

**St. Mary's University College**  
**Faculty of Law**

**ADJUDICATING SOCIAL-WELFARE RIGHTS IN ETHIOPIAN  
COURTS**

**By:- Natan Tibebe**  
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## CHAPTER ONE

### Background of the Study

Human rights are common parlance, but not all agree on its meaning. <sup>1</sup>Many definitions are given to it in various words in different materials. Common to almost all the definitions is that human rights belong to all people simply because they are human beings, irrespective of their citizenship, race, ethnicity, language, sex, sexuality, or abilities. They are recognized legitimate claims of individuals upon their society to specific freedoms and other goods and benefits, which the society is morally, politically, even legally obligated to respect, ensure, and realize.<sup>2</sup> Human rights are thus conceived as universal (applicable everywhere) and egalitarian (the same for everyone). These rights may exist as natural rights, in both national and international law. The doctrine of human rights in international practice, and regional institutions, in the policies of states and in the activities of non- governmental organizations, has been a cornerstone of public policy around the world. In the idea of human rights if the public discourse of peacetime global society can be said to have a common moral language, it is that of human rights. Despite this, the strong claims made by the doctrine of human rights continue to provoke considerable skepticism and debates about the content, nature and justifications of human rights to this day. Indeed, the question of what is meant by a “right” is itself controversial and subject of continued debate. Many of the basic ideas that animated the movement developed in the aftermath of the Second World War and the atrocities of the holocaust, culminating the adoption of the universal declaration of human rights in Paris by the united nations general assembly in 1948. The universal declaration of human rights was adopted by the united nations general assembly in 1948, partly in response to the atrocities of World War II. Although the UDHR was a non-binding resolution, it is now considered by some to have acquired the force of international customary law which may be invoked in appropriate circumstances by national and other

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<sup>1</sup> L Henkin 'Human rights: Ideology and aspiration, reality and prospect' in S power & G Allison Realising human rights: Moving from inspiration to impact (2000) p.5. Sisay Alemayehu Yeshanew (2004) Towards effective Human rights education in Africa

<sup>2</sup> Ibid p.5

judiciaries due to the fact that elements making up a customary international law pervasively exist in the UDHR, i.e, *consistency*, *opinion juris* and *generality* features. The UDHR urges member nations to promote a, civil, economic and social rights, asserting these rights as part of the “foundation of freedom, justice and peace in the world.” The declaration was the first international legal effort made after the establishment of a new international organization to limit the behavior of states and press upon them duties to their citizens following the model of the rights-duty duality.

The inclusion of civil, political, economic, social and cultural rights was predicted on the assumption that all human rights are indivisible and that the different types of rights listed are inextricably linked. The UDHR was normatively bifurcated into treaties, a covenant on civil and political rights and other social, economic and cultural rights, due to questions about the relevance and propriety of economic and social provisions in covenants on human rights.

Both covenants begin with the rights of people to self - determination and to sovereignty over their natural resources. This debate over whether civil and political rights are more fundamental than economic rights has continued to the present day. The disagreement over which rights were basic human rights resulted in there being two covenants. The debate was whether economic and social rights are aspirational, as contrasted with basic human rights which all people possess purely by being human, because economic and social rights depend on wealth and the availability of resources. This debate and the desire for the greatest number of signatories to human rights law led to the two covenants to be adopted in 1966 by the UN making the UDHR binding on all signatory states though socio- economic rights somehow lagged behind the civil and political rights irrespective of prioritization among the rights, the weight and the enforcement mechanisms afforded to civil and political rights remain far superior to those of economic, social and cultural rights since socio- economic rights are considered as government policies and not as a full-fledged right. Despite this, both share common attributes that imposes a quartet layers of obligation/duty on signatory states as the covenant classify them as different levels of state obligations by stating that every ESC right, as with every human right, include

duties to respect , duties to protect and duties to fulfill.<sup>3</sup> This tripartite classification is based on different assumptions about relationship between right-holder, his or her access to the protection afforded by right, potential threats to that access and the role of the state.<sup>4</sup>

## Duties to Respect

Duties to respect focus on preventing the state from unduly intervening in the enjoyment of a particular freedom or entitlement. The State is required to abstain from interfering negatively, but positively. Nevertheless, to prevent the interference, the state may still have to take proactive measures, for example, to prevent state agents from acting in certain ways, to provide reparation if a duty has been breached. Judicial intervention to ensure compliance with duties to respect ESC rights both preventive and restorative or compensatory is not substantially different from traditional notions of civil and political rights litigation, i.e., protecting against state action that threatens the status quo this is particularly the case when potential victims already have access to essential provisions, such as food, housing, work, income and health care. The duty to respect is justiciable, therefore, in the following circumstances *acontrario*:

- Protection against State-organized or sanctioned forced evictions;
- Protection from direct threats to health by State actors;
- Protection from the interruptions of existing levels of medical treatment provided by the State;
- Protection against arbitrary termination of employment in the public sphere;
- Protection from retrogressive and retroactive downgrading measures in social security schemes; and

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<sup>3</sup> Courts and the Legal Enforcement of Economic, social and Cultural Rights: Comparative Experiences of Justiciability, 'Human rights and rule of Law Series'. 2, Geneva 2008, pp 41.

<sup>4</sup> See Maastricht Guidelines on violations of Economic ,social and cultural rights, Guideline 6 in Courts and the Legal Enforcement of Economic, social and Cultural Rights: Comparative Experiences of Justiciability, 'Human rights and rule of Law Series'. 2, Geneva 2008, pp 42.

