

# JUSTICIABILITY OF DIRECTIVE PRINCIPLES OF STATE POLICY IN AFRICA: THE EXPERIENCES OF ETHIOPIA AND GHANA

By ABDI JIBRIL ALI\* and KWADWO APPIAGYEI-ATUA\*\*

## ABSTRACT

Directive Principles of State Policy were incorporated in some African constitutions in lieu of justiciable economic, social and cultural rights. A growing trend in international and comparative law shows that human rights are indivisible and that economic, social and cultural rights are justiciable. However, the artificial division of constitutional rights between economic, social and cultural rights, and civil and political rights seems to continue until constitutional reforms or revisions take place. Until such a time, constitutional interpretation provides a provisional solution. Like some other constitutions, Ethiopian and Ghanaian constitutions have chapters on Directive Principles of State Policy containing duties that flow from recognising economic, social and cultural rights. It is not clear from the text of both constitutions whether these principles can be enforced in courts. The Supreme Court of Ghana has held that they are justiciable although the Court has not gone further to determine some outstanding issues such as jurisdiction, standing and remedy for their violations. The Ethiopian House of Federation so far has not come up with similar temporary solution. Therefore, Ethiopia as well as other African countries can draw lessons from the Ghanaian experience to abolish the artificial distinction between constitutional rights and increase horizontal accountability of government branches.

## I. INTRODUCTION

Directive Principles of State Policy (DPSPs or directive principles) entrench a State's economic, social and cultural objectives in a constitution. They are a collection of constitutional provisions that require a state to carry out certain obligations in fulfilment of its mandate for the citizenry. Some of these

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\* LLB (Haramaya), LLM in Human Rights and Democratisation in Africa (Pretoria), Lecturer at Institute of Federalism and Legal Studies, Ethiopian Civil Service University.

\*\* LLB (Ghana), LLM (Dalhousie), DLC (McGill), Senior Lecturer at Faculty of Law, University of Ghana.

obligations can be understood as conferring rights on individuals in the same way as guaranteeing human rights of individuals implies obligations of states. In most cases, DPSPs contain Economic, Social and Cultural (ESC) rights framed in terms of state duties instead of individual entitlements together with other principles and objectives that are not directly related to ESC rights.

At international level, arguments against justiciability of ESC rights underlie the division of human rights into civil and political rights, and ESC rights.<sup>1</sup> The result was two separate treaties: International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>2</sup> At domestic level, the arguments resulted in two separate chapters within some national constitutions: one on justiciable bill of rights containing civil and political rights, and the other on non-justiciable DPSPs containing state duties corollary to ESC rights. Among countries of the world, only a small number of them have included justiciable ESC rights in their constitutions because of 'slow progress of these rights at the UN and their negligible education.'<sup>3</sup>

The arguments seem to have lost their vigour now. The African Charter on Human and Peoples' Rights (African Charter) emphasised that 'civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality.'<sup>4</sup> A decade later, the Vienna Declaration and Programme of Action announced that all human rights are 'universal, indivisible and interdependent and inter-related.'<sup>5</sup> Therefore, placing ESC rights beyond the reach of the courts is arbitrary and incompatible

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<sup>1</sup> See M. Ssenyonjo *Economic, Social and Cultural Rights in International Law* Hart Publishing (2009), p. 12. The "real driving force behind the distinction was based not on legal or empirical rationality but rather on Cold War politics."

<sup>2</sup> *International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, United Nations, Treaty Series, vol. 999, p. 171; *International Covenant on Economic, Social and Cultural Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3,

<sup>3</sup> A. G. Ravlich, *Freedom from Our Social Prisons: The Rise of Economic, Social, and Cultural Rights*, Lexington Books (2008), p.

<sup>4</sup> African Charter on Human and Peoples' Rights, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), preamble.

<sup>5</sup> Vienna Declaration and Programme of Action, adopted by the 171 countries participating in the World Conference on Human Rights, held in Vienna from 14 June until 25 June 1993, para 5.

with the principle that human rights are indivisible and interdependent.<sup>6</sup> It is 'a bit hypocritical to deny justiciability and at the same time insist on indivisibility.'<sup>7</sup>

Moreover, developments both at international and domestic level decreased relevance of arguments against justiciability of ESC rights. The Committee on Economic Social and Cultural Rights considered ESC rights 'to possess at least some significant justiciable dimensions' under the ICESCR.<sup>8</sup> The Optional Protocol to the ICESCR has been adopted to provide for international quasi-judicial procedures to enforce ESC rights.<sup>9</sup> Since civil and political rights and ESC rights treated without distinction under the African Charter, ESC rights are justiciable.<sup>10</sup> Under European Convention on Human Rights,<sup>11</sup> it has been argued that ESC rights are justiciable.<sup>12</sup> Domestic courts have also been enforcing ESC rights.<sup>13</sup> Even in countries such as US and Canada that provide the bedrock of traditional libertarian constitutions, economic and social rights have been protected on the basis of 'fair process norms and equality provisions.'<sup>14</sup>

In Africa, some constitutions do not contain justiciable ESC rights while others contain State obligations corresponding to ESC rights in DPSP. In some constitutions, DPSP are non-justiciable while their justiciability is not clear in other constitutions. Constitutional reforms that consider developments in international and comparative law would solve the problem. Until such

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<sup>6</sup> Committee on Economic Social and Cultural Rights, General Comment No. 9, *The Domestic Application of the Covenant*, (Nineteenth Session, 1998), U.N. DOC. E/C.12/1998/24 (1998), para 10.

<sup>7</sup> I. E. Koch, *Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands under the European Convention on Human Rights*, Martinus Nijhoff Publishers (2009), p. 324.

<sup>8</sup> General Comment No. 9, *supra* note 5.

<sup>9</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, adopted by the General Assembly, 5 March 2009, A/RES/63/117.

<sup>10</sup> F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press (2007), p. 237.

<sup>11</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>12</sup> Koch, *supra* note 7.

<sup>13</sup> See M. Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press (2008).

<sup>14</sup> E. Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, Hart Publishing (2007), p. 36.

reforms take place, interpretation of constitutional texts may provide an interim solution. Although judicial enforcement is not the sole mechanism of implementing ESC rights, justiciability of DPSPs (together with ESC rights implied therein) can be used as a strategy to hold branches of government accountable.<sup>15</sup>

The Ethiopian Constitution (1994) and the Ghanaian Constitution (1992) contain directive principles although they do not contain clear provisions on their justiciability.<sup>16</sup> Both constitutions also contain few justiciable ESC rights. However, it has been argued, both in Ghana and Ethiopia, that directive principles are not justiciable.<sup>17</sup> In Ghana, the Supreme Court, using its power to interpret the Constitution<sup>18</sup> has clearly held that DPSPs are justiciable for the purpose of enforcing ESC rights although the Court has not gone further to provide guiding rules on jurisdiction, standing and remedies for violation of these rights.<sup>19</sup> In Ethiopia, the House of Federation and its advisory body, the Council of Constitutional Inquiry, has not come up yet with clear rules on justiciability or otherwise of directive principles.<sup>20</sup>

The present article represents a comparative analysis of justiciability of directive principles in Ghana and Ethiopia with the intention to contribute to mutual learning. It explores the experience of the Ghanaian Supreme Court

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<sup>15</sup> See Viljoen, *supra* note 10, p. 570.

<sup>16</sup> Directive principles are called National Policy Principles and Objectives. See Chapter 10, the Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 1<sup>st</sup> Year No. 1 Addis Ababa, 21 August, 1995.

<sup>17</sup> See S.Y. Bimpong-Buta, *The Role of the Supreme Court in the Development of Constitutional Law of Ghana*, Advanced Legal Publications (2007), pp. 364-365; Sisay Alemahu 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia', 22 (2) *Journal of Ethiopian Law* (2008): 135-154, at 141-142.

<sup>18</sup> The Constitution of the Republic of Ghana (1992) confers exclusive original jurisdiction to enforce and interpret the Constitution on the Supreme Court under article 130(1)(a).

<sup>19</sup> *Ghana Lotto Operators Association (and 6 others) v National Lottery Authority* [2008] 4 Ghana Monthly Judgments 171.

<sup>20</sup> The power to interpret the Ethiopian Constitution is vested in the House of Federation, the upper chamber of the Ethiopian Parliament. It receives expert opinions from the Council of Constitutional Inquiry which considers constitutional disputes in the first instance. The Council of Constitutional Inquiry is chaired by the President of the Federal Supreme Court and consists of six legal experts to be appointed by the President of the Republic, three members of the House of Federation and the President and Vice-President of the Federal Supreme Court. Ordinary courts do not have the power to interpret the Constitution.

and its relevance to Ethiopia and other African states. It contains seven sections beside this introduction. The second section traces the origin of directive principles in Irish Constitution and discusses its expansion into India and other countries. As a reminder, the third section revisits arguments for and against justiciability of ESC rights which are the same with arguments for and against justiciability of DPSP although the latter contain principles and objectives that are not directly related to ESC rights. To provide an overview of DPSP, the fourth and fifth sections restate their contents under both constitutions with few attempts to relate them to ESC rights. The sixth section deals with justiciability of directive principles in both countries. It presents the experience of the Supreme Court of Ghana. The last section provides conclusions.

## II. ORIGIN OF DIRECTIVE PRINCIPLES OF STATE POLICY

Directive principles trace their origins to the Constitution of Ireland of 1937. Under the title 'Directive Principles of Social Policy,' article 45 of the Irish Constitution sets forth principles of social policy.<sup>21</sup> Article 45(1) requires the State to 'strive to promote the welfare of the whole people.' Article 45(2) requires the State to 'direct its policy towards securing certain things.' On the top of recognizing the rights of citizens to adequate livelihood, it requires the State to pursue a policy that enables citizens to make 'reasonable provision for their domestic needs.' Furthermore, it provides direction regarding the ownership, control and distribution of material resources of the State and requires the State to regulate the operation of free competition to prevent 'the concentration of the ownership or control of essential commodities in a few individuals.' The aim of the policy that 'pertains to the control of credit' is 'the welfare of the people as a whole.' Article 45(3) requires the State to encourage 'private initiatives in industry and commerce.' It also requires the State to ensure that private enterprises achieve efficiency in production and avoid public exploitation. Under article 45(4) the State is required to safeguard 'the economic interest of the weaker sections of the community' and ensure 'the strength and health of workers.'

