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SOCIO-ECONOMIC AND CULTURAL RIGHTS UNDER THE FDRE CONSTITUTION
THE LAW AND THE PRACTICE

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ACRONYMS

APAP	Action Professionals Association for the People
ICESCR	International Convention on Economic Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
ESC	European Social Charter
FDRE	Federal Democratic Republic of Ethiopia
ESCR	Economic, Social and Cultural Rights
CEDAW	Convention on the Elimination of all forms discrimination against women
ILD	International Labor Organization
ECOSOC	Economic and Social Council
NGO's	Non-Governmental Organizations
NACM	National Association for Court Management
UN	United Nation
WW II	World War Second
ICCPR	International Convenient on Civil and Political Rights
UK	United Kingdom
GA	General Assembly
Eco.	Economies

INTRODUCTION

There is consensus among various legal professionals with regard to the justiciability of civil and political rights. When it comes to economic, social and cultural rights, however, they doubt on their justiciability.

Even though, Ethiopia has become a party to many international human right instruments dealing with socio-economic and cultural rights, the applicability of these instruments at the court lever is very minimal.

There are many legal and practical problems to implement these rights before courts; it is therefore, these problems that the paper tries to see in more depth.

The study is organized into three chapters in the following manner. Chapter one deals with the historical background of socio-economic and cultural rights and the very nature of state parties obligation under the, ICESCR. Chapter two tries to see the controversial issue of the justiciablity of socio-economic rights in light of the different arguments for and against the issue under this chapter. Chapter three looks at the position of socio-economic rights under the FDRE constitution and the practical problems hindering their implementation before courts. Finally, some conclusions and recommendations will be made.

DECLARATION

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

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Signed _____

CHAPTER ONE

BACKGROUND OF SOCIO ECONOMIC AND CULTURAL RIGHTS

1.1. Overview

The scope of human rights isn't restricted to only civil and political rights. But also, include socio-economic and cultural rights. They together determine the integral development of the human person. In spite of this textual recognition of indivisibility, interdependence and interrelatedness it is a fact that greater attention has been given to the civil and political rights than economic social and cultural rights. As a result states have given a little time and few resources to the realization of economic, social and cultural right[1].

They are usually claims that the state must ensure that no one in the society lives in poverty and that every one enjoys the opportunity to develop his/her personality: This is to mean that the state is duty bound to provide & protect certain essential societal services if they aren't delivered by private non-state actors and also to ensure that the quality and quantity of those services is sufficient enough to provide every one with an essential standard of living[2].

The most important international instrument in relation to economic, social and cultural rights is the ICESCR, which was adopted in 1966 and entered into force in 1976. It articulates an international consensus about what the bare minimum social conditions for a dignified life are and includes, the right to work and to just and favorable conditions of work, rest and leisure, to form and join trade unions, special protection for the family, the right to social security including of social insurance

[1] Narrative report of the ICJ conference held in Bangalore, India P. 9,100
[2] Jeff King, an activist manual an Esc rights P. 119

and the right to the enjoyment of the highest attainable standard of physical and mental health[3].

1.1.1. History of Economic Social and Cultural Rights

The historical background ESC are different legal scholars gave their opinion. For Louis Henkin, the first category of rights was civil and political. He also argues that they starts from the revolution in 18th century, particularly in the American Revolution (776) and the French Revolution of 1789, and also mentioned the works of john lock, Thomas Paine and Voltaire. He mentioned that these rights were the logical consequences of the natural law doctrine[4].

On the other hand, the historical development of economic, social and cultural rights is highly connected with the workers struggle for their rights and the industrial revolution. So to study about the historical development of economic social and cultural rights, it is necessary to see about the workers struggle and the industrial revolution.

For the most part of human history hunger and starvation, poverty, ill health and illiteracy have been accepted as an inevitable part of life and these situations have worried humans throughout their life. However, when it has been clear that specific people or institutions were the causes of these specific conditions people have frequently resisted or against[5].

The Peasant's Revolutions in China, the French Revolution and the Mexican Revolution of the early 20th century were main examples of peoples responses to the above mentioned societal problems. Since the revolutions were mainly focused on issues of land, imposition of tax and

[3] John de waal, the bill of rights hand book P. 397-398
[4] Supra note. 2, P. 120
[5] http://www.lumn:edu/humanrts/edumat/IHRIP/circle/modules/ module 2.htm#-edn

other related matters and, the problems of low wages, dangerous working conditions in factories, textile mills and mines for both adults and children and ill health resulting from persistent malnutrition and poor sanitation became dominant and as the time went by these situations were increasingly publicized both in Newspapers and in literatures[6].

Marx called workers from different sectors to seize the means of productions available in the society through a revolution and thereby come to won the fruits of their labor. In addition to this, Saint Simon (1760-1825), Charles Furies (1772-1832) and Robert Owen (1771-1858) are other thinkers who proposed socialist alternatives to capitalism; all these writers discussed the obstacles to capitalism and proposed alternatives to mitigate the ill effects of industrialization[7].

In 1848, the Communist Manifesto was published and in the meantime the working class was in revolt in almost every country in Europe and these popular uprisings had among their goals, the overthrow of autocratic governments, the establishment of democracy, the unification of nations in countries like Germany and Italy and improvements in the conditions of the working class. The major social force behind these widespread revolt was the working class who had been motivated by the ideas of socialism[8]. As a result of these long lasting popular uprisings, social welfare measures were introduced in some European countries. The German chancellor Otto von Bismarck was the first person to introduce basic welfare legislation in 1883 in this respect; at that period several countries adopted factor laws workmen's compensation and health schemes, old age and unemployment insurance for workers increased, banking and communication were subject to state regulation, housing and health were brought under the responsibility of the state.