- Protection from State interference in the use of a minority language or anything deemed to have an important symbolic value for a particular culture or religion.<sup>5</sup>

## **Duty to Protect**

Under the duty to protect, the State is required to prevent third parties from unduly interfering in the right-holder's enjoyment of a particular freedom or entitlement. Emphasis is therefore placed on State action that is necessary to prevent, stop, or obtain redress or punishment for third party interference. This is normally achieved through one or all of the following

- State regulation of private party conduct;
- Inspection and monitoring of compliance; and
- Administrative and judicial sanctions enforced against noncompliant third parties, such as employers, landlords, providers of health care or educational services, potentially pollutant industries or private food and water suppliers.<sup>6</sup>

Judicial intervention to ensure compliance with duties to protect ESC rights—gain preventive, restorative or compensatory—is similar to litigation that seeks to require the State to protect against the acts of failure to act of private (third parties in the provision of what would be considered essentials for a decent life, judicial intervention is one means to protect the rights involved. This approach should work alongside and compliment other State activity, such as regulation and law enforcement. Access to some basic ESC rights—such as the rights to work, health or education services, housing or food—is often left to a great extent to market forces or provision by third parties. This creates its own tensions for the State, in how it carries out its duties to protect. However, this duty to regulate conduct between private parties becomes greater where there is a power imbalance between those parties.

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<sup>5</sup> Courts and the Legal Enforcement of Economic, social and Cultural Rights: Comparative Experiences of Justifiability, 'Human rights and rule of Law Series'. 2, Geneva 2008, .pp 42.

<sup>6</sup> Supra note 3 pp. 45 & 46

Judicial intervention as a means of controlling the actions, or failure to act of private parties in the context of duties to protect ESC rights has arisen in the following examples:

- Protection against privately conducted forced evictions;
- Protection of labour conditions in the private labour market;
- Protection from failure to comply with health or education requirements in the private sphere;
- Protection from discrimination in contracts directed at providing basic services, such as health, water, housing or education; and
- Protection from abusive termination or modification of these contracts.<sup>7</sup>

## **Duties to Fulfill**

Duties to fulfill imposed on State obligations to facilitate, provide and promote access to rights. This is particularly the case when such access is limited or non-existent. In these circumstances, the State is expected to be a proactive agent, capable of bringing about an increase in access to a range of ESC rights.

Therefore, emphasis is placed on State action directed at:

- Identifying problematic situations;
- Providing relief; and
- Creating the conditions that would allow right-holders to manage their own access to the provisions protected by rights.

The duty to fulfill ESC rights includes an obligation to remove obstacles to the full enjoyment of ESC rights. It also requires the implementation of measures to modify discriminatory social and culture patterns which result in the disadvantage of vulnerable groups.<sup>8</sup>

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<sup>7</sup> Ibid. pp 45 & 46

Alluding to the issue in focus, study focus on socio-economic components of human rights regarding its justiciability under Ethiopian context, underpinning that ECS rights can be adjudicated as adjudication is desirable manifesting the term ‘justiciability’ which refers to the ability to claim a remedy before an independent and impartial body when the violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognized rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty bearer does not comply with his or her duties. The existence of a legal remedy-understood both in the sense of providing a procedural remedy (effective access to an appropriate court or tribunal) when a violation has occurred or is imminent, and the process of awarding adequate reparation to the victim-are the defining features of a fully fledged right. Such legal remedies are particularly important when the matter at stake is the violation of human rights, which are, by definition, rights inherent to the human beings condition and identity. It is for this reason that a number of human right instruments expressly provide for a right to remedy in case of violations of human rights.<sup>9</sup>

The right to a remedy has often been considered one of the most fundamental and essential rights for the effective protection of all other human rights.<sup>10</sup>

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<sup>8</sup> Ibid.pp.48 & 49

<sup>9</sup> See, for example, international covenant on civil and political rights, Article 2(3); convention against torture and other cruel, inhuman or degrading treatment or punishment, Article 13; international convention on the Elimination of all forms of Racial discrimination, article 6; international convention for the protection of all persons from enforced disappearance, Article 12, 20 and 24; Universal declaration of human rights, article 8; united nations principles relating to the effective prevention and investigation of extra legal, arbitrary and summary executions, principles 4 and 16 declaration of basic principles of justice for victims, crime and abuse of power, principles 4-7; Vienna declaration and programme of Action, Article 27 programme of articles 13, 160-162 and `65; declaration of Human Rights Defenders, article 9; European convention on Human Rights and fundamental freedoms (ECHR), article 13; Charter of fundamental rights of the European Union, Article 47; American convention on Human Rights, Article 25; American Declaration of the Rights and duties of man, Article XVIII; inter-American covenant on forced disappearance of persons, Article III(1); Inter-American convention to prevent and punish torture, Article (1); African charter on human and peoples’ rights, Article 7(1)(A); AND Arab charter on human rights, article 9. In International Commission of Jurists, No courts and the Legal Enforcement of Economic, social and Cultural Rights: Comparative Experiences of Justifiability, ‘Human rights and rule of Law Series’. 2, Geneva 2008, pp 7.

<sup>10</sup> See, for example, the Report of the UN special representative of the secretary-general on human rights defender, A/56/341, September 10, 2001, para. 9; report of the special rapporteur on violence against women, its causes and consequences, E/CN.4/2002/83, January 31, 2002 para. 116. The human rights committee has underlined in its general comment (GC) N<sup>o</sup> 29 on derogations during a state of emergency that the right to a remedy constitutes “a treaty obligation inherent in the covenant as a whole” and that even in times of emergency, “the state party must comply with the fundamental obligation, under article 2 paragraph 3, of the covenant to provide a remedy that is

## Statement of the Problem

The notion of what is 'justiciable' is largely determined by the assumption about the role and competence of courts and that this assumptions themselves must be subject to question. The question of what rights or components of rights should be subject to adjudication and remedy by courts or other bodies raise critical question about how governments are to be made accountable, in practical terms, to human rights norm. When the justiciability debate is situated in a broader framework of questions about human rights, social citizenship and answerable governance, traditional assumption about the role of courts are reassessed in terms of their implication for the right holders. Yet, currently, such issues are largely neglected and undermined one way or the other by a mere assertion that economic, social and cultural rights cannot be adjudicated by courts, due to technical competence that is to mean they are to interpret the law, but not enforce and the fact that constitutional adjudication is not given to them. Therefore, this study revolves on such side stepped movements by the Ethiopian state and the effect of denial of justiciability recognition of these rights that narrows the range of mechanisms available for victims of rights violations to receive remedies and reparations, weakens the accountability of states, undermines deterrence and fosters impunity for violations. And set out remedies to reinforce the consideration of ESC rights as fully meaning full rights. Due to this practical reason right holders are entitled a legal right as to socio-economic matters as are not satisfied by the existing judicial practice and institutional dearth to implement such rights. The law making body has to make sure accessibility of such laws through translation and publication as adopted as part of laws of the land, and ensure such rights being exercised by citizens effectively in line with the resource available.