The Irish Constitution puts the directive principles beyond the reach of the courts. Article 45 provides that the 'principles of social policy set forth in this Article are intended for the general guidance' of Irish National Parliament. The article further provides that the 'application of those principles in the making

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<sup>21</sup> See article 45 of Constitution of Ireland, enacted by the People on 1 July 1937, available at <[http://www.taoiseach.gov.ie/attached\\_files/Pdf%20files/Constitution%20of%20Ireland.pdf](http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20Ireland.pdf)> (accessed 24 October 2011).

of laws shall be the care of the [National Parliament] exclusively, and shall not be cognisable by any Court.' In one of the debates preceding the adoption of the Irish Constitution, it was stated that the directive principles were meant to serve 'as a constant headline' by which the people judge their progress and the progress of their representatives in the legislature towards ideals, aims and objectives set forth in the directive principles.<sup>22</sup>

The directive principles in the 1937 Constitution of Ireland highly influenced the Indian Constitution whose framers followed the model of the former.<sup>23</sup> Irish nationalist movement has had ties with Indian nationalists since the nineteenth century.<sup>24</sup> As the framers of Indian Constitution were part of that nationalist movement, they took 'the concept of a constitutionally entrenched chapter on directive principles for state policy from the Irish Constitution.'<sup>25</sup> Directive principles were compared with *Raja Dharma* which spelt out the duties of the kings in ancient India towards the weaker sections of the society such as the infirm, the dying, the affected and the helpless and described as a 'little more than a reformulation of ancient *Raja Dharma*.'<sup>26</sup> Given the similarities between *Raja Dharma* and directive principles, it must have been easy for the members of Indian Constitutional Assembly to embrace the idea of directive principles.

Like its Irish counterpart, article 37 of the Indian Constitution provides that the provisions on the directive principles are not enforceable by any court. The directive principles were designed to play fundamental role in the governance of the Indian State. Article 37 requires the State to apply directive principles in making laws.<sup>27</sup> They were enshrined in the Constitution to serve as 'an instruction to all government agencies as to what socio-economic state had to be created.'<sup>28</sup> They were meant to provide 'a code of conduct according

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<sup>22</sup> Dáil debates *Dáil Éireann* Vol 67, 11 May 1937, available at <<http://www.oireachtas-debates.gov.ie/D/0067/D.0067.193705110029.html>> (accessed on 24 February 2012).

<sup>23</sup> B.K. Sharma, *Introduction to the Constitution of India*, Prentice Hall India Pvt. Limited (2007), p. 125.

<sup>24</sup> G.J. Jacobsohn, *Constitutional Identity*, Harvard University Press (2010), p. 146.

<sup>25</sup> B. de Villiers, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience', 8 *South African Journal on Human Rights* (1992):29-49, at 30.

<sup>26</sup> *Ibid*, at 30, citing K. J. Reddy 'Fundamentalness of Fundamental Rights and Directive Principles in the Indian Constitution' 1980 *Journal of the Indian Law Institute* 403.

<sup>27</sup> The term 'state' as defined under article 36 and article 12 does not include the judiciary.

<sup>28</sup> De Villiers, *supra* note 25, at 32.

to which the governance of the country should take place.<sup>29</sup> They impose 'an obligation on the State to act positively by providing finance, administration, manpower, and technological support to address the socio-economic needs of the population.'<sup>30</sup>

Given the function of any Constitution 'to entrench certain norms beyond the reach of change through the ordinary legislative process,'<sup>31</sup> the framers of the Indian Constitution insulated the directive principles from transient electoral majority. It was observed that the 'political, social and economic ideology expressed in the directive principles imparts continuity to the nation's policy and makes it comparatively free from the vicissitudes of the ideology of political parties that might come into force from time to time.'<sup>32</sup>

In the Irish Constitution, the directive principles were limited to few issues when compared to the Constitution of India. It was said that the Irish people did not derive much benefit from their directive principles although they are the source of the idea.<sup>33</sup> On the other hand, Indians expanded and customised the directive principles to the context of their society. The jurisprudence surrounding the directive principles has developed further than it has in Ireland.<sup>34</sup> The directive principles are more detailed and cover wider ranges of issues. They are generally categorised under five principles, namely; socialist principles, Gandhian principles, general welfare principles, International principles, and nature conservation principles.'<sup>35</sup>

Although the idea of directive principles was originated in Ireland, it was expanded and developed in India. In turn, the Constitution of India has influenced many constitutions in Africa as well as elsewhere in the world.<sup>36</sup>

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<sup>29</sup> *Ibid.*

<sup>30</sup> De Villiers, *supra* note 25, at 39.

<sup>31</sup> J. Usman 'Non-justiciable Directive Principles: A Constitutional Design Defect', 15 *Michigan State Journal of International Law* (2007): 643-696, at 645.

<sup>32</sup> De Villiers, *supra* note 25, at 32, quoting .A.S. Chaundhri, *Constitutional rights and Limitations*, Wadhwa (1955), p. 223.

<sup>33</sup> Jacobsohn, *supra* note 24, p. 147, citing B. de Villiers 'social and economic rights' in D. Van Wyk, J. Dugard, B. De Villiers & D. Davis (eds) *Rights and Constitutionalism: The New South African Legal Order* (1995), p. 618.

<sup>34</sup> *Ibid.*

<sup>35</sup> De Villiers, *supra* note 25, at 35-36, citing Chhabra *The Indian Constitutional System* (1984), pp. 44-45. See also Usman, *supra* note 31, at 43-44. Usman refers to three categories instead of five: socialistic principles, liberal intellectualist principles, and Gandhian principles.

<sup>36</sup> Examples from Africa include the following: the Nigerian Constitution (Chapter 2), the 1997 Eritrean Constitution (chapter 2), the 1995 Constitution of Ethiopia (chapter 10), the 1992 Constitution of Ghana (Chapter 6), the 1993 Constitution of

### III. JUSTICIABILITY OF DPSP AND ESC RIGHTS

DPSPs are identified set of goals that are entrenched in a constitution to be achieved by a State. They are the embodiment of a national consensus on certain critical issues which have to be addressed by the State.<sup>37</sup> In other words, they represent a list of instructions on the governance of the country. They place positive obligations on a State to achieve objectives identified in a constitution.<sup>38</sup> Although their content differs across constitutions, directive principles usually contain objectives on economic, social and cultural domains that contain duties assumed by states through recognising ESC rights.

ESC rights on the other hand refer to a group of rights recognised in international human rights instruments and national constitutions. ESC rights, unlike civil and political rights, do not set individuals against the State but make them allies to achieve the rights in question. They require the State to act and give the individual the material support needed to enjoy them effectively.<sup>39</sup> They are said to have been espoused and championed by the Socialist states led by the then Soviet Union. Examples of economic rights include 'the right to property, the right to work, which one freely chooses or accepts, the right to a fair wage, a reasonable limitation of working hours, and trade union rights;' examples of social rights include the right 'to health, shelter, food, social care, and the right to education;' and examples of cultural rights include 'the right to participate freely in the cultural life of the community, to share in scientific advancement, and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production.'<sup>40</sup>

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Lesotho (Chapter 3), the 1984 Constitution of Liberia (chapter 2), the 1994 Constitution of Malawi (Section 13 & 14), the 2004 Constitution of Mozambique (article 11), the 1990 Constitution of Namibia (chapter 11), the 1991 Constitution of Sierra Leon (Chapter 2), the 1998 Constitution of Sudan (part 1), the 2005 Constitution of Swaziland (chapter 5), the 1997 Constitution of the United Republic of Tanzania (part 2), the 1997 Constitution of The Gambia (chapter 20), the 1995 Constitution of Uganda, the 1996 Constitution of Zambia (Articles 110-112). Spain and Portugal could be good examples from Europe.

<sup>37</sup> De Villiers, *supra* note 25, at 29.

<sup>38</sup> De Villiers, *supra* note 25, at 31.

<sup>39</sup> Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights), prepared by Mr. El Hadji Guissé, Special Rapporteur, pursuant to Sub-Commission resolution 1996/24, para 8.

<sup>40</sup> See M. Sepúlveda et al *Human Rights: Reference Handbook*, University for Peace (2004), p. 9. The International Covenant on Economic, Social and Cultural Rights treats ESC rights in the same document as one group. It does not make distinction within the groups.



Justiciability on its part refers to the 'quality or state of being appropriate or suitable for review by a court.'<sup>41</sup> The justiciability of directive principles and ESC rights refers to their capability to be enforced by a judicial or quasi-judicial organ. It presupposes 'the existence of procedures to contest and redress violations of rights.'<sup>42</sup> Since incorporation of directive principles in constitutional texts is based on the assumption that ESC rights are non-justiciable, arguments against justiciability of ESC rights and directive principles are almost the same. For example, it has been argued that fundamental rights, mainly civil and political rights, can be 'enforced immediately without any serious economic or administrative action by the state,' while directive principles require 'extensive state action and resources and could not be implemented as easily as fundamental rights;' they only impose 'economic, administrative, technological, and manpower obligations' on a State.<sup>43</sup>

There are objections to the inclusion of ESC rights in justiciable bills of rights.<sup>44</sup> Such objections influenced some States to leave out ESC rights from their constitutions and led others to put them in the directive principles.<sup>45</sup> States that do not provide justiciable catalogue of ESC rights usually provide non-justiciable directive principles in their constitutions.<sup>46</sup> Examples of such African states include Lesotho, Nigeria, Namibia, Zambia and Sierra Leone.<sup>47</sup> The constitutions of these States contain first generation (civil and political) rights in their catalogues of fundamental rights and freedoms which can be directly enforced by the courts by means of sanctions.<sup>48</sup> On the other hand, these constitutions expressly prohibit judicial enforcement of directive principles.<sup>49</sup> Rather, the enforcement of directive principles is left to future

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<sup>41</sup> *Black's Law Dictionary* (2000), p. 698.

<sup>42</sup> Sisay Alemahu Yeshanew 'The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia' 8 (2) *African Human Rights Law Journal* (2008): 273-293, at 273.

<sup>43</sup> De Villiers, *supra* note 25, at 32-33, discussing directive principles of state policy in India.

<sup>44</sup> Sisay, *supra* note 17, at 137.

<sup>45</sup> *Ibid*, at 138.

<sup>46</sup> Viljoen, *supra* note 10, p. 576.

<sup>47</sup> *Ibid*.

<sup>48</sup> De Villiers, *supra* note 25, at 40. See the 1993 Constitution of Lesotho (article 22), the 1990 Constitution of Namibia (article 25), the 1999 Constitution of Nigeria (sec 46), and the 1991 Constitution of Sierra Leon (article 28).

<sup>49</sup> See Constitution of Lesotho (article 25), Namibian Constitution (article 101), Nigerian Constitution (sec 6(6)(c)), and Constitution of Sierra Leon (article 14).

elections and public opinion which would exert political and moral pressure on the government.<sup>50</sup>

Several arguments against justiciable directive principles emphasise non-justiciability of ESC rights.<sup>51</sup> One of these arguments is centred on the type of obligations implied in ESC rights and the resources required to carry out the obligations. It has been argued that ESC rights impose positive obligations 'requiring the state to expend resources to provide a remedy' while civil and political rights require the state to refrain from unjust interference in the enjoyment of the latter rights.<sup>52</sup> This argument is dismissed on the ground that some ESC rights require the State to refrain from interfering in their enjoyment and civil and political rights impose positive obligations on the State.<sup>53</sup>

The holding of the African Commission on Human and Peoples' Rights that all rights generate four levels of duties refutes the classification of rights on the basis of duties that they impose on a State and arguments of non-justiciability based on that classification. In a communication brought against Nigeria, the African Commission dealt with the alleged violation of some economic and social rights including the right to property and the right to health.<sup>54</sup> The Commission held that:<sup>55</sup>

Internationally accepted ideas of the various obligations engendered by human rights indicate that all rights – both civil and political rights and social and economic – generate at least four levels of duties for a

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<sup>50</sup> De Villiers, *supra* note 25, at 33 & 40.