[6] Ibid
[7] Supra note 2, P. 121
[8] Ibid

Moreover, the Russian Revolution of the early 20th century played the main role in colonial emancipation and was very important to the socialist idea around the world[9].

Right after the end of WWI, part XIII of the Treaty of Versailles provided for the creation of the ILO, among the purposes of which were the promotion of better standards of working conditions and support for the rights of association and the establishment of this int'l organization that was primarily concerned with social inequality and justice in 1919. It heralded a new phase in the struggle for economic and social equality[10].

Mathew Graven identifies three major reasons for the establishment of the ILO. These were:

1. Governments made strong war time promises regarding future social programs to maintain loyalty;
2. During the war workers become internationally organized;
3. The Russian Revolution generated a significant pressure to respond to these demands. In relation to these the need for the national protection of different social interests like health, education and social security grew even more active through out the 1930s[11].

During this period, the USA introduced a variety of social security measures that were collectively known as the "new deal" through president F.D Roosevelt. When much of North America and Europe fell into the great depression which was characterized by high levels of unemployment, food shortage and social deprivation and this document served as the starting point for much of the American social

[9] Supra note 7
[10] Malcolm N Shaw, International Law,
[11] Supra note. 2. P. 122

legislations[12]. In 1941 he made his famous four freedom speech by which he identified four freedoms that he thought were very essential for a dignified life including, freedom of speech, freedom of religion, freedom from want and freedom from fear. According to him, all needs of human beings can be included in these rights[13].

Finally, the impact of WWII up on the development of human right in general and economic, social and cultural rights in particular was immense, as the horrors of the war and the need for an adequate int'l system to maintain int'l peace and security and protection of human rights became apparent to all[14].

1.1.2. Economic Social and Cultural Rights at the UN

1.1.2.1. The International Bill of Rights

As it is stated above, people world wide have long struggled for these basic right and the international concern for the poor and the oppressed has been expressed in many religious, philosophical and national contexts and recently, in various int'l human right instruments[15].

Historically, forced by the barbarism of WWII, the UN General Assembly adopted the UDHR in Dec. 10, 1948 and this Declaration was the first int'l legal effort to set standards towards the promotion and protection of human rights including civil, economic and social rights asserting these rights are part of the foundation of freedom, justice and peace in the world[16]. Thus, the UDHR is one of the earliest attempts to regulate states acts with respect to the promotion of human rights even though it didn't impose certain specific duties upon state parties. In 1966, the ICCPR and

[12] Ibid
[13] Ibid
[14] Supra note 13, P. 249
[15] http://www.escr-net:org/resoruces/resoruces-list:html.
[16] Encyclopedia

the ICESCR were adopted and came in to force in 1976, together with the UDHR these documents form the international bill of rights[17].

The UDHR includes economic and social rights. Some of the socio-economic rights included under the UDHR are the following.

- The right to social security (Art 22);
- The right to work (Art 23);
- The right to rest and leisure (Art 24);
- The right to an adequate standard of living (Art 25);
- The right to education (Art 26);
- The right to participate in the cultural life of the community (Art 27)[18]

1.1.2.2. The Separation of Human Rights into two Covenants

As it is stated earlier, the UDHR didn't impose specific legal obligations up on States Parties and there by didn't envisage how victims of those human right violations bring a court action. To solve these problems, the UN human right commission tried to come up with a covenant with its own enforcement mechanism. To this end, in 1950 the commission decided that despite its agreement on the substantive content of a covenant on civil and political right, it couldn't do the same with respect to ESC rights, it therefore resolved to treat them in a separate covenant to be drafted at its next session in 1951 and, ECOSOC requested that the General assembly make a policy decision regarding the inclusion or exclusion of social rights from the single draft covenant. After painfully drawn out debate in the GA it declared that "...***the enjoyment of civil and political rights and of eco, social and cultural rights are interconnected and interdependent***..." and that eco & social rights

[17] Ibid
[18] Universal declaration of Human Rights Article 22 – 27

must be included in the single draft in a manner which relates them to the civil and political freedoms proclaimed by the draft covenant. This decision was adopted by ECOSOC and work on the draft covenant resumed.

Despite, these clear instructions, the commission continued to treat the rights separately and developed conceptually distinct articles particularly, with regard to the nature of state parties obligations, and a separate supervision system that was to apply uniquely to the economic and social rights provisions of the draft covenant. Faced with this undesirable prospect, ECOSOC asked the GA to reconsider its decision, which it did, thus the GA reversed its initial position and asked that two covenants be drafted separately[19].

According to many commentators, the primary cause for this separation was ideological in that the view by the western world with regard to int'l human rights law in general terms has tended to emphasize the basic civil and political rights of individuals which include due process, freedom of expression, assembly and religion. On the other hand, the Soviet approach stressed on those dealing with socio-economic and cultural rights. Besides, the general approach of the third world states has combined elements of both the previous perspectives[20]. Hence; the ICCPR and ICESCR are highly influenced by the creation of the two ideological camps.

1.1.2.3. The Current International Status of Socio-Economic Rights

Under int'l human rights law as well as with regard to its application at the national level, civil and political rights have in many respects

[19] Supra note. 2, p. 125
[20] Supra note. 10, p. 249

received more attention and legal protection than social rights[21]. But, the world community assembled in Vienna in 1993 under the motivation of the United Nations restated the most fundamental dogma of our contemporary human right principals namely, universality, indivisibility, interdependence and interrelatedness of human rights[22].

