



Judicial Implementation of Socio-Economic Rights in Africa

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Submitted to
Central European University
Department of Legal Studies

In partial fulfilment of the requirements for the degree of Master of Laws in
Human Rights

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Budapest, Hungary
2007

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Acknowledgments

Many persons have helped me, directly or indirectly, in the preparation of this thesis research work. I would like to express my thanks to all of them. The following, however, deserve my express acknowledgement.

First and foremost, I would like to express my sincere and deep gratitude to my supervisor, Marie-Pierre Granger, Assistant Professor at Legal Studies Department-CEU. I am particularly grateful for her invaluable comments and able guidance on what was for me the most difficult phase in the preparation of this thesis paper. My warm thanks also goes to Renata Uitz, Associate Professor at Legal Studies Department-CEU, among others, for providing me with important material source for the research which I wouldn't be able to get on my own. My gratitude also goes to many colleagues in Action-Professionals' Association for the People, and for my friends, Nikodimos Alemayehu and Solomon Mengesha, for whom I have great regard.

I also like to take this opportunity to gratefully acknowledge Open Society Justice Initiative (OSJI) for making my study at CEU possible; and also my mother, Yamrot Abate, for her relentless support and encouragement throughout my study. I also thank the CEU community, particularly the people at the Legal Studies Department, for making my stay at CUE pleasurable.

Executive Summary

Ensuring dignity of the human person commands addressing rights concerns of humans in civil, political, social, economic and cultural spheres of lives. Such a holistic approach to human rights has long been acknowledged since 1948, when the United Nations Universal Declaration of Human Rights (UDHR) is adopted; and subsequently been echoed in various international and regional human rights instruments.

After decades have passed since the relevant international and regional human rights instruments are adopted, millions of people in developing countries, particularly in the sub-Saharan Africa, still lack access to basic necessities of life. Indeed, resource constraint can be a challenge for African states in realizing fully socio-economic rights of all persons under their jurisdiction. At the same time, however, it is shown that low level of accountability in policy making and prioritizing on the part of many governments in Africa have negatively affected the effort to alleviate the situation of millions of Africans in dreadful socio-economic conditions.

Socio-economic rights could mean little for those who benefit from the rights most if rights violations are not redressed by appropriate remedies. In this regard, the judiciary can play an important role to play in terms of enhancing accountability of political organs towards the poor, and ultimately in ensuring dignity for all.

However, as the theory and practise of human rights places little attention to socio-economic rights, judicial implementation of these rights is not as easy as that of civil and political rights. Consequently, it is claimed that socio-economic rights have no judicially manageable standards. Moreover, it is argued that judicial enforcement of the socio-economic rights will go against constitutionalism, particularly the principle of separation of powers. Accordingly, many states in Africa perceive these rights as non-justiciable rights. Such perception, of course, precludes the judiciary's role in implementing the rights.

This thesis paper argues that, with due care to the concern of constitutionalism- obviously an important matter to African states- socio-economic rights can and should be judicially enforced. First, the thesis paper tries to demonstrate the availability of judicially manageable socio-economic rights standards good enough to guide African states implement the rights through judicial means. To this end, the thesis paper primarily uses socio-economic rights standards established by the African Regional Human Rights System. Moreover, it will show the prospect and actual implementation of the rights in two African countries, namely South Africa and Ethiopia. In this regard, factors affecting judicial implementation of the rights as well as the performance of judicial bodies in the two countries will be examined.

Chapter One – Introduction

Grave atrocities committed against the human person during the Second World War was a wake up call for the international community to establish some form of mechanism for promoting and protecting the dignity of the human person at international level. In fact, “hard lessons” the international community got from the experience of the War are reflected in Charter of the United Nations (UN Charter),¹ which emphasizes on the importance of promoting and encouraging respect for human rights and fundamental freedoms for all as a condition for maintaining international peace and stability.