<sup>51</sup> C. Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice*, Pretoria University Law Press (2009), pp. 15-50. Mbazira identifies two dimensions of these arguments: legitimacy dimension and institutional competence dimension.

<sup>52</sup> E. Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights In National Law' 22 *American University International Law Review* (2006):35-64, at 45.

<sup>53</sup> Ssenyonjo, *supra* note, p. 12. The African Commission also recognized that ESC rights are justiciable and enforceable in the *Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, available at <<http://www.communitylawcentre.org.za/achpr/files-for-achpr/draft-pcpl-guidelines.pdf>> (accessed 14 April 2012). The Commission referred to *Government of the Republic of South Africa. & Ors v Grootboom & Ors* 2000 (11) BCLR 1169 (CC) and *Minister of Health v Treatment Action Campaign (TAC)*(2002) 5 SA 721 (CC), *Uganda Land Alliance v Uganda Wildlife Authority and the Attorney General, Morebishe v Lagos State House of Assembly* [2000] 3 WRN 134 as evidence.

<sup>54</sup> *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001), para 10. The African Commission seems to have used the term 'duty' and 'obligation' interchangeably.

<sup>55</sup> *Ibid*, para 44.

state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfill these rights.

Civil and political rights may also involve positive duties and they have budgetary implications.<sup>56</sup> For example, the right to fair trial requires investment of huge amount of resources in improving the courts system and access to justice. On the other hand, adjudication of ESC rights does not necessarily require 'the determination of a particular level of resources to be spent by a State or the exact way they are to be spent.'<sup>57</sup> For example, issuing an injunctive order requiring a State to abstain from destroying or contaminating food sources of its citizens does not require resources. Even when ESC rights do require resources, their budgetary implication cannot prohibit their justiciability.<sup>58</sup> However, it is conceded that the amount of resources required for the realisation of ESC rights is greater than the amount required to realise the enjoyment of civil and political rights.<sup>59</sup>

ESC rights are said to pose a threat to 'traditional notions of democracy and the separation of powers.'<sup>60</sup> For example, it has been argued that 'since socio-economic rights are political, legislative matters involving primary issues of resource distribution, the judicial review of legislative or executive decisions concerning their implementation and enforcement constitutes an illegitimate intrusion into the policy affairs of the elected branches of government and a breach of the traditional doctrine of the separation of powers.'<sup>61</sup>

Stated otherwise, ESC rights are choice-sensitive issues.<sup>62</sup> The outcome of choice-sensitive decisions depends on the 'character and distribution of preferences within the community.'<sup>63</sup> For example, a decision to use public resources to build a hospital or a school building is a choice-sensitive issue while a decision to imprison a convict is choice-insensitive. As ESC rights are choice-sensitive issues and constitute the core of political policy, they are the realm of elected representatives who are best able to deal with them rather than an unelected judiciary.<sup>64</sup> In addition, their judicial enforcement results in

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<sup>56</sup> *Ex parte Chairman of the Constitutional Assembly: In re the Certification of the Constitution of the Republic of South Africa* (1996) (10) BCLR 1253 (CC).

<sup>57</sup> Wiles, *supra* note 52, at 47.

<sup>58</sup> *Certification case*, *supra* note 40.

<sup>59</sup> Mbazira, *supra* note 51, p. 21.

<sup>60</sup> Wiles, *supra* note 52, at 41.

<sup>61</sup> Palmer, *supra* note 14, pp. 26-27.

<sup>62</sup> D. M. Davis, 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles', 8 *South African Journal on Human Rights* (1992): 475-490, at 478.

<sup>63</sup> *Ibid.*

<sup>64</sup> Davis, *supra* note 62, p. 479; Wiles, *supra* note 52, at 42-43.

'a piecemeal and short-term approach to social policy' as courts decide rights claims on a case-by-case basis.<sup>65</sup>

The arguments that justiciable ESC rights breach the doctrine of separation of powers are based on 'a rigid formalistic conception of the balance of powers.'<sup>66</sup> Such arguments presuppose '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 balance".'<sup>67</sup> Similar arguments also apply to civil and political rights.<sup>68</sup> In addition, without breaching the separation of powers doctrine, courts can 'place the state in the difficult position of having to explain why it cannot afford to expend resources on a particular public priority.'<sup>69</sup> In such a case, 'the State is expected to justify its actions and come up with plausible explanations for budgetary allocations instead of simply being allowed to plead poverty.'<sup>70</sup> Rather, judicial enforcement of ESC rights increases horizontal accountability of government branches. The practice of Brazilian courts that realization of social rights 'by means of legal action does not infringe the separation of powers' supplements this assertion.<sup>71</sup>

Vagueness, indeterminacy, open-endedness and lack of conceptual clarity have been raised as a barrier to judicial enforcement of ESC rights.<sup>72</sup> ESC rights are said to be 'imprecise, unenforceable in domestic law, and unsuitable for supranational adjudication.'<sup>73</sup> This argument is not tenable since 'similar

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<sup>65</sup> Wiles, *supra* note 52, at 43-44.

<sup>66</sup> Palmer, *supra* note 14, p. 27.

<sup>67</sup> Sisay, *supra* note 17, at 138.

<sup>68</sup> Wiles, *supra* note 52, at 43.

<sup>69</sup> J. Berger, 'Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education' in V. Gauri & D. M. Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press (2008): 38-99, at 75.

<sup>70</sup> *Ibid.*

<sup>71</sup> F.F. Hoffmann & F.R.N.M. Bentes 'Accountability for social and economic rights in Brazil' in V Gauri & D M Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press (2008): 100-145, at 120.

<sup>72</sup> Mbazira, *supra* note 51, p. 26; Wiles, *supra* note 52, at 50.

<sup>73</sup> M.J. Dennis & D.P. Stewart 'Justiciability of Economic, Social, and Cultural Rights: Should there be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?', 98 *American Journal of International Law* (2004): 462-515, at 473. See also Report of the Open-Ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International

criticisms of conceptual clarity were levelled at civil and political rights before their jurisprudential development through practice and scholarship.<sup>74</sup> Thus, a 'lack of volume of precedent case law in global terms is no reason to denounce the principle that enforceable rights should exist.'<sup>75</sup>

The Justiciability of ESC rights has also been denounced on the ground that these 'rights are too complex for judges to analyze adequately as the social and economic issues they raise tend to be embedded in a complex web of causes and effects.'<sup>76</sup> ESC rights cases have 'polycentric repercussions which makes them unfit for judicial adjudication.'<sup>77</sup> However, such argument is 'inconsistent with developments in public law adjudication, where domestic and regional courts have increasingly become fora for the resolution of complex polycentric public interest disputes.'<sup>78</sup> There are simple cases which are capable of being handled by courts.

Another argument is that ESC rights should not be justiciable since remedies for their violation involve 'social changes that are not capable of immediate implementation.'<sup>79</sup> Although it is conceded that a remedy for some ESC rights may be less straightforward, and involve time consuming implementation process, the Committee on Economic Social and Cultural Rights 'has emphasized that many socio-economic rights are instantly realizable, and has listed a series of such rights in its General Comment.'<sup>80</sup>

It has also been argued that the poor would not benefit from justiciability of ESC rights as they cannot afford bringing cases to courts. They do not have 'the knowledge, ability, or resources to be able to voice their claims.'<sup>81</sup> Like the cases of civil and political rights, 'cases are brought only by the most articulate,

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Covenant on Economic, Social and Cultural Rights, UN Doc. E/CN.4/2004/44, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/120/29/PDF/G0412029.pdf?OpenElement> (accessed 27 October 2011). Comments of delegations, typically representing the majority of states that do not provide for domestic adjudication of economic, social, and cultural rights.

<sup>74</sup> Wiles, *supra* note 52, at 53.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*, at 53.

<sup>77</sup> Mbazira, *supra* note 51, p. 41.

<sup>78</sup> Palmer, *supra* note 14, p. 27.

<sup>79</sup> Wiles, *supra* note 52, at 55.

<sup>80</sup> See Committee on Economic Social and Cultural Rights, General Comment No. 3: The Nature of States Parties Obligations, P 5, U.N. Doc. E/C.12/1990/8 (Dec. 14, 1990). Wiles, *supra* note 52, at 55.

<sup>81</sup> Wiles, *supra* note 52, at 55.

assertive, and wealthy individuals.<sup>82</sup> Nevertheless, such argument is made on the assumption that legal enforcement is 'the only way human rights standards can be set and attained.'<sup>83</sup> ESC rights are a 'means to achieve a just form of democracy, because they are instruments designed to help minority groups and the most disadvantaged members of society improve their situations through affirmative action, thereby redressing the "tyranny of the majority" that results from a democracy without such safeguards.'<sup>84</sup> Denying ESC rights as non-justiciable while guaranteeing civil and political rights as justiciable rights is engraving 'a distorted notion of democracy' into a society.<sup>85</sup> These actions will also neglect the role of civil society organisations.

Above all, 'the real driving force behind the distinction between' civil and political rights on one hand and ESC rights on the other hand 'was based not on legal or empirical rationality but rather on Cold War politics.'<sup>86</sup> The US and other western countries advocated for the civil and political rights while socialist countries emphasised the ESC rights.<sup>87</sup>

Even when economic social and cultural rights were included as non-justiciable directive principles, courts should not ignore them. In India, for example, although courts cannot 'nullify legislation on the grounds that it is contrary to the directive principles', they use directive principles as an instrument of interpretation to uphold the validity of legislation that may have been nullified otherwise.<sup>88</sup> They should interpret fundamental rights according to 'the vision formulated in the directive principles.'<sup>89</sup> Using the directive principles, they can 'uphold legislation which in other circumstances would have been declared void' due to this legislation's violation of civil and political rights.<sup>90</sup>

The Indian Supreme Court and High Courts went further and enforced ESC rights 'as extensions of justiciable fundamental rights through various forms of litigation.'<sup>91</sup> The Supreme Court made ESC rights justiciable 'through an expansion of the fundamental rights in Part III of the Constitution,

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, at 58.

<sup>84</sup> *Ibid.*, at 49.

<sup>85</sup> Davis, *supra* note 62, p. 476.

<sup>86</sup> Ssenyonjo, *supra* note 1, p. 12.

<sup>87</sup> *Ibid.*

<sup>88</sup> De Villiers, *supra* note 25, at 33.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*, at 39.

<sup>91</sup> J. Kothari, 'Social Rights Litigation in India: Developments of the Last Decade' in D. Barak-Erez & A. M. Gross (eds), *Exploring Social Rights: Between Theory and Practice*, Hart Publishing (2007): 171-193, at 171.

particularly the right to life.<sup>92</sup> Right to life has been expanded to include 'the right to a clean environment, food, clean working conditions, emergency medical treatment, free legal aid and release from bonded labour.'<sup>93</sup>

#### IV. THE NATIONAL POLICY PRINCIPLES AND OBJECTIVES IN ETHIOPIA

The Ethiopian Constitution identifies economic, social, cultural, environmental and political objectives as well as principles for external relations and national defence.<sup>94</sup> The principles and objectives were laid down in the Constitution to guide the legislative, executive, and judicial branches of both the state and federal governments.<sup>95</sup>

##### A. Economic objectives

The Ethiopian Constitution provides for a list of economic objectives that should be achieved by the government.<sup>96</sup> These objectives only touch on duties of the State to realise economic rights such as the right to work and the right to property. As recognised under the ICESCR (to which Ethiopia is a party), the right to work includes 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.'<sup>97</sup> The duty of the State to fulfil this right requires Ethiopia to formulate and implement 'an employment policy with a view to "stimulating economic growth and development, raising levels of living, meeting manpower requirements and overcoming

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<sup>92</sup> *Ibid*, at 175.