There are certain international and regional documents supporting the indivisibility of human rights and there by include social rights in their provision. Some of them include:

- Universal declaration of human rights 1948 (UDHR) Articles, 22-28;
- Child Right Convention which was adapted in 1989 and entered into force in 1990, articles 23,24,26-29[23].
- European Social Charter which was adopted in 1961 and entered into force in 1965[24];

Thus, from the provisions of the regional and int'l human rights instruments, we can conclude that the status of economic, social and cultural rights as human rights in now established beyond question even though, certain conceptions of human rights may continue to down play their importance, it remains indisputable that one can't speak of int'l human rights law without referring also to its highly developed range of economic and social right[25].

[21] Vienna Declaration and program of action, the committee on ESC rights.
[22] Supra note. 1. P. 9
[23] International Human Right Commotion documents
[24] ESC, Banjul Charter, UDHR
[25] Supra note 2, P. 127

1.2. Government Obligations under the Covenant

1.2.1. Progressive Obligations

A progressive obligation under the ICESCR is an obligation imposed up on state parties to implement the rights through time to the maximum of their available resources. As it is clearly apparent the infrastructure necessary to implement all of these socio-economic and cultural rights can't be established over night[26].

The Committee on ESCR in its General Comment 3 paragraph 9 states the following with regard to progressive obligation or realization of socio-economic rights.

> *"The fact that realization overtime or in other words progressively is foreseen under the covenant shouldn't be misinterpreted us depriving the obligation of all meaningful context it is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for every country in ensuring full realization of economic, social and cultural rights on the other hand, the phrase must be read in light of the overall objective, indeed the raison d'etre of the Covenant, which is to establish clear obligations for state parties in respect of the full realization of the rights in question it thus, imposes an obligation to move as expeditiously and effectively as possible to wards that goal"*[27].

As it is stated above, a government is required to do at least three important things to implement its obligations progressively. These are, it must take specific steps. Second, the steps must be expeditions and effective and thirdly, the steps must be deliberate, concrete and targeted as clearly as possible.

[26] Supra note 2, P. 40
[27] United Nation Committee on Esc right General Comment Number three

However, the committee hasn't yet defined what moving expeditiously and effective entails and hence, the committee lacks concrete standard for evaluating the performance of government and their compliance with the covenant. In addition, evaluating the progressive realization of ESC rights requires the availability of data from several periods and it also requires an assessment not only of current performance but also of whether a state is moving expeditiously and effectively towards the goals of the full implementation[28].

Eventually, progressive obligations impose equally difficult obligations on rich countries also since, the obligation is to promote the rights to the maximum of available resources, rich countries must also work hard for the protection and promotion of these rights[29].

1.2.2. Immediate Obligations

In addition to the progressive obligations, certain obligations of immediate effect are imposed upon state parties. Immediate obligations under the Covenant are those state parties' obligations that must be realized at once or as a matter of first priority[30]. We find some instances of immediate obligations under the Covenant which include, the obligation to take steps under the Covenant, to guaranty all the rights put in the covenant on a non-discriminatory basis on the basis of sex, religion, race etc.…

According to the explanation of the Committee, resource constraints are not an excuse for non-compliance with the Covenant in relation to immediate obligations hence, if any of the elements of an immediate obligation are not present within a reasonable period of time, the

[28] Supra note 2, 141
[29] Ibid
[30] Supra note 27

concerned government is in automatic non-compliance with the Covenant[31].

1.2.3. Core Obligations

The other state party's obligation under the Covenant is that of core obligations or minimum core obligations. On the basis of extensive experience and data gained by the committee from the report of state parties, the Committee is of the view that minimum core obligations or minimum essential levels of each of the rights should be met. For instance, a state party in which any significant numbers of individuals are deprived of essential food stuffs, essential primary health care services, basic shelter and housing and most basic forms of education is failing to discharge its obligation under the Covenant[32].

It is the states duty to attribute its failure to meet those minimum core obligations to lack of available resource; it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy as a matter of priority those minimum obligation. It implies that, resource constraints may never be an excuse for failing to implement core obligations[33].

Therefore, the two main points in relation to core obligations are, a state party can't under any circumstance justify its non-compliance with the core obligations which are non-derogable and secondly, core obligations involve the state having the burden of proving resource obligation.

[31] Ibid
[32] Ibid
[33] Supra note 2, P. 44

1.2.4. Violations

A violation in its literal meaning is going against or refuses to obey a law or an agreement[34]. When we see the concept of violation in light of the covenant it is a failure by a state party to comply with an obligation articulated therein, since, the covenant like any other int'l human right instruments confers obligations upon states that require both positive action and restraint, such violations may result either from the failure to implement the provisions there in or form interference by the state party in the exercise of a right[35].

We may cite specific examples from both types of violations from the covenant like the failure to take adequate steps to ensure the equal rights of men and women to the enjoyment of the rights guaranteed in the covenant or to submit periodic reports to the committee are some of the reflections for violations through omissions. On the other hand, imposing restrictions on the right to from trade unions can be a good example of violation by the state through interference[36].

With regard violations we can site the following situations from the covenant it self.

- Refusal to grant the covenant full legal status under domestic legislation (Art 2(1) ICESCR.
- Interference with the Right of Association and to form labors unions (Art 8(1).
- Many states do not provide legal protection against discrimination and some countries systematically

[34] Oxford Dictionary
[35] Supra note 1, P. 33
[36] Ibid

discriminate against particular ethnic, religions or cultural minorities.

- Women in many countries don't enjoy equal rights to work and in some countries ethnic and linguistic minorities are denied the right to use their native language[37];

1.2.5. Retrogressive Measures

A retrogressive measure is any action or measure taken by the government that has the effect of removing or rolling back legislations or institutions previously used to safeguard a right[38].

