from the fact that Article 41

(Center for Human Rights, University of Pretoria) p. 60 – 75. It is believed also that it departs from the other international treaties in that it does not attach the qualification of progressive realization to the economic and social rights it incorporates. See C A Odinkalu "Analysis of Paralysis or Paralysis by Analysis? Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples' Rights" (2001) 23 *Human Rights Quarterly*, 327, 349. There is, however, a stronger case for understanding the obligation that the ACHPR imposes on states as one to realize the economic and social rights progressively within available resources at least in as far as positive (resource dependent) obligations are concerned. See C Mbazira "The Right to Health and the Nature of Socio-economic Rights Obligations under the African Charter: The Purohit Case" (2005), *ESR Review*, Vol. 6 No. 4, 15 – 18.

[33] Ethiopia follows the monist tradition where international treaties become an integral part of national law upon ratification. For a discussion on the monist/dualist distinction and the fallacies involved therein, see F Viljoen, *International Human Rights Law in Africa*, (Oxford University Press, 2007), 530 – 538 (after reviewing the problems with the monist/dualist classification and cases where the adoption of internal legislative measures domesticating provisions of treaties that were made integral part of national law by constitutions was required for their application, Viljoen argues that the deceptive label of 'monism' should be discarded in favour of an approach of making treaty provisions applicable without further domestic enactments). We argue that the provisions of treaties ratified by Ethiopia (as par of the law of the land) are applicable by the courts of the country without further need for a formal step of issuing any such enactment as "domesticating legislation".

34 It is worth noting also that where a constitutional dispute relating to the fundamental rights and freedoms enshrined in the Constitution is submitted to the Council of Constitutional Inquiry, it shall interpret the provision in question in a manner conforming to the principles of the UDHR, International Covenants on Human Rights and International Instruments adopted by Ethiopia. See Proclamation No. 250/2001 (n 26 above), article 20(2).

[35] One may say that the requirement of interpretation in accordance with the international instruments may also be an indication that these instruments are hierarchically (at least) parallel to the Constitution. there is, however, the argument that considering that international instruments get ratified by the organ that issues legislations, the House of Peoples' Representatives (article 55(12) of the FDRE Constitution) and that the Constitution is the supreme law of the land (article 9 (1)), international human rights treaties are hierarchically below the Constitution and have a status equal to legislations. Accordingly, if for instance a provision of a human rights treaty ratified by Ethiopia is inconsistent with the Bill of Rights, the latter prevails

and other relevant provisions of the Constitution are terse, vague or too general in their formulation. By making use of the provisions of instruments like the ICESCR, the provisions of Articles 41, 42, 43 and other relevant articles of the Constitution can be interpreted to have guaranteed classical economic and social rights.

By making international human rights treaties ratified by Ethiopia part of the law of the land, Article 9(4) of the Constitution extends the jurisdiction of Ethiopian courts to applying their provisions. Some believe that even if a ratified treaty is part of domestic law, the direct applicability of its provisions would depend on whether its provisions are "self-executing", i.e., whether it specifies in a rather clear way the entitlements of individuals or groups and the extent of the duties imposed on the state.[36] In the first place, the characterization of treaty provisions as "self-executing" in the context of justiciability of rights is rejected for want of strong jurisprudential foundation.[37] Secondly and more importantly, considering that legal rules are expressed in unavoidably vague wording[38] and that it is in the power of courts to interpret rights to decide their exact content, treaty provisions that are made part of domestic law should be directly applicable. The inclusion of the ratified treaties as part of the law of the land should therefore be enough for courts to be able to apply their provisions.

There actually is legal basis for the direct applicability of provisions of ratified treaties by Ethiopian courts. Article 3(1) of the Federal Courts Proclamation specifically provides that Federal Courts shall have jurisdiction over international treaties and Article 6(1) of the same proclamation states that Federal Courts shall settle cases or disputes submitted to them on the basis of, among others, international treaties.[39] In practice, however, litigants as well as courts avoid referring to international human rights instruments even in cases perfectly covered by treaties ratified by Ethiopia[40], and

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[36] See Coomans (n 1 above), 7, and Viljoen (n 33 above), 533.