<sup>93</sup> *Ibid*. Kothari refers to several cases including *Subhash Kumar v Bihar* (1991) 1 SCC 598; *AP Pollution Control Board v MV Nayudu* (1999) 2 SCC 718; *MC Mehta v Union of India* (1987) 4 SCC 463; *Peoples Union for Civil Liberties (PUCL) v Union of India & Others* WP (Civil) No 196 /2001, 23 July 2001, unreported; *Consumer Education & Research Centre v Union of India* (1995) 3 SCC 42; *Parmanand Katara v Union of India* (1989) 4 SCC 248; *Khatri v State of Bihar* (1981) 1 SCC 623; and *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.

<sup>94</sup> Ethiopian Constitution, arts 86-92 (chapter 10).

<sup>95</sup> Ethiopian Constitution, arts 85 & 50(2). Art 50(2) provides that both state and federal governments have legislative, executive and the judicial powers.

<sup>96</sup> *Ibid*, art 89.

<sup>97</sup> ICESCR, art 6(1); The Constitution guarantees this right under article 41(1) & (2) in a broader phrasing.

unemployment and underemployment".<sup>98</sup> The Constitution provides for similar duty 'to increase opportunities for citizens to find gainful employment.'<sup>99</sup>

Although the economic objectives do not emphasize positive duty of the government to implement the right to work, they provide for the principle of non-discrimination since the Constitution requires the government to create 'equal opportunity for all Ethiopians to improve their economic conditions.'<sup>100</sup> Economic conditions of a person can be improved through gainful employment or through other means of livelihood. As the salaried work is 'the principal way of distributing the national income among members of society,'<sup>101</sup> the economic objectives under the Constitution require the government to promote equitable distribution of wealth.<sup>102</sup>

Ethiopia had already recognised the right of every one to 'just and favourable conditions of work' to protect the working population before the adoption of the Constitution. When the Constitution was adopted, it recognised part of this right under article 42. Duties of the State as a consequence of recognising the right to just and favourable conditions of work has been reiterated under the economic objectives. The Constitution requires the government to 'protect and promote the health, welfare and living standard of the working population.'<sup>103</sup> The health of workers can be protected by providing safe conditions of work. The welfare of the workers can be ensured by providing job security, social security and other schemes. Their living standard can be raised by providing fair wages that enables them to afford decent living for themselves and their families. Given that labour is an important factor of production, any sound policy for economic development cannot ignore the working population. A healthy labour force is a prerequisite for economic growth.

The right to property as has been recognised under article 40 of the Constitution although it does not seem to categorise under economic social and cultural rights. The economic objectives do not specify duties of the government regarding enjoyment of property including land. They only

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<sup>98</sup> Committee on Economic Social and Cultural Rights, General Comment No. 18, Right to work, Article 6 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC/18, 6 February 2006, para 26.

<sup>99</sup> Ethiopian Constitution, art 41(7).

<sup>100</sup> *Ibid*, art 89(2).

<sup>101</sup> K. Källström & A. Eide, "Article 23", in G. Alfredsson & A. Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers (1999) p. 490.

<sup>102</sup> *Ibid*.

<sup>103</sup> Ethiopian Constitution, art 89(8).



reiterate the duty of the government to hold land and other natural resources and deploy them for common benefits and development.<sup>104</sup> The position of Ethiopia on land ownership did not change with the overthrow of military regime in 1991. The Ethiopian Constitution continued state ownership of land. Under article 40(3), the Constitution declares that land and other natural resources belong to the nation, nationalities, and peoples.

Apart from duties of the State corollary to economic rights, the economic objectives also include other objectives that are related to cultural rights and the right to development. The Constitution provides for duty of the government 'to formulate policies which ensure that all Ethiopians can benefit from the country's legacy of intellectual and material resources.'<sup>105</sup> Since reference is made to 'the country's legacy' implying its inheritance, such policies could have been better categorised under the cultural objectives.

The Constitution enshrines the right to development under article 43. It guarantees the right of nationals 'to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.'<sup>106</sup> Duties of government reminiscent of the right to development with particular emphasis on participation are incorporated under economic objectives. The Constitution requires the government to 'promote the participation of the People in the formulation of national development policies and programmes.'<sup>107</sup> The government should also 'ensure the participation of women in equality with men in all economic and social development endeavours.'<sup>108</sup>

The right to development is understood as both instrumental and constitutive under the African Charter on Human and Peoples' Rights.<sup>109</sup> It also requires that development must be 'equitable, non-discriminatory, participatory, accountable, and transparent.'<sup>110</sup> Viewed from these five criteria, the Constitution seems to recognise only one criterion: development must be participatory. The other criteria of development are not reflected in the Constitution as duty of the State.

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<sup>104</sup> *Ibid*, art 89(5).

<sup>105</sup> *Ibid*, art 89(1).

<sup>106</sup> *Ibid*, art 43(2).

<sup>107</sup> *Ibid*, art 89(6).

<sup>108</sup> *Ibid*, art 89(7).

<sup>109</sup> See the holding of the African Commission on Human and Peoples' Rights in *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009), para 277. Ethiopia ratified the African Charter in 1998.

<sup>110</sup> *Ibid*.

The Ethiopian Constitution enshrines affirmative action for the least advantaged ethnic groups in economic objectives. It requires the government to provide special assistance to disadvantaged nations, nationalities and peoples not only in economic development but also in social development.<sup>111</sup> Given the past policy of exclusion and marginalisation of ethnic groups, such assistance reverses the previous policy.<sup>112</sup>

The government's duty to prevent any natural and man-made disasters and to provide assistance when they occur is included as an economic objective.<sup>113</sup> This obligation of the government corresponds to the human rights duty to provide for economic social and cultural rights under regional and international human rights instruments. The provision is necessitated by Ethiopia's 'tragic cyclic history of droughts, wars, migrations, and famine.'<sup>114</sup>

## **B. Social objectives**

Social objectives are framed in such a way that the obligations of the State are limited.<sup>115</sup> The Constitution provides that to 'the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security.'<sup>116</sup> The focus of the provision is on the aim of social policy. So far as policies aimed at providing access to education, health services, clean water, housing, food, and social security are in place the government may argue that it has carried out its obligation. The Constitution deals with provision of 'access' to socio-economic services instead of the provision of the services themselves. It could be said that the obligation of the State is limited to the obligation to facilitate and does not impose obligation to provide socio-economic services on the State. Even the provision of access to socio-economic services is subject to the availability of resources.

Social objectives do not contain all duties that social rights (such as the right to health, the right to education, the right to food, the right to water, the right to housing and the right to social security) impose on the State as they are

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<sup>111</sup> Ethiopian Constitution, art 89(4).

<sup>112</sup> Fasil Nahum *Constitution for a nation of nations: the Ethiopian prospect*, Red Sea Press Inc Ltd (1997), p. 187.

<sup>113</sup> Ethiopian Constitution, art 89(3).

<sup>114</sup> Fasil, *supra* note 112, p. 187.

<sup>115</sup> Ethiopian Constitution, art 90(1).

<sup>116</sup> The Amharic version of article 90(1) does not mention the policy. It provides that all Ethiopians should be provided with education, health services, clean water, housing, food, and social services.

formulated in very general terms. As the Constitution lacks specificity, obligations of the State regarding any social right are not clear. For example, it is not clear from the Constitution whether the State has the obligation to provide free primary education although Ethiopia has assumed such obligation under the ICESCR.<sup>117</sup> The emphasis on policies seems to neglect other obligations of the State.

Social objectives, therefore, are not much different from obligation of the State to allocate resources to provide health, education, and other social services under article 41. Although article 41 is provided under the chapter on fundamental rights and freedom, it is not framed in terms of rights of an individual. It is formulated in terms of state duties. The State complies with the text of the Constitution if it allocates budget for provision of public health, education, and other social services irrespective of whether the budget actually results in enjoyment of social rights.

### C. Cultural objectives

Cultural objectives in the Constitution contain some positive duties of the State to realise cultural rights. The government has the duty to support growth and enrichment of cultures and traditions.<sup>118</sup> The Constitution denotes state duties corollary to collective right of groups to enjoy their culture. This duty is more akin to the right of every nation, nationality and people to 'develop and promote its culture.'<sup>119</sup> In carrying out its duty to support, the government should treat all cultures and traditions equally. The Constitution tries to remedy Ethiopian history since previously the cultures and traditions of nations, nationalities and peoples did not enjoy equal state support.

Culture understood in a wider anthropological sense refers to the '*sum total of the material and spiritual activities and products of a given social group which distinguishes it from other social groups.*'<sup>120</sup> Nations, nationalities and peoples in Ethiopia have their own specific cultures. These cultures maintain a handful of traditional practices that are harmful, particularly to women and children. Thus, the Constitution allows the growth and enrichment of cultures and traditions only if they are compatible with 'fundamental rights, human dignity,

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<sup>117</sup> ICESCR, art 13(2)(a).

<sup>118</sup> Ethiopian Constitution, art 91(1).

<sup>119</sup> *Ibid*, art 39(2).

<sup>120</sup> R. Stavenhagen "Cultural Rights and Universal Human Rights" in A. Eide, C. Krause & A. Rosas (eds), *Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers (1995) p. 66.

democratic norms and ideals, and the provisions of the Constitution.<sup>121</sup> For example, cultures and traditions that uphold the superiority of men over women do not qualify for governmental support. Accordingly, such harmful traditional practices have already been outlawed by the Criminal Code.<sup>122</sup>

Culture also means 'the accumulated spiritual and material heritage of humankind.'<sup>123</sup> In this sense it includes cultural properties such as monuments and artefacts. The Constitution provides for the protection of cultural properties and natural heritage. It provides that the government and the citizens have the duty to protect 'natural endowments, historical sites, and objects.'<sup>124</sup> This duty is in line with Ethiopia's obligation under the ICESCR to respect and protect cultural heritage on all its forms which include 'the care, preservation and restoration of historical sites, monuments, works of art and literary works, among others.'<sup>125</sup> Ethiopia's natural endowments, such as the forest, have been dwindling.<sup>126</sup> Given that the majority of Ethiopians depend on agriculture for their survival the protection of natural endowment is necessary. As most of Ethiopia's historical sites and objects are in the possession of religious institutions, the Constitution rightly imposes obligation both on the government and the citizens to protect them.<sup>127</sup>

A component of cultural rights also includes the right to 'enjoy the benefits of scientific progress and its application.'<sup>128</sup> Although Ethiopia ratified the ICESCR before the adoption of the Constitution, the latter does not expressly guarantee the right to enjoy the benefits of scientific progress and its application. The Constitution, however, includes a part of state duties corresponding to this right under cultural objectives. It requires the government to support 'the development of arts, science and technology.'<sup>129</sup> If such support is provided, it can be understood as positive steps taken by

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<sup>121</sup> Ethiopian Constitution, art 90(1).