As it is stated in the Committee's comment, *"If any deliberate retrogressive measures are taken, the state party has the burden of providing that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the covenant in the context of the free use of the state party's maximum available resources[39].*

The most common forms of retrogressive measures would include,

- Drastic reduction in welfare rates without any compensatory measures.
- To cut a budget allocation for a social sector like education, health, housing etc...[40]

1.2.6. Specific Means of Implementing the Rights

According to the Covenant the rights put in the covenant are to be implemented by all appropriate means and some specific obligations which include the following.

[37] Supra Note 1 P. 34
[38] APAP KÇ™‹“ KÖuq‹ u›=¢•T>Á© T%u^© “ vlL© Sw„‹ LÃ ¾]²ÒË ¾eMÖ“ TÖnKÁ
[39] The United Nations Committee on ESC Rights. General Comment number 14
[40] Supra note 2, P. 45

- ***Legislative***: It is the enactment of legislations designed to implement ESC rights, however, legislative measures are not alone sufficient to fulfill the obligations of the covenant. It should be noted that Art 2(1) would often require legislative actions to be taken in cases where existing legislations are in violations of the obligations assumed under the covenant;

- ***Administrative***: Administrative measures under the covenant include for instance, making sure that the various government bodies such as social security agencies, hospital, medical centers, agricultural bureaus and others respect the rights enshrined in the covenant in their day to day activities. Therefore, this is one of the specific methods of implementing social rights at the national level;

- ***Judicial Remedy***: Judicial remedies are usually the natural courses for violations of human rights. The Limburg principals on the implementation of the ICESCR, emphasizes that state parties shall provide for effective remedies including where appropriate judicial remedies because, there doesn't exist yet an individual complaint procedure under the covenant.

1.2.7. International Obligations

The textual source of int'l obligation under the covenant is Art 2(1) which requires states to take steps individually and through int'l cooperation to realize these rights. According to the committee's general comment it calls up on states to refrain from action that interfere directly or indirectly with the enjoyment of the rights in other countries, some of the instances include harmful embargoes[41], and conclusion of damaging int'l trade agreements or debt services (whether bilateral or multi-lateral) and

[41] Supra note 39

also, agreements concerning trade liberalization shouldn't curtail or inhibit a country's capacity to ensure the full realization of these rights[42].

States, also have the duty to protect people in other countries from the harmful practices of transnational private actors based in their jurisdiction, states are further called upon to ensure that their actions as members of int'l organizations respect, protect and fulfill covenant rights[43].

[42] Ibid
[43] Statement of the Committee on ESC Rights to the 3rd Ministerial Conference of WTO

CHAPTER TWO

JUSTICIABILITY OF ESC RIGHTS

2.1. The Concept of Justiciability Defined

Some legal scholars define the concept of justiciability as the capacity of courts or tribunals to enforce Economic social and cultural rights. Justiciability is a jurisdictional issue which is the institutional approach to justiciability. This approach concentrates on the existence of judicial review procedure and at the international level makes the existence of an individual communication procedure a sin-quo-non. It is equally argued that justiciability relates to the essence, content and scope of the rights concerned, which is the content of rights approach[1].

Generally speaking an issue is justifiable when a court is the capable and legitimate institution for resolving it. The central point in deciding such issues have been summarized as follows. It is possible to identify at least four points that are common to all justiciability doctrines.

- The concern for judicial economy, efficiency and effectiveness;
- The concern for dispute being adequately argued in an adversarial forum;
- The concern not to immunize laws and government actions from judicial review and
- The concern not to deny worthy parties and issues a proper judicial resolution[2].

These concerns arise out of two central principles which underline the law of justiciability. First, that courts cannot adjudicate cases beyond

[1] Jeff King. An Activist Manual on ESC Rights, 2004, P.138
[2] Ibid

their institutional capacity and second, that courts cannot adjudicate cases beyond their legitimacy to resolve disputes[3]. Hence, the limiting of cases before courts is economically advantageous and also, it promotes judicial efficiency. In relation to socio-economic and cultural rights, justiciability refers to whether the rights are capable of being entertained and decided by legal principles or courts of justice and other tribunals like any other human rights principles[4].

In relation to the aforementioned points, it is appropriate to note that the justiciability of an issue is relative to the jurisdiction in question. For instance, the power conferred upon the judiciary in South Africa to review the adequacy of public housing measures is express and constitutionalized. The Canadian Charter of Rights and Freedoms mandates courts to determine whether the government has fulfilled its positive obligation to provide minority language schooling to the children of Franco-phone or Anglophone citizens[5].

2.2. Arguments for Justiciability of ESC Rights

A starting assumption for justiciability of Economic social and cultural rights is that they represent fundamental moral entitlements; they spell out the minimum conditions for a dignified life. This is what it means when we call them human rights[6]. There are different arguments supporting the justiciability of socio-economic and cultural rights. Some of them include the following.

One argument is that judicial remedies are the natural courses for protection of human rights. This is so because; the political forum may

[3] APAP, Justifiability of Esc Rights, a Paper Presented in the Training Workshop for the Federal Court judges and Lawyers, Dec. 2006
[4] Sisay Alemahu Yeshanew, Justifiability of the Right to Housing and the Right to Health in Ethiopia: the Legal and Policy Framework, APR. 2006(Unpublished) P. 8
[5] Supra Note 1 P. 138
[6] Supra note. 3

not adequately protect rights. It is problematic to suggest that the political forum is the only appropriate one for protecting human rights[7].

Second argument is that international human rights law obliged state parties to provide legal remedies or explain why they have not. When states ratify the ICESCR, they undertake to implement its provision by all appropriate means. The international committee on Economic Social Cultural Right in its General Comment No. 9 holds that the burden is upon the state to show why the judicial protection of the Covenant's rights is not among the appropriate means[8].