[37] See M Scheinin "Direct Applicability of Economic, Social and Cultural Rights: A Critique of the Doctrine of Self-executing Treaties" in K Drzewicki *et al* (eds.) *Social Rights as Human Rights: A European Challenge* (Institute for Human Rights, Åbo Akademi University, 1994) 73.

[38] H.L.A. Hart, The Concept of Law (1963), Chapter VII.

[39] Proclamation No. 25/1996 (n 29 above).

[40] The very limited number of cases in which international instruments were applied are exceptions. One such exception is the very first decision of the Federal High Court in the trial of officials of the previous (*Derg*) regime for genocide, namely, *Special Prosecutor v. Col. Mengistu Hailemariam and 173 Others*, Federal High Court, Criminal File No. 1/87, Decision of 9 October, 1995 (instruments referred to include: the UDHR, Convention on the Prevention and Punishment of the Crime of Genocide, Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment). See S A Yeshanew, Report and Commentary on "*Special Prosecutor v. Mengistu Hailemariam and 173 Others*, Federal High Court, Criminal File No 1/87, Decision of Meskerem 29, 1988 E.C. (9 October, 1995 G.C.)" *International Law in Domestic Courts*, ILDC 555 (ET 1995), (Oxford University Press, 2007). See also *Dr. Negaso Gidada v. the House of Peoples' Representatives and the House of Federation*, Federal High Court, appeal, Addis Ababa, Judgment of 4 January 2006 (in affirming the right of the appellant to freedom of opinion and expression and his right to vote and be elected, the Court referred to articles 18 and 19 of the UDHR and International Covenant on Civil and Political Rights, respectively, which it said are part of the law of the land by virtue of article 9(4) of the Constitution and that in accordance with article 13(2), the fundamental

many members of the judiciary believe that the rights in ratified international treaties, which are not otherwise clearly guaranteed in domestic laws, are not justiciable.[41]

The skewed attitude and practice in relation to the judicial application of provisions of ratified treaties is, it is believed, partly attributable to the fact that the full texts of such treaties are not published in the Official Legal Gazette of Ethiopia. Specific Proclamation with the title of the treaty is usually issued upon the ratification of a certain international treaty by the House of Peoples Representatives.[42] This is in accordance with Article 71(2) of the Ethiopian Constitution which provides that the President of the country shall proclaim international agreements approved by the House of Peoples' Representatives in the *Negarit Gazeta*. Such proclamations incorporate an article with a succinct statement that a treaty, indicating its full name, has been ratified or acceded to. They never reproduce the full text of the treaty in question and translate the treaty provisions into the official languages of the country.[43] What is more striking is the fact that such proclamations (providing that a treaty has been ratified or acceded to) in the Official Legal Gazette do not exist in relation to some ratified international human rights treaties including the ICESCR.[44]

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rights and freedoms shall be interpreted in conformity with these international instruments). The latter case demonstrated the perfect use to which article 13(2) of the FDRE Constitution should be put. Some lawyers argue that the judicial practice in which the provisions of international human rights instruments are rarely referred to is a result of the fact that domestic law, especially the Constitution, incorporates the provisions of international instruments. See R Mesele, "Enforcement of Human Rights in Ethiopia", Action Professionals' Association for the People, 31 August 2002, at 39, available at <http://www.apapeth.org/Docs/ENFORCEMENT%20OF%20HR.pdf> (accessed on 24.04.2007). But the truth is that the Bill of Rights of the FDRE Constitution is not substitutive of the diversified and elaborate provisions of international human rights treaties. Suffice it to consider the terseness of the provisions of article 41 on socio-economic rights as it stands. What is more, courts rarely refer to relevant constitutional provisions either.

41 S A Yeshanew, Protection of the Right to Housing and the Right to Health in Ethiopia: The Legal and Policy Framework, Action Professionals' Association for the People, April 2006 (Unpublished), 23 (on file with author) (conclusion reached after interviews with Judges and advocates of the various level of courts in Ethiopia).