<sup>122</sup> See Criminal Code of the Federal Republic of Ethiopia, Proclamation No. 414/2004, 9 May 2005, art 561-570.

<sup>123</sup> R. Adalsteinsson & P. Thórhallson "Article 27" in G. Alfredsson & A. Eide (eds) *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers (1999) p. 576.

<sup>124</sup> Ethiopian Constitution, art 90(2).

<sup>125</sup> ICESCR, art 15(1)(a); Committee on Economic Social and Cultural Rights, General Comment No. 21 Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/21, 21 December 2009, para 50(a).

<sup>126</sup> Fasil, *supra* note 112, p. 192.

<sup>127</sup> *Ibid.*

<sup>128</sup> ICESCR, art 15(1)(c).

<sup>129</sup> Ethiopian Constitution, art 90(3).

Ethiopia towards the realisation of the cultural right. The support is provided in the Constitution as they are means for raising standard of living of the peoples.<sup>130</sup> Unlike other cultural objectives, the duty to support the development of arts, science and technology are made to depend on the extent of available resources. The duty of the State to contribute to promotion of arts and sports are not dependent on the availability of resources.<sup>131</sup>

#### **D. Political objectives**

The Constitution requires both the State and the federal governments to promote and support self-rule at all levels under article 88(1). Self-rule is desirable because it is 'the best system to advance liberty.'<sup>132</sup> The Constitution advances ethnic self-rule as it emphasises sovereignty of ethnic groups and their right to self-determination including the right to secession.<sup>133</sup> The constitutional requirement for the promotion of ethnic self-rule is a response to past ethnic oppression.<sup>134</sup>

In promoting self-rule the government is expected to be guided by democratic principles which require promotion of self-government to be based on the consent of the people expressed through periodic elections. A government formed through the freely expressed will of the people should protect the interests of its electorate and be accountable to them. Democratic principles require any government to respect the human rights of individuals and minority groups particularly their freedom of expression, freedom of association, freedom of assembly, and other democratic rights.<sup>135</sup> The

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<sup>130</sup> Fasil, *supra* note 112, p. 192.

<sup>131</sup> Ethiopian Constitution, art 41(9).

<sup>132</sup> A. Przeworski, *Democracy and the Limits of Self-Government*, Cambridge University Press (2010), p. 17.

<sup>133</sup> Article 8, article 39(1) and article 47 of the Ethiopian Constitution. Article 8 recognises sovereignty of nation, nationalities and peoples while article 39(1) guarantees their right to self-determination. Article 47 defines constituent units of Ethiopia on the basis of ethnicity.

<sup>134</sup> See Solomon Negussie 'Ethiopia's fiscal federalism: A constitutional overview' in Assefa Fiseha & Getachew. Assefa, *Institutionalising Constitutionalism and the Rule of Law: towards a Constitutional Practice in Ethiopia*, Addis Ababa University press 3 *Ethiopian Constitutional Law Series* (2010) 85-86. Before introduction of federalism *de facto* in 1992 and *de jure* in 1995, While Ethiopia's problem was characterised as colonial experience by some, others characterised it as ethnic oppression. The Constitution adopted the latter view.

<sup>135</sup> Protection of human rights is used as one of the criteria to measure level of democracy in a state. See 'Democracy index 2011: Democracy under stress' A report

commitment of the Constitution to democracy is also evident from article 1 which declares formation of democratic state and article 52(2) which requires regional states to establish democratic order.

Under political objective both the federal and State governments should respect the identity of nations, nationalities and peoples.<sup>136</sup> The Constitution was drafted in the aftermath of victories won by ethnic-based liberation organisations which fought for recognition and equality of their ethnic groups. Wars of liberation were fought to overthrow linguistic, cultural, and political domination by the ruling elite and the exclusion and marginalisation of the other ethnic groups under the banner of unity. Thus, respect for the identity of ethnic groups avoids liberation wars such as those fought before 1991. The government has a constitutional duty to uproot ethnic domination through strengthening 'ties of equality, unity and fraternity' among different ethnic groups.<sup>137</sup>

## E. Environmental objectives

The Ethiopian Constitution provides for environmental objectives under article 92. It reinforces the right to a clean and healthy environment under article 44(1). While the right of all persons to a clean and healthy environment under article 44(1) implies obligation on the State to protect the environment, the Ethiopian Constitution expressly requires the government to 'ensure that all Ethiopians live in a clean and healthy environment under article 92(1). Article 92(4) reiterates obligation of the government to protect the environment and extend similar obligations to citizens. For that purpose the government has taken some legislative measures which include laws relating to the establishment of institutions concerned with protection of the environment, pollution control, and environmental impact assessment.<sup>138</sup>

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from the Economist Intelligence Unit, available at [http://www.eiu.com/public/topical\\_report.aspx?campaignid=DemocracyIndex2011](http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex2011) (accessed on 25 February 2012). It uses civil liberties as one of the five criteria used to rank level of democracy in countries of the world.

<sup>136</sup> Ethiopian Constitution, art 88(2).

<sup>137</sup> *Ibid.*

<sup>138</sup> See Environmental Protection Authority Establishment Proclamation No. 9/1995 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 1<sup>st</sup> year No. 9 Addis Ababa, 24 August 1995; Environmental Impact Assessment Proclamation No. 299/2002 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 9<sup>th</sup> year No. 11 Addis Ababa, 3 December 2002; Environmental Pollution Control Proclamation No. 300/2002 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 9<sup>th</sup> year No. 12 Addis Ababa, 3 December 2002.

Consistent with the rights of every Ethiopian to take part in government under article 38, the Ethiopian Constitution guarantees the rights of people to participate in environmental decision-making.<sup>139</sup> People should be consulted on 'the planning and implementation of environmental policies and projects.' However, the Ethiopian Constitution limits consultation of the people to projects and policies that directly affect them.

## **F. Principles for international relations and national defence**

The principles of external relation were copied from the United Nations Charter and the Charter of Organisation of African Unity.<sup>140</sup> The Constitution reiterates the principle of equality of states and non-interference in domestic affairs of other states in line with the UN Charter and the Constitutive Act of the African Union.<sup>141</sup> The Constitution requires the government to promote foreign relations that respect Ethiopia's interest and sovereignty. Thus, international agreements are concluded and observed if they protect the interest of Ethiopia and that of its peoples. Once again, article 86(6) affirms peaceful resolution of international disputes as stipulated in the UN Charter and the Constitutive Acts of the African Union.<sup>142</sup> The Constitution specifically provides for the promotion of economic union and fraternal relationship with African countries.<sup>143</sup>

The principles of national defence under the Ethiopian Constitution clearly identify the responsibilities of the military as protecting the sovereignty of the State and administering a state of emergency.<sup>144</sup> In this regard, the Constitution attempts to remedy the defect in previous regimes where the main responsibility of the military was domestic control as in any other non-democratic regimes.<sup>145</sup> The Constitution requires equitable representation of ethnic groups in the national defence forces.<sup>146</sup> As a response to the domination

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<sup>139</sup> Ethiopian Constitution, art 92(3).

<sup>140</sup> Fasil, *supra* note 112, p. 180.

<sup>141</sup> Compare article 86(2) of the Ethiopian Constitution with article 2(1), UN Charter; article 4(a) & (g), Constitutive Act of African Union.

<sup>142</sup> Article 2(3) of UN Charter; article 4(e) of Constitutive Act of AU.

<sup>143</sup> Ethiopian Constitution, art 86(5).

<sup>144</sup> *Ibid*, art 87(3).

<sup>145</sup> See T. C. Bruneau & S. T. D. Tollefson, *Who Guards the Guardians and How: Democratic Civil-Military Relations*, University of Texas Press (2006), p. 75.

<sup>146</sup> Ethiopian Constitution, art 87(1).

of defence forces by few ethnic groups in the past, such equitable representation has some advantages. It builds national unity by giving equal opportunity and a sense of ownership to all nations, nationalities, and peoples.

The Ethiopian Constitution enshrines civilian control of the military by requiring the Minister of Defence to be a civilian.<sup>147</sup> Of course, the mere presence of a civilian Minister of Defence or a Ministry of Defence does not guarantee effective civilian control.<sup>148</sup> In established democracies it is observed that 'civilians exercise control over the armed forces in order to maximize military effectiveness in response to political objectives and to enhance the efficiency and accountability in the use of resources.'<sup>149</sup> The requirement of the Ethiopian Constitutions that the Minister of Defence should be a civilian can be seen as an effort to follow the models of established democracies.

Under the principles of national defence, the Ethiopian Constitution entrenches civilian control of the military and keeps the military out of politics in two other respects. First, it requires the military to respect the Constitution.<sup>150</sup> If the military respects the Constitution, it will not usurp power from civil government through *coup d'état* since the Constitution lays down election as the only means of assuming state power. As a result, the Constitution tries to avoid the repetition of the 1974 experience which resulted in seventeen years of military rule. Second, the Constitution eliminates the possibility of alliance between the military and a political party by requiring the military services to be non-partisan.<sup>151</sup> Rendition of non-partisan military services avoids a puppet civil government manipulated by the military. It also avoids the use of the military to maintain certain political organisations in power.

## V. DIRECTIVE PRINCIPLES IN GHANA

The DPSPs provided under chapter six of the Ghanaian Constitution are more detailed than the National Policy Objectives and Principles under chapter ten of the Ethiopian Constitution. They include economic, social, educational, cultural and political objectives. The following subsections describe these objectives.

### A. Economic objectives

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<sup>147</sup> *Ibid*, art 87(2).

<sup>148</sup> Bruneau & Tollefson, *supra* note 145, p. 76.

<sup>149</sup> *Ibid*.

<sup>150</sup> Ethiopian Constitution, art 87(4).

<sup>151</sup> *Ibid*, art 87(5).



The Ghanaian Constitution provides detailed economic objectives under article 36. The State has an obligation to take all necessary action to achieve maximum rate of economic development.<sup>152</sup> The Constitution focuses on economic development rather than economic growth. Since economic growth is only 'one aspect of the process of economic development,'<sup>153</sup> high economic growth rate does not necessarily mean high rate of economic development for Ghana. The economic development should be equitable since the Constitution requires 'even and balanced development of all regions', and urban and rural areas.<sup>154</sup> Economic development is also equitable when benefits derived from development are equally distributed.<sup>155</sup> Thus, the Constitution prohibits exploitation by requiring payment of 'fair and realistic remuneration for production and productivities.'<sup>156</sup> This safeguard is particularly important for farmers who do not usually obtain fair prices for their produce.