Thirdly, it is known that judicial recourses provide an effective means of protecting Economic social and cultural rights. Courts are effective and disciplined forums for evaluating evidences, adjudicating adversarial claims, reviewing the unforeseen consequences of policies and laws, given an official audience to claiming about rights, legislations and more. This would make judicial recourses the most appropriate way for attending social rights[9].

2.3. Arguments Against the Justiciability of Economic Social Cultural Right

Before considering them in detail, it is helpful to examine a general summary of the arguments forwarded against the justiciability of the socio-economic and cultural rights. Thus are out lined below.

- The rights are progressive and thus there is an absence of core content
- The rights are very vague and would amount to judicial legislation.

[7] Ibid
[8] Ibid
[9] Ibid

- Positive obligations are technically, unsuited for judicial enforcement. Since, courts lack the capacity to decide upon complex policy matters.
- Social rights would be a massive expansion of judicial review. This would undermine the doctrine of the separation of power and would involve un elected judges deciding upon the allocation of scarce resources.

2.3.1. Institutional Capacity

Capacity based arguments against the justiciability of Economic social and cultural rights generally fall into three main categories.

- The unsuitability of positive obligations
- Vagueness of social rights provisions
- The absence of an enforceable core content due to progressive nature of the rights.

2.3.1.1. Positive Obligations

The most common obligation is the notion of courts enforcing positive obligations. This is because; the enforcement of positive rights requires the courts to assess what constitutes satisfactory governmental expenditure in administrative and economic matters that go far beyond their ability to comprehend. Judges are not social scientists; economists nor public administrators and therefore, they are unable to determine what is appropriate in each of this domains[10]. Hence, according to this view, most economic social and cultural rights entail positive duties for the enforcement of which, it is argued, courts are not well placed.

[10] Supra not 1

There are few responses to this argument. The notion of categorizing social rights as exclustivly positive and civil and political rights as exclusively negative has been widely criticized. Since there are list of court enforced positive obligations arising from civil and political claims, like.

- Due process and procedural fairness
- Prisoner's health
- Life, liberty, and security of the person

As it is clearly apparent, the above-mentioned list of rights would not be realized with out the state being actively involved. Conversely there are economic, social and cultural right that impose only negative obligations, for instance,

- Respecting the rights to form trade unions
- The rights of parents to send their children to private schools etc.

These rights does not require the state to do any thing, all it does is require the state to recognize the right[11]. Finally, it can be argued that even through, economic, social and cultural rights involve an increasing number of positive obligations, courts are capable of enforcing the rights. So the positive rights objection would not exclude all social rights from being justifiable.

2.3.1.2. Vagueness

An argument which was accepted for many years with regard to the justiciability of socio-economic and cultural rights was that, in order to be legally enforceable; rights need to be precisely drafted. It was asserted that Economic social and cultural rights were vague and imprecisely

[11] ICJ, Reprot of the ICJ conference head in Bangalor, India.

worded. Since, the rights are aspirational and programmatic; according to this view, courts of law are unable to convert abstract values such as 'the right to an adequate standard of living' in to enforceable court order. Civil and political rights, it was argued, are precisely drafted and accordingly more suited to adjudication[12].

Generally speaking, according to this view, in so far as social rights give rise to aspirations such as the right of all work, or to a descent standard of living, the right are in principle too vague to determine whether a violation has occurred or not.

In response, it may be argued that such problem could be solved through judicial elaboration. The general nature of the rights does not by itself preclude the justiciability of the rights[13].

It is know that courts are constantly engaged in deciding upon very vague concepts. The concepts of liberty, reasonableness, due diligence, efficiency, expression and proportionality are all at least as vague as economic, social and cultural rights concepts[14].

2.3.1.3. Absence of an Enforceable Core Content

This argument relates to the idea that because, the rights are to be implemented progressively pursuant to article 2(1) of the ICESCR[15], there is in principle, no minimum starting requirement that judicial authorities can identity and enforce. The argument emphasizes in the need to have a threshold before courts can enforce the rights[16].

[12] Sandy Ruxton & Razia Karim "beyond civil rights, developing Esc rights in the UK, Oxfam Working Paper, 1997. P. 13
[13] Supra note 2 P. 143
[14] Ibid
[15] Art. 2(1) of the ICESCR
[16] Supra note 3

To the contrary, one can argue that; the absence of core content claim is incorrect because, it is contradicted by the authorities of the bodies and experts' best acquainted with the nature of social rights obligations. In General Comment No 3 the Committee on Economic-Social and cultural rights clarifies that core content is necessarily part of each right under the Covenant. Paragraph ten states the following:

> *"On the basis of the extensive experience gained by the committee as well as by the body that precede it, over a period of more than a decade of examining states parties reports to the committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is upon every state party[17]"*

The Committee equates core obligations with 'minimum essential levels of each of the rights', it is thus difficult to argue that there are no minimum core obligations arising from the ICESCR. [18].

The second argument against the absence of core content claim is that, progressive obligations are themselves justiciable. Article 2(1) requires state parties to take concrete and expeditious steps. The Committee is entitled to question whether a step effectively advances the rights in question or not[19].

In conclusion, the arguments against an absence of core content are misguided. Because there is in principle an identifiable core content to social rights and secondly, core content is not strictly necessary for judicial review.