42 See for example, Convention on the Rights of the Child Ratification Proclamation No.10/1992, and Proclamation to Provide for Accession to the African Charter on Human and Peoples' Rights, Proclamation No. 114/1998.

43 The Committee on the Rights of the Child has expressed its concern about the failure to publish the full text of the Convention on the official gazette. See Concluding Observations of the Committee on the Rights of the Child: Ethiopia CRC/C/15/Add.144 (31/01/2001), para. 14. The Human Rights Commission of the Country has now embarked on a project to translate and disseminate the human rights treaties ratified by Ethiopia in the major languages of the state. Interview with Mr Paulo's Firdissa, head of Human Rights Education and Research Department, on 31 July 2008.

44 Most international human rights treaties were ratified or acceded to by the Transitional Government of Ethiopia between 1991 and 1994. While ratification instruments were deposited with the United Nations and hence the treaties bind Ethiopia, their ratification was not published on the official Gazette, let alone their full texts. The requirement of article 71(2) of the Constitution that the President shall proclaim ratified treaties in the official gazette applies to those treaties that are ratified after the entry into force of the Constitution (1995). It is also argued that the formality of proclamation in the *Negarit Gazeta* should not affect the implementation and judicial applicability of the treaties that are duly ratified by the organ with authority – in this case, the Parliament of the Transitional Period.

According to Article 2 of the Federal *Negarit Gazette* Establishment Proclamation, all Laws of the Federal Government shall be published in the Gazette and all Federal or Regional legislative, executive and judicial organs as well as any natural or juridical person shall take judicial notice of Laws so published.[45] There is an argument based on this law that ratified international treaties should be published on the official gazette for their provision to be implemented at the domestic level.[46] But the above provisions apply to "the laws of the federal government", also called "Federal Laws".[47] And in the proclamation that defines the jurisdiction of Federal Courts and the substantive laws they apply, international treaties are referred to in addition to "Federal Laws".[48] International human rights treaties ratified by Ethiopia are therefore distinct from the body of law called "laws of the federal government" and hence are not among those laws which must be published in the federal official gazette in accordance with Article 2 of the Proclamation that established the gazette.[49] There is a further argument based still on the above provisions of the Proclamation that courts take judicial notice *only* of legal texts or provisions published on the official gazette. This is also a distorted argument for the law requires only that judicial notice be taken of laws published in the Official Gazette. It does not necessarily imply that the laws that courts may apply or take judicial notice of are only those whose texts are published in the gazette.

As regards international human rights instruments the ratification of which is published in the official gazette, one may possibly argue that the statement that the treaty has been ratified or acceded to is as good as publishing the full text of such instrument. Those who insist on the need to publish the full text maintain that it is only upon publication of the law/treaty on the official gazette that it can be deemed to have been known by the public - the publicity function of the gazette. A counter argument is that publication, which is required for the benefit of the public, should not serve as a reason to bar citizens from enjoying or invoking their rights in the international instruments ratified by the State and that the knowledge of the public, though important, should not matter that much

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45 Proclamation to Provide for the Establishment of the Federal *Negarit Gazeta*, Proclamation No.3/1995, Addis Ababa, 22 August, 1995, article 2.

46 Mesele (n 40 above) (several interviewed judges believe that the provisions of the Proclamation establishing the Gazette hinder the application by courts of the international human rights treaties).

47 Regional states have their own official Gazette other than the Federal *Negarit Gazeta*.

48 Proclamation No. 25/1996, article 3(1) (n 29 above). Article 6(1)(a) also states that Federal Courts shall settle cases or disputes submitted to them on the basis of Federal Laws and international treaties. Article 2 (3) of the Proclamation defines Federal Laws as laws "relating to matters that fall within the competence of the Federal Government as specified in the Constitution". They are those legislations that are issued by the House of Peoples' Representatives – the law-making body (legislature) of the Federal Government.

49 One may go on to argue based on this that international treaties ratified by Ethiopia may be applied by federal courts irrespective of their publication in the official gazette. While the converse reading of article 71(2) of the Constitution implies that the proclamation of ratified treaties in the *Negarit Gazeta* is a formality requirement that must be met, it should not affect their applicability where the House of Peoples' Representatives has ratified them in accordance with the Constitution.