The Constitution requires the State to take necessary action 'to secure maximum welfare, freedom and happiness of every person in Ghana.'<sup>157</sup> It recognises the fundamental duty of the State to assure 'basic necessities of life for its people.'<sup>158</sup> To carry out this fundamental duty, the State is expected to take necessary action 'to provide adequate means of livelihood' through creating suitable employment. The State is also to address cases of persons that cannot take up employment and provide for their basic necessities. Such persons who lack means of their livelihood due to such factors as unemployment, sickness, disability, widowhood and old age could be regarded as needy persons. The State is supposed to provide public assistance to the needy in the form of social security.<sup>159</sup>

Like economies of many African countries, the Ghanaian economy depends on primary economic activities. An attempt to achieve economic development should not ignore the roles of agriculture and mining. These fields should be modernised so as to increase their productivity. In addition, the economy should be diversified and industrialised. Thus, the role of the State, among others, is to promote the development of agriculture and industry.<sup>160</sup>

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<sup>152</sup> Ghanaian Constitution, art 36(1).

<sup>153</sup> A. Sen, 'Development: Which Way Now?' 93 (372) *The Economic Journal* (1983): 745-762, at 748.

<sup>154</sup> Article 36(2)(d) of the Ghanaian Constitution.

<sup>155</sup> C. Baldwin & C. Morel, 'Group Rights' In M. Evans & R. Murray (Eds) *The African Charter On Human And Peoples' Rights: The System in Practice 1986-2006*, (2008) 272.

<sup>156</sup> Ghanaian Constitution, art 36(2)(a).

<sup>157</sup> *Ibid*, art 36.

<sup>158</sup> *Ibid*, art 36(2)(e).

<sup>159</sup> *Ibid*, art 36(1).

<sup>160</sup> *Ibid*, art 36(3).

Promotion of mining is equally important though the Constitution does not clearly refer to mining. Encouraging foreign investment could be one form of promoting the economy.<sup>161</sup>

All kinds of development (economic, social, or cultural development) should be non-discriminatory.<sup>162</sup> In this regard, the Ghanaian Constitution requires the State to 'afford equality of economic opportunity to all citizens.'<sup>163</sup> Since women have been subjected to discrimination throughout history, it is not enough to treat them as equal with men in affording women equality of economic opportunity. Since additional measures should be taken in favour of women, the Constitution requires the State to 'take all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana.'<sup>164</sup> Such steps may include providing facilities for 'the care of children below school-going age' to allow women to have time to engage in economic activities.<sup>165</sup>

Recognition of private property rights plays an important role in economic development. The Constitution of Ghana expressly protects property rights.<sup>166</sup> It reiterates recognition of ownership of property and rights of inheritance as economic objectives.<sup>167</sup> Land, as property and as an important factor of production, should be properly managed in order to score sound economic development. Unlike Ethiopia, Ghana does not maintain state ownership of land. Still, the Constitution recognises that possession and ownership of land should serve the larger community. In particular, it specifies that the managers of land are accountable as fiduciaries.<sup>168</sup>

The labour force is another factor of production that should be properly managed and protected. Obviously, the success of every nation's economy depends on the quality and quantity of its labour forces. In this regard, the Constitution requires the state to 'safeguard the health, safety, and welfare of all persons in employment.'<sup>169</sup> In addition, workers are entitled to satisfactory, safe, and healthy conditions of work.<sup>170</sup> They are also entitled to rest and leisure and limited working hours. To protect their rights they can organise themselves into trade unions. The State is obligated to encourage the

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<sup>161</sup> *Ibid*, art 36(4).

<sup>162</sup> Baldwin & Morel, *supra* note 155.

<sup>163</sup> Ghanaian Constitution, art 36(6).

<sup>164</sup> *Ibid*, art 36(6).

<sup>165</sup> *Ibid*, art 27(2).

<sup>166</sup> *Ibid*, art 20.

<sup>167</sup> *Ibid*, art 36(7).

<sup>168</sup> *Ibid*, art 36(8).

<sup>169</sup> *Ibid*, art 36(10).

<sup>170</sup> *Ibid*, art 24.

participation of workers in decision-making at work place. The workers may participate in decision-making individually or through their trade unions.<sup>171</sup>

Environmental objectives are considered under economic objectives. The Constitution requires the state to take appropriate measures to safeguard the national and international environment.<sup>172</sup> The Constitution also imposes similar duty on the citizens of Ghana to protect and safeguard the environment.<sup>173</sup>

## **B. Social objectives**

The Constitution lays down the social objectives of Ghana.<sup>174</sup> It focuses on building a social order 'founded on the ideals and principles of freedom, equality, justice, probity and accountability.'<sup>175</sup> These ideals and principles are enshrined in fundamental human rights and freedoms of the Constitution. The Constitution requires the state to adopt policies directed towards ensuring that Ghanaians have 'equality of rights, obligations and opportunities before the law.'<sup>176</sup> Article 37(1) of the Constitution reinforces the right to equality under article 17 which envisages substantive equality by providing that policies and programmes for addressing social, economic and educational imbalance are not in violation of the right to equality. The state may take affirmative measures for integration of women, persons with disabilities, young persons and relatively less developed regions of Ghana. Without such affirmative measures, persons would not have equality of rights, obligation, and opportunities because 'uniform treatment of unequals is as bad as unequal treatment of equals.'<sup>177</sup>

As part of its social objectives, the Constitution emphasises the importance of the right to participate in the development process.<sup>178</sup> It requires the State to enact laws for ensuring 'enjoyment of rights of effective participation in development processes' in line with the right to participate in economic, social, cultural and political development recognised in Declaration on the Right to

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<sup>171</sup> *Ibid*, art 36(11).

<sup>172</sup> *Ibid*, art 36(9).

<sup>173</sup> *Ibid*, art 41(k).

<sup>174</sup> *Ibid*, art 37.

<sup>175</sup> *Ibid*.

<sup>176</sup> *Ibid*, art 37(1). Article 37(1) is similar with article 28 of the Universal Declaration of Human Rights according to which everyone is entitled to social order in which rights and freedoms are realised.

<sup>177</sup> M. P. Singh *V N Shukla's Constitution of India* (2001) 38.

<sup>178</sup> Ghanaian Constitution, art 37(2).

Development.<sup>179</sup> The right to participate in development process includes the right to form association, the right of access to agencies and officials of the State, freedom to form organisations and the freedom to raise funds.<sup>180</sup> The Constitution requires the state to enact laws to ensure the promotion and protection of all basic human rights and freedoms in development process.<sup>181</sup> It mentions the right of vulnerable groups including the right of the disabled, the aged, and children. While enacting these laws the state should be guided by international human rights instruments.<sup>182</sup>

The Constitution requires the State to ensure institution and maintenance of contributory schemes to guarantee economic security of the self-employed and other Ghanaians.<sup>183</sup> The State is to require employers and employees to contribute to funds such as pension. Although it is limited to old age, the Constitution requires the State to provide social security payments.<sup>184</sup>

The Constitution also lays down objectives relating to population and sports. The state has the obligation to adopt and maintain population policy that is consistent with the development needs and objectives of Ghana.<sup>185</sup> Regarding sports, the state has the obligation to ensure provision of adequate facilities for sports throughout Ghana.<sup>186</sup> The purpose of sports is also stated as the promotion of national integration, health, discipline, and international friendship and understanding.

### C. Educational objectives

Educational objectives of the Constitution are similar in essence with educational rights.<sup>187</sup> Educational rights are framed in terms of individual entitlement while educational objectives are framed in terms of duties the State. All persons have 'the right to equal educational opportunities and facilities' while the state should provide those facilities at all levels and in all regions.<sup>188</sup> To fully realise the right to education, 'basic education shall be free,

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<sup>179</sup> Article 1, Declaration on the Right to Development, adopted by General Assembly resolution 41/128 of 4 December 1986.

<sup>180</sup> Ghanaian Constitution, 37(2)(a).

<sup>181</sup> *Ibid*, art 37(2)(b).

<sup>182</sup> *Ibid*, art 37(3).

<sup>183</sup> *Ibid*, art 37(6)(a).

<sup>184</sup> *Ibid*, art 37(6)(b).

<sup>185</sup> *Ibid*, art 37(4).

<sup>186</sup> *Ibid*, art 37(5).

<sup>187</sup> Compare Article 38 with article 25 of the Ghanaian Constitution.

<sup>188</sup> Ghanaian Constitution, art 38(1) & art 25.

compulsory and available to all.<sup>189</sup> Thus, it is the objective of the state to draw programmes for provisions of 'free, compulsory and universal basic education.'<sup>190</sup>

Since secondary and higher education should be available and accessible to all, the State is expected to provide equal access to secondary and university education.<sup>191</sup> The Constitution envisages the progressive introduction of free secondary and university education under article 25 as a right while there is no corresponding provision under article 38. The state should focus on science and technology.<sup>192</sup> In addition, the state should provide free adult literacy programme and life-long education.

#### **D. Cultural objectives**

The Constitution addresses culture as rights of individual and objectives of the state. It is the right of every person to 'enjoy, practice, profess, maintain and promote any culture, language, tradition or religion.'<sup>193</sup> The State has the responsibility to integrate customary values into national life through education.<sup>194</sup> The Constitution requires the State to adopt and develop customary and cultural values as part of growing needs of the society.<sup>195</sup> It is not that every customary value should be integrated, adopted or developed. A customary value should be appropriate. In particular, the Constitution prohibits traditional or customary practices that are injurious to physical and mental health or well-being of a person.<sup>196</sup> The State has the duty to 'foster the development of Ghanaian languages and pride in Ghanaian culture.' The State should also 'preserve and protect places of 'historical interest and artifacts.'<sup>197</sup>

#### **E. Political objectives**

The Constitution deals with several issues concerning fundamental human rights and freedoms.<sup>198</sup> The Constitution requires the state to 'cultivate among

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<sup>189</sup> *Ibid*, art 25(1)(a).

<sup>190</sup> *Ibid*, art 38(2).

<sup>191</sup> *Ibid*, art 25(1)(b) & art 38(3).

<sup>192</sup> *Ibid*, art 38(3).

<sup>193</sup> *Ibid*, art 26.

<sup>194</sup> *Ibid*, art 39(1).

<sup>195</sup> *Ibid*, art 39(2).

<sup>196</sup> Compare Article 26 with article 39 of the Ghanaian Constitution.

<sup>197</sup> Ghanaian Constitution, art 39(3).

<sup>198</sup> *Ibid*, art 35.

all Ghanaians respect for fundamental human rights and freedoms and the dignity of the human person.<sup>199</sup> This provision focuses on building a culture of respect for human rights through different measures including education, awareness creation, and others. The political objectives specifically refer to non-discrimination. The Constitution prohibits discrimination and prejudice on certain grounds including 'place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs' and requires the state to promote integration of the peoples of Ghana.<sup>200</sup>

For the purpose of integration, the Constitution requires the State to take measures directed towards ensuring loyalty to Ghana, regional and gender balance in appointment and recruitment, free movement of persons, goods and services, decentralisation of administrative and financial machinery of government, and distribution of location of institutions offering services.<sup>201</sup> Although the Constitution does not require equality of access to public services like some human rights instruments, it requires the state to 'promote just and reasonable access by all citizens to public facilities and services.'<sup>202</sup>

The political objectives also deal with form of government, sovereignty of the people and territorial integrity of Ghana. The Constitution provides for a democratic form of government, with sovereignty residing in the people of Ghana.<sup>203</sup> In terms of democracy, Ghana has shown better score than many African countries, including Ethiopia.<sup>204</sup> As political tolerance is one of the hall marks of democracy, the Constitution requires the State to promote 'a culture of political tolerance' among the people of Ghana.<sup>205</sup> The Constitution requires the State to 'safeguard the independence, unity and territorial integrity of Ghana.'<sup>206</sup> Thus, the State should maintain defence forces that are capable of reversing any foreign aggression and suppressing secessionist groups.