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effective". See HRC, general commitment N 29, States of Emergency (Article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para.14.

## **Objective of the Study**

The scenario in which the study considers to include has multidirectional elements of theoretical and practical issues that seeks to be addressed in a holistic manner to rectify the misconception conceived in academia and professional arena in order to pacify and settle the issue of justiciability as the purpose of this study is to show problem areas in adjudication of socio-economic rights as it examines the justiciability of social welfare rights in Ethiopia, ponderance given to socio-economic rights. It juxtaposes laws and scholarly assumptions in an attempt to show the extent to which the laws are operative, interpretative and justiciable in Ethiopian courts and manifest how socio-economic rights adjudicated, judicial competence in the realm of socio-economic rights, subtle translation meagerness and barely access and how to interpret legal documents with the view of status and application of internationally ratified documents. Having recalled the scenario, it is proper to put in the picture the readers a general and specific line up of objectives could be exploited from the discourse within this sub section.

### **General objectives**

Mostly, it is academic than practical in contrast to the specific objectives inferentially connected. The judicial activity alongside adjudicating socio-economic rights persistently viewed as hard to manipulate. Therefore, the study as a matter of objective pursues to lay down insights as to social welfare rights at stake and the socio-economic development that would materialize when governmental excuse to avoid its duties under the guise of unchecked reasons and corruptions that materializes in such uncontrolled subject matters. Besides, the study intends to persuade stake holders in this regard as part of the major objectives.

## **Specific objectives**

Like that of the statement of the problem, specific objective content wise is the upside down coherent piece providing research boundary tools. The research resists refuting both technical and structural failures to practically adjudicate social welfare rights that after all put up with justiciability of the socio-economic rights per se along with the judicial activism, in respect to judicial role and judicial power granted to them.

## **Significance of the Study**

Despite the objectives of the study can be well thought-out as the reframed version of the significance perceptions, but the significance on its own relies on the cognition factor which is the fundamental component of the study's significance particularly for those who assume a position as a rule maker, law interpreter, lawyer, researcher and a student at equidistant as a stakeholder per se. Moreover, researchers are believed and expected as well to have made meticulously that the argument will defeat and still bear significance of convincing all the parties whom their conduct pertains to change the issue in matter through bridging the gaps, be it interpretation wise or implementation wise, as it fits.

## **Scope of the study**

The study has boundaries from which it confines itself to issues related to socio-economic rights adjudication in line with the legal regime governing such rights and remedies in the constitution and international documents and recommendations based on current trend. But historical accounts to address nature of indivisibility in their peculiar commission are the peripheral inclusions of the study among others.

## **Research Methodology**

The first and for most attention of the study is limited to the context of Ethiopian ESC rights adjudication, yet when it is deemed to be significant, some comparative approaches will be deployed. For this and other reasons the study will be attempted on the basis of relevant materials like FDRE constitution, international documents such as ICCPR and ICSECR, Optional Protocols, and other commentaries, if necessary, to play vital role, as a primary resource and literatures from segregated books and scholarly written articles as secondary resources.

## **Limitation of the study**

The hurdles that were faced during the time of research are many-sided as the study quest involves boarder line issue which is kind of difficult to effortlessly get access to literatures that are relevant to the points germane to the study not to mention the time constraints, budget constraints and uneasiness to discover the scenario in Ethiopia which is hindered by many abounding legal confusions and moot concepts that seems to matter most in a life of dignity within the confines of human rights.

## Organization of the Paper

This paper will have three chapters

**Chapter One:** This chapter peruse in to the general survey of human rights by definition and their historical antecedents there by referring the bifurcation of the two treaties under the UDHR, particularly socio-economic rights as a background of statement and the issue of justiciability being statement a focal point of the problem and setting the objects to be attained, triggering the significance the study offers and the confines within which the study sphere extends to the extent of methodology of the study as in a proposal format, which will advance to a level of chapter one.

**Chapter Two:** This chapter will briefly explore some of the implications of the points discussed in previous chapters in the context of setting up perspectives for ECS rights appraisal from which the legal enforcement encounter tight corners irrespective of the judicial role fringes with translation scant and the paradox within the constitution as to the status granted to such rights as envisaged in the constitution, moreover, it also deals with institutional dearth and the excuse of progressive realization as a guise for in application the rights properly, to examine if persuasive enough under scrutiny test, interpretation wise despite of the practical and theoretical fringes. Besides, courting legitimacy to the extent of courts confidence and competency to interpret laws from the perspective of judicial attitude and judicial role will be dealt. Assertions will also be made as article juxtapositions in light of the FDRE Constitution and other international instruments

**Chapter Three;** This chapter will sketch some of the ways whether an act of reference proves or disproves the justiciability of the referent in Ethiopian courts in line with the domino effects of such references in policy documents. Besides, questioning human rights documents to uphold indivisibility of the rights per se (in their nature) as a manifestation to vindicate the right holder

and duty bearer to create the vibe of creditor-debtor condition will be treated in a shallow manner. In addition to the assertions that will be made regarding the interpretation of progressive realization, drawing conclusion and possible suggestions to recommend and rectify defects in place.