(in relation specifically to the judicial applicability of the treaty provisions) for such instruments impose much of state obligations than individual responsibilities. In addition, domestic laws and other obstacles such as the non-publication of international treaties ratified by a state cannot justify the failure to apply the treaties domestically.[50] States and their judicial organs cannot, therefore, evade domestic application of state's international obligations resulting from the ratification of treaties by invoking domestic law or obstacles. But the thing is that there is no Ethiopian legislation that clearly precludes the application of relevant international treaties by regular courts.

The foregoing shows that the formal promulgation of ratified international treaties (which according to the Constitution are integral part of the law of the land) in the official gazette is not really required for the application of their provisions by courts and other organs with judicial power. This means that the socio-economic rights provisions of ratified human rights treaties may be judicially enforced in Ethiopia. But still, it should be underlined that the publication of the full text of the human rights instruments and their interpretation in local vernaculars would make substantial contribution towards the enforcement or application of the rights they protect. It would make it more known and easier for litigants as well as courts to refer to the treaty provisions. It is, therefore, submitted that the text of treaties, including the ones whose ratification was not promulgated, should be published in the official gazette with translations in domestic official languages.

III. Notes on the Justiciability Issue

We have shown above that the FDRE Constitution protects economic and social rights by incorporating them in its bill of rights as well as by making pertinent international treaties part of the law of the land. We have also argued that the rights are enforceable by courts and other organs with judicial power. But this latter argument cannot be put to rest without answering special concerns about the enforceability or justiciability of economic and social rights. It has been indicated earlier that there are principled objections to the constitutional protection and justiciability of this group of rights and also that there are by and large ready responses to them.[51] Considering that the conventional obligation of states in relation to socio-economic rights is one of "progressive realization within the maximum available resources"[52], there still remain

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[50] See Vienna Convention on the Law of Treaties (adopted on 22 May 1969 and entered into force on 27 January 1980), Treaty Series, vol. 1155, p.331, arts. 26 & 27.

[51] See n 12 above.

[52] See article 2(1) of the ICESCR, article 22 of the UDHR, and articles 41(4) & 90 of the FDRE Constitution.

questions about the mode of judicial enforcement of these rights in a country as poor as Ethiopia.

It is now generally agreed that human rights in general and socio-economic rights specifically entail duties to respect, protect and fulfil.[53] While the duties to respect and protect entail states' avoidance of interference with the enjoyment of rights and prevention of violation of the rights by third parties, respectively, the obligation to fulfill includes making available what is required to satisfy basic needs. Whereas the obligations to respect and to protect economic and social rights might have resource-demanding implications, they are not the primary subjects of the debate concerning the justiciability of this group of rights.[54] The major issues with the judicial enforceability of the rights relate to the resource-dependent fulfillment obligations.

The obligation to progressively realize economic and social rights does not entitle states, however poor they may be, to sit back and ascribe every failure on their part to lack of resources. The obligation requires states to begin taking steps immediately and fulfill the obligations step by step through deliberate, concrete and targeted measures.[55] Some of the rights are capable of immediate application by judicial organs – examples are the rights to equal pay for equal work and trade union rights as part of the right to work. There are also negative aspects to the obligations of states. For example, a state should not interfere with the enjoyment of legally obtained right to housing of individuals through forced eviction – the obligation to respect. A state may also protect its citizens from violations of their rights by third parties at relatively low cost. Through control and supervision of private health practitioners for example, a state may ensure quality health services. It may also avoid discriminatory practices in the provision of services that are meant to realize socio-economic rights without availability of resources being an issue. Cases concerning these negative aspects to the rights may be adjudicated and decided by courts of law in the same way as any other case.

Courts may also possibly adjudicate positive obligations that raise the issue of resource availability. They usually do this in civil and political rights cases and yet the justiciability of this group of rights has generally not been questioned. For example, in enforcing the right to counsel or legal assistance as part of the right to a fair trial, courts make decisions with significant resource implications. Courts may similarly enforce socio-economic rights even where the obligation in question is one of fulfillment. All

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[53] For classifications made by different authors at different times with various terminologies to the duties that human rights entail and the utilization of typologies of States' duties by the Committee on Economic, Social and Cultural Rights in the General Comments it issued and in its Concluding Observations on States' reports, see M Sepulveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia, 2003) 157-248.