The Constitution incorporates the principles of good governance as it requires the state to 'eradicate corrupt practices and the abuse of power.'<sup>207</sup> The

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<sup>199</sup> *Ibid*, art 35(4).

<sup>200</sup> *Ibid*, art 35(5).

<sup>201</sup> *Ibid*, art 35(6).

<sup>202</sup> Compare Article 35(3) of the Ghanaian Constitution with article 13 of the African Charter on Human and Peoples' Rights.

<sup>203</sup> Ghanaian Constitution, art 35(1).

<sup>204</sup> Regarding governance performance, Ghana stood seventh out of 53 African Countries according to 2011 Ibrahim Index of African Governance, available at <<http://www.moibrahimfoundation.org/en/section/the-ibrahim-index>> (accessed on 25 February 2012).

<sup>205</sup> Ghanaian Constitution, art 35(9).

<sup>206</sup> *Ibid*, art 35(2).

<sup>207</sup> *Ibid*, art 35(8).

eradication of corrupt practices requires the state to put in place accountability and transparency mechanisms.

## **VI. THE JUSTICIABILITY OF DIRECTIVE PRINCIPLES IN ETHIOPIA AND GHANA**

Constitutions of African states in general may be classified into four categories based on the way they treat ESC rights. The first category does not deal with economic social and cultural rights at all.<sup>208</sup> The second category includes ESC rights in directive principles and provides that they are not enforceable by any courts.<sup>209</sup> The third category incorporates economic social and cultural rights both in fundamental rights and freedoms and in directive principles.<sup>210</sup> The fourth category does not have directive principles. Constitutions in this category incorporate economic social and cultural rights along with civil and political rights in their bill of rights.<sup>211</sup> Under these constitutions economic, social and cultural rights are legally enforceable by courts.

The constitutions of Ethiopia and Ghana fall under the third category which contains economic, social and cultural rights in chapters dealing with fundamental rights and directive principles. The Ethiopian Constitution does not frame ESC rights in terms of individual rights while the Ghanaian Constitution provides them in terms of individual entitlements.<sup>212</sup> Both Constitutions do not contain provisions that specifically prohibit the courts from enforcing directive principles.

### **A. Justiciability of directive principles in Ethiopia**

The Ethiopian Constitution does not contain a clear provision on justiciability of national policy objectives and principles unlike the constitutions of India

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<sup>208</sup> See Constitution of Botswana (1966).

<sup>209</sup> See article 101, Constitution of Namibia, 1990; sec 6(c), Constitution of Nigeria, 1999; article 111, Constitution of Zambia. The provisions of these constitutions are similar with Irish Constitution (article 45) which provides that 'The principles of social policy... shall not be cognizable by any court' and the Indian Constitution (article 37) which provides that directive principles of state policy 'shall not be enforceable by any court.'

<sup>210</sup> See Constitution of Uganda (1995), Constitution of Eritrea (1997).

<sup>211</sup> See Constitution of South Africa (1996); Constitution of Angola (1992); Constitution of Algeria (1976); Constitution of Kenya (2010).

<sup>212</sup> For example, see article 41, Ethiopian Constitution; articles 24-26, Ghanaian Constitution.

and Ireland.<sup>213</sup> Apart from specifying that duties of government organs to be guided by national policy objectives and principles, article 85 does not make specific references to enforceability of ESC rights by courts or by quasi-judicial organs.<sup>214</sup> So far cases concerning their justiciability have not been brought to the courts or quasi-judicial organs, such as the House of Federation.<sup>215</sup> Despite the absence of such clear provisions or decisions, it has been argued that 'they are not justiciable' because article 85 is silent on their justiciability and it requires the government to be guided by them instead.<sup>216</sup>

Such arguments seem to have been based on the experience of states whose constitutions expressly provide that directive principles are non-justiciable. However, this contention is very weak for at least two reasons. First, the silence of article 85 on justiciability of national policy objectives and principles does not make them non-justiciable because the Constitution as a whole is a justiciable document like any other law. Since all laws are meant to be justiciable, it is not necessary to include a provision on their enforceability in courts. Reading silence of the Constitution as a prohibition of its enforcement will lead to an absurd conclusion: all laws that do not make reference to their enforcement in courts or before quasi-judicial organs would be non-justiciable. Second, since all laws are made to guide the government and the citizens, the provisions that the government shall be guided by chapter 10 of the Constitution cannot be understood as prohibiting their enforcement.

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<sup>213</sup> Article 45 of the Irish Constitution provides that:

The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and *shall not be cognisable by any Court* under any of the provisions of this Constitution. (Italics added).

Article 37 of the Indian Constitution provide that:

The provisions contained in this Part *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 these principles in making laws. (Italics added).

<sup>214</sup> Article 85 of the Ethiopian Constitution provides that:

(1) Any organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter. (2) The term "Government" in this Chapter shall mean a Federal or State government as the case may be.

<sup>215</sup> See Ethiopian Constitution, arts 62(1) & 82–84. The House of Federation is the Upper House vested with the power to interpret the Constitution. It obtains recommendation from Council of Constitutional Inquiry, a body that mainly consists of legal experts.

<sup>216</sup> Sisay, *supra* note 17, at 142.



Let alone justiciability of national policy objectives and principles, there is some confusion regarding justiciability of fundamental rights and freedoms in Ethiopia. Such confusion is prevalent among judges and lawyers as they 'tend to avoid invoking and applying human rights provisions in the Constitution' and international human rights treaties.<sup>217</sup> Judges of federal and regional courts 'think that they have little or no role in interpreting the provisions' of fundamental rights and freedoms of the Constitution.<sup>218</sup> Thus, the Constitution has been described as 'museum material' because of lack of court decisions referring to provisions of fundamental rights and freedoms in the Constitution.<sup>219</sup>

One source of confusion seems to originate from lack of clear provisions on the jurisdiction of courts. Unlike the Constitution of Ghana which clearly grants jurisdiction over fundamental human rights and freedom to the High Court under article 33(1), the Ethiopian Constitution is not clear on the jurisdiction of courts over fundamental rights and freedoms apart from stipulating the duty of the judiciary as a whole to enforce them under article 13. Legislation issued after promulgation of the Constitution hints jurisdiction over fundamental rights and freedoms although they do not comprehensively regulate it. The Federal Courts Proclamation (as amended) provides that federal courts have jurisdiction over 'cases arising under the Constitution.'<sup>220</sup> Since violations of fundamental rights and freedoms are violations of the Constitution or arise under the Constitution, federal courts have jurisdiction over fundamental rights and freedoms. The Proclamation establishing the Ethiopian Human Rights Commission and the Institution of the Ombudsman also implies that courts have power over the violation of fundamental rights and freedoms.<sup>221</sup>

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<sup>217</sup> Sisay, *supra* note 42, at 273.

<sup>218</sup> Assefa Fiseha, 'The Concept of Separation of Powers and Its Impact on the Role of the Judiciary in Ethiopia' in Assefa Fiseha & Getachew Assefa, *supra* note 134, at 25.

<sup>219</sup> Yonatan Tesfaye Fessha, 'Judicial Review and Democracy: A Normative Discourse on the (Novel) Ethiopian Approach to Constitutional Review', 14 *African Journal of International and Comparative Law* (2006):53-82, at 81.

<sup>220</sup> Federal Courts Proclamation No. 25/1996 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 2<sup>nd</sup> year No. 13 Addis Ababa, 15 February 1996, art 3.

<sup>221</sup> See Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 6<sup>th</sup> year No. 40 Addis Ababa, 4 July 2000, article 6 & 7. Article 6(4) empowers the Commission to undertake investigation of human rights violations while article 7 prohibits Commission from investigating complaints on human rights violations when they are brought before courts of law at any level. See Institution of the Ombudsman Establishment Proclamation No. 211/2000 *Federal Negarit Gazeta of the*

## B. Justiciability of directive principles in Ghana

The Constitution of Ghana (1992) does not contain a provision similar to article 45 of the Irish Constitution or article 37 of the Indian Constitution. Under Article 34(1), it provides that:

The Directive Principles of State Policy contained in [Chapter six] shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies and persons in applying or interpreting this Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.

It is not clear from the text of the Constitution whether the directive principles are justiciable or not. This issue was raised before the Supreme Court of Ghana in *New Patriotic Party v Attorney-General* (The 31<sup>st</sup> December Case) as early as the first year of the coming into force of the Constitution.<sup>222</sup>

The plaintiff, a political party, requested the Supreme Court to prohibit the government from celebrating the 31<sup>st</sup> December as public holiday. The 31<sup>st</sup> December marked the date when the military *coup d'état* overthrew a constitutionally established government in 1981. Since then the Provisional National Defence Council, a government which came to power through military *coup d'état*, had celebrated 31<sup>st</sup> December as public holiday for 11 years until 7 January 1993. The plaintiff submitted that such celebration was inconsistent with the system of government established by the Constitution. The plaintiff based its argument, among others, on article 35 and 41 of the Constitution which fall under 'Directive Principles of State Policy' in Chapter Six of the Constitution.

Adade, JSC, writing for the majority held that Directive Principles of State Policy are justiciable for three reasons:<sup>223</sup>

First, the Constitution, 1992 as a whole is a justiciable document. If any part is to be non-justiciable, the Constitution, 1992 itself must say so. I have not seen anything in chapter 6 or in the Constitution, 1992 generally, which tells me that chapter 6 is not justiciable..Secondly, notice that article 1(2) of the Constitution, 1992 speaks of inconsistency

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*Federal Democratic Republic of Ethiopia* 6<sup>th</sup> year No. 41 Addis Ababa, 4 July 2000. Article 7(2) prohibits Institution of the Ombudsman from investigating 'cases pending in courts of law of any level.'

<sup>222</sup> *New Patriotic Party v Attorney-General* [1993-94] 2 Ghana Law Reports 35. The Constitution of Ghana (1992) came into force on 7 January 1993 while the case was filed in December of the same year.

<sup>223</sup> *The 31<sup>st</sup> December Case*, at 66.

with “any provision of this Constitution, 1992”; and article 2(1) of the Constitution, 1992 makes reference to inconsistency with a contravention of “a provision of this Constitution.” None of these articles expresses an exception in favour of chapter 6. ...

Thirdly, the very tenor of chapter 6 of the Constitution, 1992 supports the view that the chapter is justiciable [according to article 34].