## Time Frame Work

Time	Month 1	Month 2	Month 3	Month 4	Month 5	Month 6	Month 7	Month 8
Activities	Weeks	Weeks	Weeks	Weeks	Weeks	Weeks	Weeks	Weeks
Thesis formulation	█							
Planning stage	█	█						
Collecting raw data		█	█					
Data analysis			█	█				
Literature review				█	█			
writing stage					█	█		
Data refill and analysis						█	█	
Re writing and editing							█	
1 <sup>st</sup> reading of final draft							█	
Rewriting and editing								█
2 <sup>nd</sup> reading and editing								█



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## CHAPTER TWO

### Human Rights under Ethiopian Context Vis-à-vis Jusiciability

#### 2.1 Human rights Vs. Justiciability

The FDRE constitution devotes more than one third of its contents to the provisions on fundamental human rights.<sup>11</sup> Moreover there are provisions that deal with national policy principles and objectives which either establish important guarantees or have direct relevance to the interpretation of fundamental rights. The constitution imposes a responsibility and duty to the respect and enforcement of fundamental rights and freedoms at all levels of the federal and state legislative, executive and judicial bodies.<sup>12</sup> The constitution further elevates the horizon of human rights through reference to the international and regional human rights instruments as thresholds for the interpretation of its human rights provisions. Another prominent feature is the implicit recognition of the independence, interrelatedness and indivisibility of all generations of human rights by incorporating them on equal footing without any difference in consequence.<sup>13</sup>

A holistic and purposive view at the constitution, however, reveals that even the individuals and juristic persons are bound by the bill of rights. This is because the constitution enjoins, though not exclusively concerning the bill of rights, ‘all citizens, and organs of state, political organizations, other associations as well as their officials’ to obey and ensure its observance.

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<sup>11</sup> Adem Kassie (2011) Human Rights in Ethiopian Constitution: A Descriptive Overview, in Mizan Law Review Vol. 5 No. 1, . pp. 43,

<sup>12</sup> FDRE Constitution Art 13(1) –this reinforces the supremacy of the Constitution and the general responsibility and the duty the constitution imposes on “ all citizens, organs of state, political organizations, other associations as well as their officials” to obey and ensure its observance (Arts 9(1) and (2)).

<sup>13</sup> This is in conformity with the 1993 Vienna World Conference on Human Rights (para 5), and the African charter on Human and Peoples’ Right which affirms the indivisibility of all kinds of rights in the preamble(adopted 27 June1998, preamble para 6) ,

However, with all these and other recognitions endowed to such rights the constitution does not provide criteria for determining, nor a definition of justiciability of a matter explicitly. It's therefore arguable whether, for instance, the policy principles of the constitution are justiciable, hence, there is a need to reformulate them in tune with the ICESCR and other relevant instruments ratified by Ethiopia for instance article 41(4) of the constitution provides "The state shall have the obligation to allocate ever increasing resources to provide to the public health and other services" this does not provide right for citizens as ICESCR does, rather it simply provides it as a duty of a government it does not establish a right to health or education.

When we talk about justiciability, we should consider

1. The level of resources available for welfare provision relative to the needs of the population.
2. The political consensus on wealth redistribution and
3. The degree of legitimacy popularly accorded to judicial authority to adjudicate as opposed to legislative and executive action.

Here, even if certain socio-economic rights are identified, it's necessary to look at how judges can legitimately decide on the content of the right, to whom welfare provisions extend and at what levels. This is the point at which many opponents of socio-economic rights argue that they are non-justiciable as some professionals in the country argue that constitutional provisions are too broad to apply in specific case and hence disputes are better settled by the application of ordinary legislation.<sup>14</sup> However, such argument fails on two grounds.

Firstly, it is not true that the generality of the constitutional provisions precludes their application by courts of law. The Ethiopian constitution enshrines provisions specific enough to be applied by courts, for instance, rights of persons arrested and accused under

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<sup>14</sup> Rakeb Mesele (2002), Enforcement of human rights in Ethiopia, APAP (observation of some judges and advocates)

article 19 and 20 respectively. Moreover, the small number of cases in which the constitution has been referred to by the courts of Ethiopia and the judicial practice of other states disproves this argument.<sup>15</sup> Secondly, there are constitutional rights which do not have a perfect substitute in ordinary legislation. An example is the right of accused person to ‘full access to any evidence presented against them’ under article 21(4) of the constitution. Courts cannot totally avoid referring to constitutional rights, especially in the latter cases.<sup>16</sup> There is no objective way for a judge to decide on the level of an individual’s welfare entitlement, or the size or allocation of the public purse. These are inherently political decisions and must therefore be determined by the elected branches of governments which are accountable to the electorate for the decisions they reach. In addition, socio economic rights involve “difficult and agonising judgments” on the allocation of a limited budget between contending priorities thereby being purely a matter for the administrative authority to determine and are inherently non-justiciable.

Content and definition of these rights and the existence of procedures for their judicial or quasi-judicial enforcement making rights justiciable is only one of the ways of protecting them. Policy and related measures should also be taken to realise human rights. In elaborating a framework for the domestic protection of human rights, emphasis is usually placed on their inclusion in a constitution bill of rights and ordinary legislation and the reviewability of their implementation by judicial and quasi-judicial organs. Less attention is paid to the existence of cases on behalf of victims of violations of human rights (*actio popularis*). This protection of human rights determine the extent to which rights are justiciable in a domestic legal system.

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<sup>15</sup> Sisay Alemayehu (2008) The justiciability of human rights in the Federal Democratic Republic of Ethiopia, African human rights journal vol. 8 no. 2pp. 12

<sup>16</sup> Ibid pp. 12

### 2.1.1 Judicial Competence V Judicial Role

Article 13(1) of the FDRE Constitution establishes the duty of all federal and state legislative, executive and judicial organs to respect and enforce fundamental rights and freedoms. While the above provision declares the judicial enforceability of fundamental rights and freedoms, article 37 makes bringing justiciable matters before judicial and quasi judicial organs and get decision thereon a right by itself.