Close reading of the UN Charter reveals that the Charter envisages not only of rights pertaining to individual autonomy and liberty as civil and political rights, but also rights related to the fulfilment of basic human needs or socio-economic nature such as health, education, food and housing.² This holistic approach to human rights indeed reinforces what the US President Franklin Roosevelt famously articulated in 1941 as ‘Freedom from Want’, by which he meant securing to all everywhere basic human needs without which ‘liberty is demeaned and endangered’.³

¹ Office of the High Commission for Human Rights, UN, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 683 (Professional Training Series No. 9. 2003) [hereinafter OHCHR Human Rights Manual] (accessible at <http://www.ohchr.org/english/about/publications/docs/titlepage.pdf>).

² See Articles 55(a), 55(b)) and 55(c), United Nations Charter, adopted in 26 June 1945, 1 UNTS xvi.

³ Roosevelt Institute, ‘Award of the Freedom from Want Medal to Marguerite Barankitse’ (http://www.feri.org/common/news/info_detail.cfm?ClientID=11005&QID=2169 accessed on September 17, 2007)

Same approach is further strengthened by the adoption of the 1948 United Nation's Universal Declaration of Human Rights (UDHR);⁴ which guaranteed socio- economic rights on equal footing with civil and political rights.

Surely, the UDHR has served as a foundation for the adoption of a range of legally binding international and regional human rights instruments guaranteeing socio-economic rights, including the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ and the 1981 African Charter on Human and Peoples' Rights.⁶ Moreover, internationally and regionally guaranteed socio-economic rights have further been elaborated by treaty monitoring bodies.

Although recognition of the rights is an important step in realizing rights, it is by no means sufficient measure to actualize them. After decades have passed since the rights have been proclaimed by the international community, the promises of socio-economic rights continue to be a distant dream for millions of people in developing countries,

4 OHCHR Human Rights Manual, supra note 1, at 684.

⁵ International Covenant on Economic, Social and Cultural Rights adopted by the General assembly of the United Nations, Resolution 2200 (XXI) on December 16, 1966[hereinafter ICESCR].

⁶ The African Charter on Human and Peoples' Rights, Adopted by the eighteenth Assembly of Heads of State and Government, June 1981 - Nairobi, Kenya [hereinafter African Charter].

Other examples of principal regional human rights instruments guaranteeing socio-economic rights are the American Convention on Human Rights (1969), Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988), the European Social Charter (1961) and the European Social Charter (Revised) (1996).

particularly in sub-Saharan Africa.⁷ Former United Nations' Secretary General, Kofi Annan, in fact said that:

After the years invested in the elaboration of an international code of conduct in human rights--as embodied in international conventions and other legally binding instruments--the priority now is to translate these norms and standards into national legislation and national practices, thus bringing about real change in peoples' lives.⁸

Specifically in the African context, it is also pointed out that the gap between international or regional recognition of (socio-economic) rights and their national or local implementation in Africa has remained to be the most problematic aspect of the international effort to ensure universal respect for the dignity of the human person.⁹

Accordingly, concern for universal respect of human dignity should dictate international, regional and national human rights scholars and defenders to put their effort more on the implementation side of internationally and regionally guaranteed socio-economic rights in Africa.

African leaders often try to justify the dismal record of socio-economic rights situation in the continent by citing resource limitation. While resource limitation can be a challenge

⁷ UNDP 2006 Human Development Index (United Nations Development Program, 2006). (accessible at http://hdr.undp.org/hdr2006/pdfs/report/HDR_2006_Tables.pdf) The record shows most African countries, specifically sub-Saharan African countries, ranking at the bottom, with dismal socio-economic figures.

⁸ Quoted in George William Mugwanya, *Human Rights in Africa: Enhancing Human Rights Through the African Human Rights System*, 185 (Transnational Publishers, Inc, 2003).

⁹ Palamagamba John Kabudi, *Human Rights Jurisprudence in East Africa: A Comparative Study of Fundamental Rights and Freedoms of the Individual in Tanzania, Kenya and Uganda*, 4 (Humburger Gesellschaft fur Volkerrecht und Auswartige, Hamburg, 1995).

for many African states, governmental actions and inactions are also to blame for the status quo.