[54] IE Koch, "Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective" (2006), 10 *International Journal of Human Rights*, No. 4, 405 425.

[55] See General Comment No. 3 of the Committee on Economic, Social and Cultural Rights, the nature of States parties' obligations (article 2, para. 1 of the ICESCR), 14/12/90, paras. 2 & 5.

that it takes is the adoption of a well-though-out model of review. If and where Ethiopian courts are faced with issues concerning positive obligations of the state relating to legally guaranteed socio-economic rights, they should first interpret the relevant provisions to identify their normative content and then carefully develop a model of review that may be used to evaluate the steps taken to realize the rights against measurements that may be derived from their provisions. They may take lessons from the jurisprudence of such foreign judicial organs as the South African Constitutional Court which developed its famous 'reasonableness test' as a model of reviewing the implementation of economic and social rights.[56] Under this test the Court evaluated the 'reasonableness' of programs meant to realize socio-economic rights in terms of their comprehensiveness, coherence, coordination, transparency, responsiveness to urgent problems etc.[57] The mode of enforcing positive obligations in the realm of economic and social rights is still developing and Ethiopian courts may play their part in this jurisprudential development if they entertain and decide such cases.

IV. Conclusion

The FDRE Constitution provides protection to economic and social rights by entrenching them in its justiciable Bill of Rights and making them part of national policy principles and objectives that guide the governance of the country. While the relevant constitutional provisions are very sparse, the classic socio-economic rights may be read in to the Constitution by relating the specific provisions with the other rights it enshrines and the articles of ratified international human rights treaties which are integral part of the law of the land. It is, however, disturbing that Ethiopian courts barely apply the provisions of the Constitution and those of ratified treaties to concrete cases even where they are in point and are actually invoked by the parties. This mainly resulted from the wrong understanding of the mandate of the House of Federation to decide "constitutional disputes" as divesting courts of the power to adjudicate claims that are based on constitutional provisions. The mandate of the House of Federation is one to provide an authoritative interpretation of constitutional provisions if and when needed, and courts are obliged to enforce the rights and freedoms in the Bill of Rights. As regards international treaties ratified by Ethiopia, the reason may be that their provisions have not been published in the official gazette although that is not really a requirement for the enforceability of the rights by courts.

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[56] See *Government of the Republic of South Africa and Others v Grootboom and Others* (also called the *Grootboom Case)*, 2000 (11) BCLR 1169 (CC), paras 26 – 41.

[57] Note that the South African Constitutional Court derived the 'reasonableness' test from the state's obligation to take "reasonable measures" under articles 26 & 27 of the Constitution. But still, it is applicable in any setting where the obligation of the state is to progressively realize socio-economic rights. Note also that the 'reasonableness' test is criticized for denying direct individual right to the provision of concrete goods and services (only a right to demand that the state adopt a reasonable program), and throwing the burden on litigants to persuade courts of the unreasonableness of the State's programs. If Ethiopian courts adopt the 'reasonableness' model, they should address these problems with the approach of the South African Constitutional Court.

The prevailing judicial practice of avoiding application of constitutional provisions is responsible for the lack of jurisprudential development on the fundamental rights and freedoms in the Constitution. The judicial interpretation and application of the rights in concrete cases would help develop their normative content. Considering the terseness of the provisions of Article 41 and other pertinent provisions of the Constitution on socio-economic rights, engagement in constitutional litigation is extremely important. It is high time that the courts of the country started developing constitutional jurisprudence through the interpretation and application of fundamental rights and freedoms, including those on economic and social rights, in specific cases. Ethiopian judges should demonstrate more progressive stance in taking steps to apply the relevant constitutional provisions and finding doctrinal basis to their reasoning in judgments that relate to the constitutionally protected rights and freedoms. This would be bolstered through specialized trainings on the justiciability of human rights in general and socio-economic rights in particular targeting the judges of the various levels of courts in the country.