A close look at the relevant laws status that the mandate of the council of constitutional inquiry and the house of federation to “interpret” the constitution, as the title of Article 83 shows, does not exclude courts from enforcing constitutional provisions on fundamental rights and freedoms. The provisions of article 84 of the constitution and article 6, 17 and 21 of the council of constitutional inquiry commission proclamation shows clearly that “constitutional disputes” are those in which the constitutionality of laws or decisions are contested and those which make the interpretation of some constitutional provisions necessary.<sup>17</sup>

Ordinary courts have jurisdiction over cases arising under the constitution is further confirmed by article 3(1) of the federal courts establishment proclamation which provides that federal courts shall have jurisdiction over cases arising under the constitution, federal laws and international treaties.<sup>18</sup>

In practice, Ethiopian courts generally tend to avoid adjudicating cases based on constitutional provisions (including on human rights) even where such provisions are invoked and are relevant.<sup>19</sup> Such cases are referred to the council of constitutional

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<sup>17</sup> Council of Constitutional Inquiry Proclamation, Proclamation 250/2001, Federal Negarit Gazeta 7<sup>th</sup> Year 40, 6 July 2001. See also Proclamation to consolidate the House of the Federation of the Federal and Democratic Republic of Ethiopia and to define its Powers and Responsibilities, Proclamation 251/2001, Federal Negarit Gazeta, 7<sup>th</sup> Year 41, 6 July 2001. According to Art 6 and 17 of Proclamation 250/2001

<sup>18</sup> Federal Courts Proclamation, Proclamation 25/1996, Federal Negarit Gazeta 2<sup>nd</sup> Year 13, 15 February 1996. In.....

<sup>19</sup> Sisay Alemayehu (2008) The justiciability of human rights in the Federal Democratic Republic of Ethiopia, African human rights journal vol. 8 no. 2pp. 07.

inquiry,, especially when the constitutionality of a law or a decision is contested, sometimes in a way that contravenes the relevant constitutional and legislative provisions.

Ethiopian courts also generally avoid referring to or applying the constitution even in relation to issues the disposition of which the provisions on fundamental rights and freedoms and directly relevant, in recent years, some members of the judiciary have taken steps to invoke and directly apply constitutional provisions, still, such decisions remain exception to the general trend of evasion.<sup>20</sup>

### **2.1.2 Judicial Attitude**

Article 13(1) and 37 of FDRE constitution make the fundamental rights and freedoms guaranteed by the Ethiopian constitution justiciable, by making international human right treaties ratified by Ethiopia part of Ethiopian law. Article 9(4) of the constitution extends the jurisdiction of Ethiopian courts to apply their provisions. Article 3(1) of the federal courts establishment proclamation specifically provides that federal courts shall have jurisdiction over international treaties and article 6(1) of the same proclamation states that federal courts shall settle cases or disputes submitted to them on the basis of, among others, international treaties.<sup>21</sup> In practice, however, litigants as well as courts avoid referring to international human right instruments ratified by Ethiopia even in cases where they are directly relevant. Many members of the judiciary believe that rights included in ratified international treaties but which are not clearly guaranteed in domestic laws are not justiciable.<sup>22</sup> Besides, the bill of rights in the constitution is not substitutive of the diversified and elaborated provisions of international human rights treaties as well, courts rarely refer to relevant constitutional provisions.

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<sup>20</sup> Ibid pp. 11

<sup>21</sup> Federal Courts Proclamation, Proclamation 25/1996, Federal Negarit Gazeta 2<sup>nd</sup> Year 13,15 February 1996.

<sup>22</sup> Sissay Yeshanew Protection of the right to housing the right to health in Ethiopia: the legal and police frame work (2006) action professionals “association for the people (APAP) 23 conclusion reached after interviews with judges and advocates of the various levels of courts in .Ethiopia.

In the practice of Ethiopian courts, ratified international human rights treaties are sidelined even where the relevant provisions are unambiguously specific that they are part of the law of the land and that, courts are specifically mandated to apply them should be enough for their direct justiciability, a part from the above point, the federal Supreme Court Cassation Division cited UN charter on the rights of the child.<sup>23</sup> By virtue of Article 4 of proclamation 454/2005, federal as well as regional courts on all levels are bound by the cassation division's interpretation.<sup>24</sup> Thus, they can cite international human right instruments while making judgment.

### **2.1.3 Judicial Role**

According to the constitution and ordinary legislations, human rights are enforceable through judicial and quasi-judicial mechanisms. However, constitutional provisions are rarely invoked and applied by the courts. There is an erroneous tendency to take all cases in which constitutional provisions are invoked or the constitutionality of a law or decision is questioned as "constitutional disputes" that are within the jurisdiction of house of federation. However, according to the applicable law, courts may refer an issue to the constitutional inquiry council only when they believe that a certain constitutional provision needs authoritative interpretation, they are not all barred from deciding cases in which a constitutional provision is invoked or the constitutionality of a law or decision is contested.

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<sup>23</sup> Mrs. Tsedale Demissie Vs Mr. Kifle Demissie, file No 23632, judgment 6 No V, 2006.

<sup>24</sup> Federal Court Proclamation Amendment Proclamation 454/2005, Federal Negarit Gazette.

## 2.2 Ratification and Translation Meagerness

Apparently, general trend of avoiding reference to ratified international human rights treaties by both litigants and courts is partly attributable to the fact that the texts of the treaties have not been published in the official gazette of the state. According to article 71(2) of FDRE Constitution, the president of the country shall proclaim international agreements approved by the house of people's representatives in the Negarit Gazette. Thus, a specific proclamation with the title of the treaty is usually issued upon the ratification of certain international treaty by the House of People's Representatives.<sup>25</sup> Such proclamations incorporate an article with a succinct statement that a treaty (in its full name) is ratified or acceded to. They never reproduce the full text of the treaty in question and translate the treaty provisions into the official language of the country.<sup>26</sup> More strikingly, such proclamations (providing that a treaty is ratified or acceded to) in the official gazette do not exist in relation to some international human right treaties, including ICESCR and ICCPR.<sup>27</sup>

According to article 2(2) of Federal Negarit Gazette establishment proclamation, all laws of the Federal government shall be published in the Federal Negarit Gazette.<sup>28</sup> Article 2(3) of the same proclamation provides that all federal or regional legislative, executive and judicial organs as well as natural or juridical persons shall take judicial notice of laws published in the Gazette it has been argued, based on this provisions, that ratified international treaties should be published in the official Gazette for their

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<sup>25</sup> See, eg, Convention on the rights of the child ratification proclamation 10/1992 and proclamation to provide for accession to the African charter on human and peoples rights, proclamation 114/1998 in.....