In the Africa continent a significant amount of resource has been, and continue to be, lost as a result of violent conflicts. And most of the recent conflicts in the continent are reported to be “against poverty and governmental inaction in the face of destitution”.¹⁰ Moreover, dismal record the rights situation in many African countries is attributed to “skewed prioritization of policies and a debilitating lack of public accountability” on the part of governments.¹¹ This is so despite the fact that, increasingly many African countries are accepting democracy as a basis of governance.¹² In fact, even in South Africa (a relatively functioning democracy with a strong constitutional commitment to socio-economic rights) it is observed that political organs of a state, i.e the legislator and executive ignore or violate socio-economic rights of the poor and vulnerable segments of society. The country’s judiciary had to be involved in order that socio-economic rights of these people are complied with by the political organs.

Notwithstanding the need and importance of reinforcing the cause of socio-economic rights in Africa, it is sad to note that in Africa and beyond, socio-economic rights are

¹⁰ Shedrack C. Agbakwa, *Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights* 5 Yale Hum. Rts. & Dev. L.J. 177, 184 (2002).

¹¹ Dejo Olowu, *Human Development Challenges in Africa: A Rights-Based Approach*, 5 San Diego Int’l L. J. 179, 198 (2004).

¹² *Id.* at 192.

much less known and also enforced than civil and political rights. According to prominent scholars on the field, socio-economic rights have often been neglected both in theory and practice of human rights as compared to civil and political rights.¹³ Specifically the African region human rights body-the African Commission on Human and People's Rights in 2004 has adopted a declaration expressing its concern regarding the marginal position these rights continue to possess in the continent.¹⁴ Still more, several human rights scholars and activists in Africa,¹⁵ including Nsongurua J. Udombana,¹⁶ and Dr Ibrahim Wani,¹⁷ have also echoed the same concern.

Considering political organs failure in delivering the promise of socio-economic rights to the millions of people in the continent, the need for emphasizing judicial implementation of the rights in the continent cannot thus be overemphasized. This thesis paper will

¹³ Asbjørn et al. (eds.), *Economic, Social and Cultural Rights*, 3 (2D ed., 2001).

¹⁴ Pretoria Declaration on Economic, Social and Cultural Rights in Africa adopted by the African Commission on Human and Peoples' Rights at its 36th session in December 2004. preamble par. 4; compiled by Heyns and Killander (ed.s), *Compendiums of Key Human Rights Documents of the African Union*, 315 (3D ed., 2007).

¹⁵ J. Oloka-Onyango, *Reinforcing Marginalized Rights in an age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa*, 18 Am. U. Int'l L. Rev. 851, 852-854 (2003). David Marcus, *The Normative Development of Socioeconomic Rights through Supranational Adjudication*, 42 Stan. J. Int'l L. 53, 55 (2006). J. Oloka-Onyango, *Beyond the Rhetoric: Reinigorating the Struggle for Economic and Social Rights in Africa*, California Western International Law Journal Volume 26 Fall Number 1, par. 1 (1995). (<http://humanrights.law.monash.edu.au/africa/Oloka-Onyango.html> last accessed on September 17, 2007)

¹⁶ Nsongurua J. Udombana, *Can the Leopard Change its Spots? The African Union Treaty and Human Rights: Critical Essay*, 17 Am. U. Int'l L. Rev. 1177, 1185 (2002).

¹⁷ Dr Ibrahim Wani, Regional Representative of the OHCHR Regional Office in Addis Ababa, Ethiopia on a Meeting Organized by Addis Ababa University and UNESCO, ADDIS ABABA 9 – 11 MARCH 2005, on "Priorities for Research to advance Economic, Social and Cultural Rights in Africa". (accessible at http://portal.unesco.org/shs/en/files/8538/11303345311final_report.pdf/final_report.pdf)

therefore deal with judicial implementation of the rights in Africa. It is hoped that the outcome of the paper will contribute in narrowing the intellectual and implementation gap surrounding judicial enforcement of socio-economic rights in Africa and beyond.