[17] United Nation Committee on Esc Rights General Comment Number three
[18] Supra Note 1 P. 145
[19] Ibid

2.3.2. Institutional Legitimacy

Those who oppose the justiciability of socio-economic and cultural rights raises arguments based on the doctrine of separation of power. Accordingly, making the rights justifiable will amount to interfering in the power of legislative branch of the government[20]. One constitutional scholar expresses the general concern as follows:

> *"Economic and social rights involve a massive expansion of judicial review, since it would bring under judicial scrutiny all the elements of a modern welfare state; including the regulation of trades and professions, the adequacy of labor standards and bankruptcy laws and of course, the level of public expenditures on social programs[21]"*

Responses to these arguments vary according to the jurisdiction in question and some of them include the following:-

2.3.2.1. Express Mandate

The first response is that the problem with regard to the massive expansion of judicial review can be addressed by an express legislative mandate. The main concern is that courts will assume powers without the proper authorization by the legislative assembly. This is particularly so, where courts are asked to interperate existing legal provisions in a way that includes protection of social rights. However, if a parliament takes the clear step of enacting social rights legislations authorizing judicial review, there will not be a transgression, in such case the authorization is clear[22].

[20] Supra Note 12 P. 15
[21] Supra Note 3
[22] Ibid

2.3.2.2. Social Rights do not Always Involve Great Expenses

A related issue is that social rights involve expansions in to areas of serious fiscal concern. There are a range of social rights the courts can enforce without great expense. Some of them includes the following:

- The right to form and join trade unions
- Protection against arbitrary eviction
- Non-discrimination in access to employment
- Non-discrimination in access to housing and social security benefits etc[23].

There are also cases which the amount of cost to the government appears insignificant compared to the social rights in question.

2.3.2.3. Remedial Flexibility

Judges can declare a provision justifiable without enforcing it. Judges may effectively face three options when faced with a social rights claim that they deem justifiable[24].

- Deny that the violation took place
- Declare that a violation took place
- Declare a violation and choose the least intrusive remedial options like, issuing injunctions against behaviors that actively interferes with the right, provision of inexpensive temporary facilities[25].

2.3.2.4. Paramountacy Argument

Eventually, the problem of expanding judicial review power of courts and deciding upon resource constraints is outweighed by the unanswered

[23] Supra note 12 P. 16
[24] Ibid
[25] Ibid

violation of human rights. The protection of human rights must remain the paramount consideration. It is important to note that one is not asking the courts to order the state to provide unaffordable services. The very concept of social rights is that the state is obligated to provide "to the maximum of available resources", but if it can be demonstrated that resources are lacking, then the court can't compel the state to do anything[26].

[26] Ibid

CHAPTER THREE

ECONOMIC SOCIAL AND CULTURAL RIGHTS UNDER THE FDRE CONSTITUTION

3.1. Economic Social and Cultural Rights under the FDRE Constitution

As it is repeatedly stated above, even if the ICESCR has consistently proclaimed that all human rights are indivisible, interdependent and interrelated, responses to violations of socio-economic and cultural rights are lower compare to civil and political rights.[1]

The inclusion of socio-economic and cultural rights as justiciable rights in a national constitution is relatively recent development.

Ethiopia has ratified different international instruments dealing directly or indirectly with socio-economic and cultural rights in different times. This includes the following:

- ICESCR
- UDHR
- CEDAW
- CRC
- African charter on human and people right[2]

By virtue, of article 9(4) of FDRE constitution which provides, "all international ratified by Ethiopia are integral part of the law of the land".[3] The said international agreements which Ethiopia has ratified are

[1] Rakeb Messele, Enforcement of Human Rights in Ethiopia, research sub contracted by APAP, 31 Aug 2002. P.33
[2] Getachew Assefa, Problems of implementing international human rights law by Ethiopian Courts, P.5
[3] FDRE Constitution, Art. 9(4)

incorporated as parts of our law. Therefore we can say that the FDRE constitution is one of the main domestic legal documents which gives recognition to socio-economic and cultural rights[4]. Hence, the constitution has recognized a number of socio-economic rights as justiciable human rights, under article 41.

Hence, from the constitutional provisions we can conclude that the categorizing of socio-economic and cultural rights under one heading in article 41 separately from civil and political rights gives the impression that the interdependence, indivisibility and interrelatedness of human rights is not given due emphasis and also the socio-economic and cultural right provisions are not well elaborated in a way that ensure their justicibility.[5]

3.1.1. National Policy Principles and Objectives

In addition to, incorporating socio-economic rights, the FDRE constitution has incorporated various social, economic and cultural objectives and principles that the state has to observe for formulation of national policies under chapter ten. This kind of incorporation of socio-economic needs in the form of directive principles of state policy is also adopted by other jurisdictions, such as, the Namibian, Indian and Irish, though, these principles are not directly enforceable, they may affect the interpretation of other rights.[6] Accordingly, and these socio-economic and cultural objectives included the following:

[4] Supra note. 1 P.33
[5] Supra note 3 Art. 41(1-9)
[6] Supra note. 1 P. 34

3.1.2. Beneficiaries of Economic Social and Cultural Rights Under the FDERE Constitution

Most of the socio-economic and cultural rights which are listed under article 41 are formulated for the benefit of every Ethiopian though; some are for the benefit of a defined group of beneficiaries such as:

- The physical and mentally disabled
- The aged and children who are left with out parents or guardian
- Ethiopian farmers and pastoralists.[7]

Moreover, most of the socio-economic and cultural objectives and principles for state policy under article 89-91 are also formulated for the benefit of all Ethiopians though; some are for the benefit of a defined group of beneficiaries like:

- Nations, nationalities and peoples least advantaged
- Women
- Victims of disaster etc..[8]

None of the rights are explicitly formulated for the benefit of every one that is, the constitution has excluded non-citizens from claiming the socio-economic rights put under the constitution, with regard to this issue Article 2(3) of the ICESCR provides the following:

"Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present covenant to non-nationals"[9]