<sup>26</sup> The committee on the rights of the child has expressed its concern about the failure to publish the full text of the convention in the official gazette. Concluding observation of the committee on the rights of the child: Ethiopia CRC/C 15/ADD144 (31/01/2001) Para 14 .

<sup>27</sup> Most International human rights treaties were ratified or acceded to by transitional government of Ethiopia between 1991 and 1994. While ratification instruments were deposited with the UN and hence the treaties bind Ethiopia , their ratification was not published in the official gazette, let alone there full text . The effect of the non proclamation of these treaties has been debated in light of the provision of article 71(2) of the constitution . It is how ever argued that the article applies for treaties ratified after 1995 (the year the constitution entered into force ) in that the presidential proclamation is a formality that does not affect the applicability and implementation of the treaties in question .

<sup>28</sup> Proclamation to provide for the establishment of the federal Negarit gazeta , proclamation 3/1995, 22Aug. 1995 , Art 2. Incidentally, regional states have different official gazette of their own

provisions to enforced at domestic level.<sup>29</sup> While the provisions of the federal court proclamaiton, defining the jurisdiction of federal courts and with substantive laws they apply, refer to internaitonal treaties as a different set of laws than federal laws.<sup>30</sup> This means that, ratified treaties are not part of the federal laws that must be published in the Negerit Gazetta in accordance with article 2(2) of the establishment proclamaiton. One may go on to argue based on this that, internaional treaties ratified by Ethiopia may be applied by federal courts irrespective of their publication in the official Gazette. While the converse reading of article 71(2) of the FDRE Constituion implies that the proclamation of ratified treaties in the Negerit Gazette is a formality requirement that must be met, it should not affect their applicability.

In relation to international human right instruments, the ratification of which is published in the official gazette. One may argue that the statement that the treaty is ratified or acceded to is as good as publishing the full text of such an instrument. Those who insist on the need to publish the full text maintain that it's not only up on publication of the treaty in the official gazette that it can be deemed to have been known by the public.

### **2.2.1 Ambivalent effect of Ratification in light of publication**

As one of the most moot matters surrounding the issue of ratification of international human rights instruments whether they have legal effect irrespective of publication within Ethiopia is vague under the FDRE constitution. On this issue, there are two conflicting views in Ethiopia. . These views were in particular reflected during the discussions at the International conference on the Establishment of the Ethiopian Human

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<sup>29</sup> Rakeb Messele Enforcement of human rights in Ethiopia (2002), APAP (several interviewed judges believe that the provision of the proclamation establishing the gaztte hinder the application by courts of the international human rights treaties )

<sup>30</sup> Federal courts proclamation , Proclamation 25/1996 federal Negarit gazzeta Art 3 (1) . Art. 6 (1) (A) also states the federal courts shall settle cases or disputes submitted to them on basis of federal lows and international treaties.

Rights Commission and the Institution of Ombudsman, from May 18-22, 1998, and the symposium on 'The Role of Courts in Enforcement of the Constitution' organized by the Ethiopian Civil Service College, from May 19-20, 2000. Both the Conference and the Symposium were in held in Addis Ababa, Ethiopia.

The first view insists that ratification by the House of peoples' Representatives suffices for conventions to have effect internally. In defense of their position, proponents of this view cite Article 9(4) of the FDRE Constitution. In the argument of these lawyers, an international convention becomes part of Ethiopian law as soon as it is ratified. They insist that publication of the convention adds no validity to the conventions, which are already valid through ratification. According to this view, ratified international human rights convention could, therefore, be applied without the requirement of publication in the Negarit Gazeta.

The other view takes an opposite stand. This view argues that publication of a ratified international convention is a requirement for such conventions to be applicable within Ethiopia. According to this view, publication is a requirement for conventions as much as it is for all other laws enacted by the House of peoples, Representatives.<sup>31</sup> The researcher favors the first view for two reasons.

The first one is for the fact that a law is not created in a vacuum, meaning the ratification by itself means something when incorporated in the constitution with the status endowed there in. The second reason is procedural matters should not affect the very essence of the law i.e. since human rights are sensitive we should interpret the laws positively for the benefit of a right holder.

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<sup>31</sup> Ibrahim Idris (2000), The place of International Conventions in the 1994 FDRE constitution, Journal of Ethiopian law, Vol 20, pp.124

### **2.3 Barely Accessible**

The publicity function of the Gazette, which is required for the benefit of the public, should not serve as a reason to bar citizens from enjoying or invoking their rights in the international instruments ratified by the state and that the knowledge of the public, though important, should not matter that much (in relation specifically to the judicial applicability of the treaty provisions). As such instruments impose the states obligations rather than individual responsibilities. In addition, domestic laws and other obstacles, such as the non-publication of international treaties ratified by a state, can not justify the failure to apply (including judicially) the treaties domestically.

## Chapter Three

### Policy Principle Reference

#### 3.1 Underpinning DPSP to Vindicate Justiciability (*Indian Practice*)

##### Directive Principles of State Policy

These social and economic rights would be jural rights only when they are implemented by appropriate legislation. Till then, they are more in nature of ideals which are to be attained by the state by gradual steps because many of these rights, such as the right to a decent standard of life, depend on a certain standard of economic prosperity which may not so far have been attained by some countries. So long as the process is not complete, the international declaration of these rights stand as a beacon- light of human dignity which would not only inspire the suffering humanity, but remind respective states of their obligation to undertake the legislation required to transform the ideal into a reality.<sup>32</sup> The DPSP's stated under part IV of the Indian constitution states

**39. A Equal Justice and Free legal aids-** The state shall secure that the legal system promotes justice, on a basis of equal opportunity and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

**41. Right to work, to education, and to public assistance in certain cases –** The state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and public assistance in cases of employment, old age, sickness and disablement, and in other cases of undeserved want.