Adade, JSC, dealt with the argument that the directive principles were not intended to be justiciable since the Report of the Committee of Experts on Proposals for a Draft Constitution of Ghana provides that ‘[b]y tradition Directive Principles are not justiciable.’ Adade JSC was of the opinion that the Consultative Assembly had different views and that the intention of the Committee of Experts was not carried into the Constitution.<sup>224</sup>

Later, the Supreme Court handed down contradictory judgement in *New Patriotic Party v Attorney-General (CIBA Case)*.<sup>225</sup> The same plaintiff as the previous case invoked the original jurisdiction of the Supreme Court for a declaration that the Council of Indigenous Business Association (CIBA) Law, 1993 (PNDCL 312) is inconsistent with the Constitution. Again, the plaintiff’s arguments were based on, among others, provisions under the Directive Principles of State Policy, article 35(1) and article 37(2)(a) and (3). In their memorandum of agreed issues, the plaintiff and the defendant submitted for determination ‘whether or not articles 35(1) and 37(2)(a) and (3) which fall under chapter 6 of the Constitution are justiciable.’<sup>226</sup>

In the *CIBA Case*, the Supreme Court followed the position adopted in India although there is no express provision in the Ghanaian Constitution that prohibits the courts from enforcing the directive principles. Bamford-Addo, JSC, held that:

As stated by the Drafters of the 1992 Constitution, the Directive Principles have no separate existence; they are measures by which laws are judged for constitutionality and they afford a yardstick by which policy decisions are to be taken and implemented for the establishment of a just and free society. This means that until they are read and applied in conjunction with any substantive guaranteed human rights and freedoms set out in chapter 5, they remain guidelines only and are not enforceable rights by themselves.

Bamford-Addo, JSC, made two exceptions to the general principle that directive principles ‘are not of and by themselves legally enforceable by any

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<sup>224</sup> *Ibid*, at 69.

<sup>225</sup> *New Patriotic Party v Attorney-General* [1996-97] Supreme Court of Ghana Law Reports.

<sup>226</sup> *CIBA Case*, at 743.

court.<sup>227</sup> First, the directive principles become enforceable 'when they are read together or in conjunction with other enforceable parts of the Constitution.'<sup>228</sup> Second, they are enforceable when 'there are particular instances where some provisions of the directive principles form an integral part of some of the enforceable rights.'<sup>229</sup> In such a case, the directive principles qualify as enforceable rights 'or can be held to be rights in themselves.'<sup>230</sup>

The holding of the Supreme Court in *CIBA* case was based on interpretation of the Constitution according to the intention of its framers. Bamford-Addo, JSC, referred to quotation from the Report of the Committee of Experts on Proposals for a Draft Constitution of Ghana which clearly provided that 'Directive Principles are not justiciable.'<sup>231</sup> She also referred to another quote from the Report which provided that '[t]he [Directive] Principles should not of and by themselves be legally enforceable by any court.'<sup>232</sup> Thus, she established the intention of Constitution framers from the Report.

Since there was conflict between *The 31<sup>st</sup> December* and the *CIBA* case, there had been no binding precedent on justiciability of directive principles until the Supreme Court adopted another rule in *Ghana Lotto Operators Association (and 6 others) v National Lottery Authority*.<sup>233</sup> In this case, the Supreme Court departed from the intention of the framers for two reasons. First, since specific language proposed by the Committee provided that 'the principles shall not of and by themselves be legally enforceable by any court' was not adopted by the Consultative Assembly in the final version of the 1992 Constitution, there was 'a significant departure' from the intention of the framers.<sup>234</sup> Second, the original intent of the framers is not necessarily determinative of an interpretation of a certain provision.<sup>235</sup>

In interpreting the Constitution, according to the Court, it is not safe to 'exclusively or even predominantly' rely on the intent of the framers.<sup>236</sup> Dr Date-Bah, JSC, delivering the judgment of the Court, held that:<sup>237</sup>

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<sup>227</sup> *Ibid*, at 745.

<sup>228</sup> *Ibid*.

<sup>229</sup> *Ibid*.

<sup>230</sup> *Ibid*.

<sup>231</sup> *Ibid*, at 744.

<sup>232</sup> *Ibid*.

<sup>233</sup> *Ghana Lotto Operators Association (and 6 others) v National Lottery Authority* [2008] 4 Ghana Monthly Judgments 171.

<sup>234</sup> *Ibid*, at 186.

<sup>235</sup> *Ibid*, at 186-187.

<sup>236</sup> *Ibid*, at 188.

<sup>237</sup> *Ibid*, at 188-189. The Supreme Court distinguished between subjective and objective purpose. It held that '[t]he subjective purpose of a Constitution or statute is that

A more modern approach would be to see the [Constitution] as a living organism. As the problems of the nation change, so too must the interpretation of the Constitution by the judiciary. Interpreting the Constitution as a living organism implies that sometimes there may be a departure from the subjective intention of the framers of it. The objective purpose of the Constitution may require an interpretation different from that of the original framers of it.

The Court identified 'strengthening of the enforcement of fundamental human rights' as a core value of the Ghanaian legal and constitutional system.<sup>238</sup> The Court interpreted article 34 of the Constitution with the 'purpose of achieving an expansion of the range of enforceable human rights in Ghana.'<sup>239</sup> The Court held that:<sup>240</sup>

The rights set out in chapter 6, which are predominantly the so-called ESC rights, or economic, social and cultural rights, are becoming, by international practice and the domestic practice in many jurisdictions, just as fundamental as the rights in chapter 5. The enforceability of these ESC rights is a legitimate purpose for this court to seek to achieve through appropriate purposive interpretation.

The Court adopted 'presumption of justiciability in relation to the provisions' of directive principles. That presumption can be rebutted if those provisions, by their nature, do not lend themselves to enforcement by a court. The implication is that the burden of demonstrating such nature of provisions lies with a defendant. However, the Court did not go further to distinguish between provisions that lend themselves to enforcement by the court and those which do not.

The Supreme Court takes heed of two concerns. First, it emphasises that ESC rights 'need not be implemented in the same way as civil and political

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actual intent that the authors of it, namely, the framers of the Constitution or the legislature, respectively, had at the time of the making of the Constitution' while '[t]he objective purpose is not what the author actually intended but rather what hypothetical reasonable author would have intended, given the context of the underlying legal system, history, value, etc of the society for which he is making law.'

<sup>238</sup> *Ibid*, at 191.

<sup>239</sup> *Ibid*, at 189.

<sup>240</sup> *Ibid*, at 189. Chapter 6 of the Ghanaian Constitution is entitled 'Directive Principles of State Policy' and contains objectives that have been discussed above. Chapter 5 is entitled 'Fundamental Human Rights and Freedoms' and predominantly contains civil and political rights as well as some economic, social and cultural rights.

rights.<sup>241</sup> Although it does not expressly provide in its decision, the Court seems to endorse the concept of progressive realisation of ESC rights. The Court recognises that the implementation of ESC rights require more resources than civil and political rights. Such understanding is in line with Ghana's obligation under the International Covenant on Economic Social and Cultural Rights.<sup>242</sup>

Second, the Court stresses that the directive principles should be liberally interpreted 'in order not to interfere with the democratic mandate of successive governments.'<sup>243</sup> The Court has taken an activist role in upholding human rights and expanding their scope. Yet, it cautions that cases arising under the directive principles should be examined with circumspection. In other words, the Court calls for some form of judicial restraint.

The decision of the Supreme Court in the *Ghana Lotto Operators Association* case is progressive and the bench needs to be applauded for taking the bold step of recognising the presumption of justiciability of directive principles and more importantly placing the burden on the duty-bearer to prove otherwise in case it is claimed by an individual. Thus, the Court, by its decision, has affirmed the country's commitment to meeting some of the key demands in the African Charter. Yet, it does not settle some important issues including the relationship of directive principles with fundamental human rights. Are directive principles assimilated to the fundamental rights and freedoms for all purposes? Who can claim a violation of ESC rights under the directive principles? Which Court has the jurisdiction to grant the appropriate remedies?

The High Court has jurisdiction to enforce fundamental human rights and freedoms under article 140(2) and 33(1) of the Ghanaian Constitution. Since the Supreme Court has original jurisdiction to invalidate enactments or decisions as unconstitutional under article 2(1) and 130(1), the High Court does not have the power to invalidate them on the basis of violating fundamental human rights and freedoms. The decision of the Supreme Court is not clear as to whether the power of the High Court extends to the enforcement of ESC rights under the directive principles.

*The Ghana Lotto Operators Association* case is also silent on the types of remedies to be ordered when ESC rights are violated. Article 33(2) provides that the High Court may 'issue such direction or orders or writs including

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<sup>241</sup> *Ibid*, at 192.

<sup>242</sup> See article 2 of International Covenant on Economic, Social and Cultural Rights. Ghana ratified the Covenant on 7 September 2000 available at <[http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)> accessed on 8 January 2012.

<sup>243</sup> *Ibid*, at 199.

writs or orders in the nature of *habeas corpus*, *certiorari*, *mandamus*, *prohibition*, and *quo warranto* as it considers appropriate.' Given that such remedies have also been adopted in India where the Directive Principles are not justiciable, one may argue that they do not fully address violation of ESC rights.

Article 33(1) adopts restrictive standing rule as it requires a person to allege a violation of his or her rights.<sup>244</sup> Should the same standing rule be adopted for ESC rights under directive principles? It is the poor who usually suffer violation of ESC rights and they are not capable of using courts to enforce their rights. Justiciability of ESC rights would not deliver much to the poor if others are not allowed to represent them.

Finally, apart from a caution that ESC rights are not enforced in the same way as civil and political rights and that care should be taken so as not to interfere in the 'democratic mandate' of government, *The Ghana Lotto Operators Association* case does not lay down detailed rules regarding implementation of ESC rights; it is limited to justiciability of directive principles.

## VII. CONCLUSION

Many constitutions of African states contain directive principles following Irish and Indian model of constitutional design. Some of them expressly provide that directive principles are not justiciable while others are silent. In particular, the constitutions of Ghana and Ethiopia are silent on justiciability of directive principles. The absence of clear provision has created confusion in both countries.

In Ethiopia, it has been argued that the National Policy Principles and Objectives are not justiciable although the issue has not been submitted to courts or to other organs with the power of interpreting the Ethiopian Constitution, the Council of Constitutional Inquiry and the House of Federation. Such argument puts ESC rights provided in the National Policy Principles and Objectives beyond the reach of courts.

In Ghana, the Supreme Court has cleared the confusions in the *Ghana Lotto Operators Association* case in that it set aside two conflicting judgments. With the purpose of strengthening the enforcement of ESC rights, the Court unequivocally declared that directive principles are justiciable. The Court has taken an active role and made a ground-breaking judgement as it has decided to break with the tradition of non-justiciable directive principles and expanded the scope of fundamental human rights under the Constitution of Ghana. Therefore, Ghana provides excellent lessons not only to Ethiopia but also to

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<sup>244</sup> Compare a broad approach adopted in sec 38 of the South African Constitution (1996) where a person need not allege contravention of his or her rights.

other countries such as Uganda and Eritrea, whose constitutions are silent on justiciability of directive principles.

For the enforcement of ESC rights recognition of their justiciability alone is not enough. Courts and any other organ with the power of interpreting constitutions should provide further guidance on issues relating to standing, jurisdiction, and remedies for violation of ESC rights. In particular, the Supreme Court of Ghana should go beyond declaring justiciability of directive principles and provide clarification on standing to bring cases for violation of ESC rights to the High Court. It should also provide remedies that can be ordered in cases of violation.