[7] Supra note 3 Art. 41
[8] Id Art. 89
[9] Article 2(3) of the ICE SCR

3.1.3. Duty Bearers under Economic social and cultural rights in the FDRE Constitution

According to Article 13 (1) of the FDRE Constitution;

> *"All federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter"*[10]

3.1.4. States Obligation Under the FDRE Constitution

- The obligation to respect;
- The obligation to protect and
- The obligation to fulfill (facilitate, provide and promote)[11]

The obligation to respect requires states to refrain from interfering directly or indirectly with the enjoyment of the rights. Some of the instances in this regard,

- Refraining from forced evictions;
- Refraining from denying or limiting equal access to various infrastructural facilities like schools and health centers etc…[12]

The obligation to protect on the other hand requires states to take measures that prevent third parties from interfering with the rights. States for instance have duties in this respect:

- To adopt legislations;
- To take other measures ensuring equal access to health care and health related services provided by third parties;

[10] Supra note 3 Art. 13(1)
[11] Sisay Alemahu Yeshanew, justiciability of the right to housing and the right to health in Ethiopia: the legal and policy framework; APR, 2006. P. 15
[12] Jeff King, an activist manual of Esc rights, draft 5 (wits associates Pvt limited/2004, P. 39)

- To prevent the violations of any individuals rights to housing by any other individual or private non-state actors like land lords, land owners and property developers.

When the aforementioned infringements occur it should act to preclude further deprivations as well as guaranteeing access to legal remedies.[13] Some of the violations in this regard from the constitution include;

- Article 41(6) which places a positive duty on the state to pursue policies which aim to expand job opportunities for the unemployed and the poor.[14]
- Article 41(4) which states that the state has the obligation for provide to the public education.[15]

Finally, the obligation to fulfill requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realizations of socio-economic and cultural rights.[16]

Some of the instance with respect to states obligation to fulfill socio-economic rights under the FDRE constitution includes;

- The allocation of resources for the realization of the socio-economic rights provided in the constitution; [17]
- Direct provision of basic needs when no other alternative are available to the individual like, for instance article 36(5) which provides the following "the state shall accord special protection to orphans and shall encourage the establishment of institutions

[13] Supra note. 3 Art. 41(3)
[14] Ibid Art. 41(6)
[15] Id. Art. 41(4)
[16] Supra note 12, P. 41
[17] Supra note. 3, Art. 41

which insure and promote their adoption and advance their welfare and education"[18]

3.2. Practical Problems of Economic Social and Cultural Rights at the Court Level

3.2.1. The Problem of Lack of Awareness

As the writer has tried to mention earlier in this paper, Ethiopia has become a party to many international human rights treaties dealing with socio-economic and cultural rights, however, the great majority of judges, administrative organs, legislative organs, legal professionals and other role players around the judiciary are not aware of the detailed contents of these socio-economic and cultural rights.[19]

Lack of awareness among the legal community in general and the judiciary in particular is among the major reasons that impede the implementation of economic social and cultural rights in our courts.

Making this information readily available to the general pubic is pivotal role for the success of the right to make economic social and cultural rights applicable before courts, and, human rights education which encompasses socio-economic rights is crucial to inform the society and the judiciary so that, they may be able to pursue their rights more rigorously since, in the absence of adequate knowledge of rights and the mechanisms available to realize them, violations can not be recognized and rights can not be protected.

[18] Id. Art. 36(5)
[19] APAP, operational manual; 2005, P. 3. (Organizational background)

3.2.2. The Problem with Respect to Lack of Specific Implementing Legislations

The second problem to the justiciabilty of Economic social and cultural rights is the lack of specific implementing legislation to take the rights in the international instrument and the constitution into effect. The rights that are put forwarded in the international instruments and the federal constitution regarding Economic social and cultural rights are not fully capable of being used by individuals since, many of them are too generally stated and it would be extremely difficult to use them to specific cases.[20]

The problem of lack of specific implementing legislation is concerned, most of the judges and legal professionals agreed that is necessary for the legislature to promulgate specific legislations which elaborate and give effect to the general provisions of the constitutions dealing with economic social and cultural rights since the legislature is better equipped and placed to ascertain the needs of the society, and respond to those needs and expresses these in specific legislations.

Initiation and enactment of specific legislations plays a pivotal role in the process of making Economic social and cultural rights justiciable.

3.2.3. Lack of Sufficient Connection Between Human Rights Activities and Courts

According to a study made by Oxfam which aimed to explore the potential for developing further activities on economic social and cultural rights in the UK in 1997, the NGO sector is best placed to:

- Influence social welfare policies.

[20] Supra note 2, P.36

- To promote and assess awareness of economic social and cultural rights.
- To build support for economic social and cultural rights among key sectors of a government.
- Lobby and disseminate information and materials on Economic social and cultural rights.[21]

For a sustained enforceability of economic social and cultural rights at the national level various human rights activists mainly NGOs engaged in the promotion of these rights and play a vital role.

- Upgrading the awareness of judges and other legal professional and justice partners concerning the very content of Economic social and cultural rights through various trainings, publications and other medias;
- Creating a favorable atmosphere in lobbying the government of its duties and responsibilities under the international covenant and the constitution;
- Raising the awareness of the general public concerning his Economic social and cultural rights so as to enable him to claim his rights in case of violations etc.