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<sup>32</sup> Durga Das Basu ( 2005) Human rights in Constitutional law ( Along with international Human Rights Documents) pp. 86

**48. A Protection and improvement of environment and safeguarding of forests and**

**wild life.**- The state shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country which reiterates the fact that DPSP reference would not affect the issue of justiciability as art 31- C under part III of the Indian constitution states about the:-

**31-A Saving of laws giving effect to certain directive principles-** Notwithstanding anything contained in art 13, no law giving effect to the policy of the state towards securing all or any of the principles laid down in part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by art. 14 or Art. 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy; provide that where such law is made by the legislature of a state, the provisions of this art. shall not apply thereto unless such law, having been reserved for consideration of the president, has received his assent.<sup>33</sup>

In addition to incorporating socio-economic rights, the FDRE constitution has incorporated various social, economic and cultural objectives and principles that state has to observe for formulation of national policies under chapter ten. This kind incorporation of socio-economic needs in the form of directive principles of state principle is also adopted by other jurisdiction, such as Namibian, Indian and Irish. Though these principles are not directly enforceable, they may affect the interpretation of other rights by being 'read into' those rights or may be relevant in the interpretation of legislation. Some of substantive socio-economic areas for which the principles and objectives are provided in the constitution are health, welfare and living standards, education, clean water, housing, food and social security arts. 89 and 90)

The Ethiopian Constitution has incorporated a number of principles of objectives that public authorities are obliged to be guided by the implementation of the constitution, laws and policies (art. 85(1)). The Constitution stipulates that the government has the duty to

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<sup>33</sup> Ibid pp 676

ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them ( 89(2)). The constitution further stipulates that policies shall aim at providing all citizens access to health, education etc.....(art. 90(1)).<sup>34</sup>

### **3.1.2 National Policy Principle and Objectives**

Chapter ten of the FDRE Constitution is devoted to “National Policy Principles and Objectives” with which any organ of government at both Federal and State levels shall be guided in the implementation of the constitution, other laws and public policies.<sup>35</sup> Articles 89 and 90 of the Constitution provide for the economic and social objectives, respectively. Under the economic objectives, the Government has the duty to, among others, formulate policies that ensure equal benefit from the country’s legacy of intellectual and material resources, and equal opportunity for all to improve their economic conditions. The social objectives require that policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security to the extent the country’s resources permit.

The national policy objectives and principles are the DPSP of the FDRE Constitution. While Article 41 and other relevant provisions of the constitution protect economic and social rights as entitlements of individuals and groups, Articles 89 and 90 extend this

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<sup>34</sup> Rakeb Messele (2002), Enforcement of human rights in Ethiopia, APAP (observation of some judges and advocates)

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

protection by requiring the government to develop policies that ensure the enjoyment of the rights by citizens. As opposed to the former, the policy objectives are not directly enforceable by courts, i.e., they are not directly justiciable.<sup>36</sup> The latter are, however, to be used as tools that guide the interpretation and construction of fundamental rights and freedoms of the FDRE Constitution that include Article 41 and the other provisions with relevance to socio-economic rights. They could be used to give content to the sparse provisions of Article 41 on socio-economic rights. Policies should also be developed and implemented with due respect to fundamental rights. Detailed policies that identify responsible organs and set time frame for implementation are the major vehicles of giving effect to the policy objectives and principles. By virtue of Articles 89 and 90 of the FDRE Constitution, the Ethiopian government is duty bound to adopt and implement such policies in all areas of economic and social rights.

### **3.1.2.1 National Plans of Action**

A national plan of action (sometimes national strategy) is a specific time –bound plan to ensure the full realization of certain right. Each state party to the covenant is required to adopt a national plan of action in respect of each right under the covenant. These plans must include the following items, which are derived from General comment No.14

1. Objectives of the strategy
2. Policies for implementing it
3. Identification of resources for implementing the plan and cost effective means of using them.
4. Indicators for monitoring the enjoyment of the right in question
5. Specific benchmarks as individual goals of achievement
6. Consultation with civil society (which includes the NGO community, the rights holders themselves, academic experts, the private sector and international organizations)
7. Address the problem of discrimination

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<sup>36</sup> Article 85 of the FDRE constitution.

8. Consider framework legislation for implementing the right
9. Remedies for the non-enjoyment of the right
10. Provide a reasonable time-line for its implementation.

While this list is fairly straightforward, some explanation of the role of indicators and benchmarks is warranted.<sup>37</sup>

### **3.2 Indivisibility of Human Rights**

‘In the Vienna human rights conference in 1993, it was noted that it’s the duty of states to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems. Some fundamental human right norms enjoy universal protection by customary international law across all boundaries and civilizations. This holds true for torture. The world community has come to a consensus in Vienna, Austria that all human rights are universal, interdependent and indivisible. The improvement of one right facilitates advancement of the others likewise; the deprivation of one right adversely affects others.’<sup>38</sup>

Today, the protection of human rights is no more the exclusive concern of individual states; it’s rather a matter of global concern in the sense that a violation of human rights in one country triggers the jurisdiction of other countries and entitles them to bring a legal claim against the responsible state. Humanitarian intervention is one among many reasons which justify intervention. One may take the recent Libyan case Availing UN charter when it’s to one’s interest and rejecting it when it’s to its detriment should be stopped by Ethiopia.

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<sup>37</sup> Jeff King (2003), *An Activist Manual on the International Communities on Economic Social and Cultural Rights*, pp 49.

<sup>38</sup> Awol kassim (2009) St. Mary’s University College, *Human Rights Teaching Material*, pp. 12

## **Conclusion**

Human rights are rooted in a shallow manner in the Ethiopian constitution. The major international human rights treaties are part of the law of the land. There are many pieces of ordinary legislation protecting various aspects of human rights. A coherent reading of these legal instruments shows that the classic human rights are protected in the Ethiopian legal system and that their contents are defined.

Consequently, it is a fact that there is an already significant consensus on most of the international standards of human rights through the very cautious and solid process by which they have been verbalized and adopted over the years as well as the wide ratification of most international human rights documents. The controversy as to the protection and promotion of one class of rights while the other is denied, is against the concept of universal human rights. Though, it is argued that socio-economic rights are considered to be too general and vague to be considered to have at least some significant justiciable dimensions. In fact human rights are indivisible and interdependent. Thus irrespective of the states economic, political and cultural backgrounds and development, the protection and promotion of all human rights should be advanced and emphasized.

Concerning the record of Ethiopia in protecting, respecting and promoting human rights, the situation is quite blurred. The 1994 constitution offers a comprehensive agenda of human rights and incorporates all ratified international human rights instruments as the law of the land. Moreover, it also provides for interpretation of domestic legislation to be in conformity with international human rights standards. Nonetheless, lack of enforceability, justiciability and serious breaches of human rights at domestic level have become a matter of great concern to everyone. This shows that implementation of human rights does not solely depend on constitutional or legislative provisions.

Conferring to the constitution and ordinary legislation, human rights are enforceable through judicial and quasi-judicial mechanisms. However, constitutional provisions are rarely invoked and applied by the courts. There is an erroneous tendency to take all cases in which constitutional provisions are invoked or the constitutionality of a law or decision is questioned as constitutional inquiry only when they believe that a certain constitutional provision needs authoritative interpretation. They are not at all barred from deciding cases in which a constitutional provision is invoked or the constitutionality of a law or decision is contested.

The prime concern for enforcing human rights lies with national authorities, mainly the legislature, executive and judiciary. In some countries, international human rights instruments are incorporated into the domestic legal system and can thus be directly implemented in domestic courts. In

some countries, however, national legislation needs to be promulgated before international human rights provisions could be implemented at the national level. Ethiopia mainly follows the dualistic approach, as all international human rights instruments ratified by Ethiopia need to be published in the Federal Law Gazette as per the requirement of proclamation No. 3/1995 which is none-existent. International human rights treaties ratified by Ethiopia are rarely invoked by litigants and applied by courts of law, even in cases that would best be settled by their application. There is now a precedent requiring the judicial application of relevant provisions of ratified treaties. The non-publication of the treaties in the official gazette is partly the reason and hence they should be printed with translations into local languages.

With regard to the already ratified but not yet translated and published human rights instruments, the state must take the necessary measures to publish in a domestic legislation and publicize them at least in the working language of Ethiopia to facilitate the enforceability of human rights in courts of law. The constitution additionally states that any law, customary practice or decision, which contravenes the constitution, shall be of no effect. However, new laws need to fill in the numerous gaps that are created because of this constitutional provision. In addition, many contend that the restricted implementation of human rights is due to the general and vague language used and the absence of a precise elaboration of the normative content of each human right.

## **Recommendation**

It is recommended that the legislature takes steps to amend or enact legislation to ensure that domestic legislation is fully compatible with the principles and provisions of the constitution and international human rights documents. The judicial practice should be brought in line with the law and courts should develop human rights jurisprudence through the application and enforcement of the human rights provisions of the constitution and ratified treaties. Specialized training on human and their justiciability targeting members of the judiciary would reinforce such an endeavor.

Nevertheless, identification and elaboration of areas of the law that require amendment or enactment, necessitates in-depth review and scrutiny. While the legislature should play the major role in this area, NGOs, could also play an vital role before and through the drafting of specific legislation and amendment of unconstitutional provisions. Since NGOs have a broad knowledge on the reality of human rights violations in the country and expertise in specific national issues and international human rights standards, they should undertake on research on specific provisions that are inconsistent with constitutional and international human rights principles, propose amendment and persistently lobby the law making body

for the protection, respect and promotion of human rights at the national level.

However, for such kind of surveys and analysis to be successful, adequate and easily accessible information is a prerequisite. The data collection and recording system of the legal system needs to be reviewed and cases need to be properly categorized as to facilitate research and thorough study. Legal institutions, with possible technical and financial assistance from NGOs, should also identify and record details of any significant jurisprudence from domestic courts that make use of and reference to provisions of human rights standards.

It is also of great importance that the society is aware what human rights are recognized by the constitution and the international human rights standards Ethiopia has ratified. Stakeholders could also play an important role by providing public human rights education in its broadest sense, to develop a culture of human rights by raising the awareness of people of their rights because it is only when someone knows her/his rights that s/he strives to exercise her/his rights, respect other people's rights and seek remedy for the violation of her/his human rights.

In addition, all administrative and judicial authorities should also be aware of the obligations that Ethiopia has assumed in its constitution and the international instruments it has adopted and ratified. The relevant authorities should also be proficient and accustomed with the content of

these instruments to enable them ensure that the state's conduct is in conformity with human rights standards. They should further be aware that neglect of state's responsibility to protect, respect and promote human rights is inconsistent with the international obligation of Ethiopia and the principle of the rule of law. This will facilitate the legitimization process of human rights standards set down by the international human rights law and constitutional and legislative provisions in the country. The Government should also give effect to the rights recognized by the Constitution, ratified international human rights standards and national legislation. Appropriate means of redress or remedies must be available to any individual whose human rights have been violated by legislation, act of officials or private actors. Means of ensuring accountability by the government and impartiality and independence of the judiciary should also be developed. Otherwise, the unchecked power of the government can be a major threat to the dignity of the individual.

In conclusion, the importance of the right to an effective remedy by competent national tribunals for violations of human rights cannot be over-emphasized. However, judicial remedy should not be taken as the sole remedy for violation of human rights. In certain circumstances, administrative remedies might be more appropriate and adequate. However, adequate measures should be taken to make such remedies accessible, affordable, timely and effective.

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## Acronyms

- **FDRE** Federal Democratic Republic of Ethiopia
- **EHRC** Ethiopian Human Rights Commission
- **ICCPR** International Covenant on Civil and Political Rights
- **UDHR** Universal Declaration of Human Rights
- **CHARTER** United Nations Charter
- **ICESCR** International Covenant on Economic, Social and Cultural Rights
- **NGO's** Non-Governmental Organizations
- **ESC** Economic, Social and Cultural Rights
- **OP** Optional Protocol
- **DPSP** Direct Policy State Principle



## **Declaration**

I hereby declare that this paper is my original work and take full responsibility for any failure to observe the conventional rules of citation.

### **Researcher**

Name \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_

### **Advisor**

Name \_\_\_\_\_

Signature \_\_\_\_\_

Date \_\_\_\_\_

Place of Submission; St. Mary's University College

Addis Ababa, Ethiopia