3.2.4. Problems Related to Court's Institutional Capacity Building Programs

In order to realize their social goals and objectives, courts should be equipped with the necessary technical, professional, material and financial facilities which in turn, can be achieved through launching various capacity building programs in the areas of:[22]

- Information technology

[21] Sandy Ruxton & Razia Karim: beyond civil rights, developing Esc rights in the UK, Oxfam working paper, 1997, P. 47s
[22] NACM. Available at:

- Leadership
- Budget and finance
- Proper case flow management system
- Human resource management
- Court community communication system

Courts are among one of the main branches of the government that are performing their activities with very backward technologies which in turn, is directly related with the absence of sufficient institutional capacity building programs. Even if there is internet service in many of the first instance courts that the writer has visited, they do not have time that enable them to update their knowledge of this rights by looking at the experience in other countries which is the result of again lack of capacity building programs since, this shortage of time is the result of delay and burden of cases on judges.

The importance of modern information technology system in the enforcement of Economic social and cultural rights in this regard is greater compared to the other areas since, it would create the opportunity for judges and other legal professional around courts to assess the experience in other countries and form the international perspective for instance the availability of internet access would help the judge to update his knowledge of the current international legal situation on Economic social and cultural rights by searching from online libraries, journals, articles and UN General comments.

Judges should also have enough knowledge on how to operate the information technology system since, there must be a competent person behind the system, which in turn, requires additional costs from the courts limited resources to train judges. Besides this, shortage of time is another major problem that hinders judges from working on the

information technology system which is the result of mainly delay and burden of cases on judges that may emanate from:-

- Poor case flow management system
- Poor leadership
- Poor human resource management system
- Insufficient budget allocated from the government etc…

3.3. Conclusions

As it is briefly discussed in the main part of this paper, economic, social, and cultural rights have traditionally been accorded lower status than civil and political rights, in spite of the fact that, the drafters of the UDHR, the document generally regarded as the foundation stone of international human rights law and other regional human right instruments including, the European Social Character, the African (Banjul) Charter on Human and People Rights, the American Convention on Human Rights, recognized the indivisibility of the two families of rights. Since, the end of the cold war and after the adoption of Vienna Declaration in 1993, there has been a growing acceptance of the concept of the indivisibility. There is certainly far less reluctance to regard economic, social and cultural rights as legal rights and an increasing commitment to providing means of redress for violations of ESC rights.

The ICESCR, which was adopted in 1966 and entered into force in 1976, is the most important international instrument dealing with socio-economical rights. Besides the ICESCR, there are also various regional and international human right instruments containing socio-economic and cultural rights provisions in their substantive part, such as the UDHR, CEDAW, CRC, African Charter on Human and Peoples Right, the European Social Charter and the American Convention on human and peoples right are among the main ones.

Though, Ethiopia has become a party to many of the aforementioned international and regional human right instruments, and has also put some of these fundamental rights in its constitution. There are many problems of implementation of these international instruments, some of these problems are imputable to the court and, some are caused by government functionaries.

The widely known problems of the controversial issues of the status of international instruments in our legal system, non-publication of these instruments in the Nagarit Gazetta, and the problem with respect to the power of interpretation of the constitution. There are also other problems that complement the said problems in relation to the non-implementation of these rights.

3.4. Recommendation

The first problem, in this regard is the lack of awareness of the legal community in general and the judiciary in particular, about the very content of the rights and these problem as to my opinion can be avoided through.

- Encouraging the development of education on human rights to the society in general and to all around the justice system (court customers, executive bodies, parliamentarians and administrative bodies)
- The inclusion of human rights education in the national curriculum to a great extent especially, as part of compulsory education etc.…
- These various human rights education programs should emphasize on the indivisibility and universality of human rights and equal importance of socio-economic rights with civil and political rights.

- Main streaming of economic, social and cultural rights in different government administration systems.

The second problem, in relation to the non-implementation of socio-economic rights is, the problem of lack of specific implementing legislation, in this regard, it must be stressed that in our country, where there is a lack of qualified judges, non-qualified persons to whom legal training of short period is given are appointed, the existence of specific legislation becomes a necessity rather than an option, because, this problem can be avoided through:-

- Prompt enactment of specific legislations to take these rights before courts of law.
- Inclusion of some modern procedural setups that greatly help to take socio-economic and cultural rights before courts.

In this regard, lawyers and bar associations can help to push for the establishment of such procedural mechanisms, whose primary role will be focused towards promoting the acceptance of these rights as fundamental and monitoring their protection. Besides, they can:

- Introduce the very content of these rights to the general public.
- Lobby the government of its duties under the covenant and the constitution.
- More importantly, they can actively participate in the enactment process.

The third problem, in relation to the non-implementation of these rights before court of law is the lack of sufficient connection between various human right activities and courts a different level. In this regard,

- NGO's should design appropriate strategies and materials for raising awareness among individuals and civil society (schools,

religious groups or special interest groups about key issues in relation to socio-economic and cultural right issues.

- They should explore innovative methods for disseminating such information - like.
    - Trainings
    - Lobbying workshops
    - Publications and Researches etc…
- Support human rights education programs technically and financially.

More importantly, in order for the realization of these rights NGO's must cooperate with courts at various levels and there should be a clear legal and structural framework by which courts and NGO's work hand in hand. In this regard:

- The government must facilitate these cooperative working environment through various mechanism, like:
    - Supporting them financially
    - Technical assistance
    - Enacting appropriate legal framework

The fourth problem is a problem related to courts institutional capacity building programs. Accordingly, this problem can be avoided through:

- Launching various capacity building programs around courts and the judiciary in areas of:
    - Proper information technology systems.
    - Sufficient budget that enable courts to perform various activities other than their ordinary activities, like:

        - Conducting various trainings to the general public.
        - Training judges and other legal professionals of various human right issues.
    - Proper human resource management system in a way that avoids backlog and delay of cases.
    - Appropriate leadership system etc..

These problems, as it is apparent, and highly related with government functionaries and as to my opinion the justice sector reform program, currently underway in our country should focus on the above said areas.

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