Domestic judicial bodies have, at least in theory, the opportunity and duty to give effect to international and/or regional human rights commitments of a state. As simple as the statement might sound regarding civil and political rights, it may, however, tantamount to oversimplification in respect to socio-economic rights. Whether or not socio-economic rights are capable of being implemented by judicial means, if so how; has been, and continue to be a divisive issue. In fact, difference of views on the judiciary's involvement in the implementation of the rights, in other words the justiciability issue, is noted to be the reason behind the United Nations decision to adopt the two Covenants, namely the International Covenant on Civil and Political Rights (the ICCPR)¹⁸ and the Covenant on Economic, Social and Cultural Rights (the ICESCR)¹⁹, separately; reversing its original idea of adopting a single International Bill of Rights document.

In the mean time, however, it should be noted here that at least some aspects of socio-economic rights can and should be implemented by the judiciary. For one, the World Conference on Human Rights in Vienna (1993), without making a distinction between

¹⁸ International Covenant on Civil and Political Rights adopted by the General Assembly of the United Nations by Resolution 2200 (XXI) on 16 December 1966.

¹⁹ Jeff King, *An Activist's Manual on the International Covenant on Economic, Social and Cultural Rights*, 125 (Jeff King, 2003). (<http://cesr.org/filestore2/download/771> last accessed on September 17, 2007)

rights, declared that the judiciary can be “essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development”.²⁰ In addition, as Renata Uitz observed, Cass Sustain, a learned constitutional law scholar and once was a strong opponent to the idea of justiciability is now of the opinion that socio-economic rights should be judicially enforced.²¹ Moreover, the notion that realization of human rights should not be left to the exclusive domain of politically elected authorities²² should give some weight for justiciability of the rights.

Notwithstanding, many states in African consider socio-economic rights as non-justiciable rights.²³ Hence, justiciability of socio-economic rights, specifically justiciability of the rights before domestic judicial bodies, is a fundamental issue this thesis paper will address.

The fundamental issue the thesis paper addresses is a recurrent issue in the continent. Most of the African countries are striving to lift millions of people out of poverty while at the same time they are formally committed to constitutionalism based on liberal economic model. Moreover, the current development approach advocated by influential

²⁰ Vienna Declaration and Program of Action. Adopted by the World Conference on Human Rights, 25 June 1992. UN doc.A/CONF.157/23. Par. 27

²¹ Renata Uitz, Yet Another Revival of Horizontal Effect of Constitutional Rights: Why? And Why Now? – An Introduction, in A. Sajo & R. Uitz (Eds.), *The Constitution in Private Relations: Expanding Constitutionalism*, 1-20, 19 (Eleven International Publishing, 2005).

²² Food and Agriculture Organization of the United Nations, *Justiciability of the Right to Food*, p.89, par. 68 (FAO, 2007). (<ftp://ftp.fao.org/docrep/fao/010/a0511e/a0511e03.pdf> last accessed on September 17, 2007)

²³ Olowu, supra note 11, at 198.

civil society groups operating in Africa and beyond is a rights-based-approach. Although the full implications of adopting this approach is yet to be worked out, the rights-based-approach emphasizes on the role of the state in terms of fulfilling socio-economic rights of peoples and that it doesn't rule out the possibility of taking up rights claims before courts.

In terms of reinforcing judicial implementation of the rights in the continent, the African Regional Human Rights System can provide a strong case. The principal human rights instrument in the continent i.e. the African Charter on Human and People's Rights (the African Charter), is "hailed"²⁴ for recognizing socio-economic rights on equal footing with civil and political rights. Secondly, the African Commission on Human and Peoples' Rights- a quasi-judicial body supervising implementation of the Charter by member states, including hearing individual complaints- considers all rights guaranteed by the charter as justiciable rights. In addition to the supportive normative standard, all of the fifty-three members of the African Union have ratified/acceded to the African Charter,²⁵ with reservations or a note verbal put by few states, namely- Zambia, Egypt, and South Africa²⁶. This is unlike the case of the ICESCR which has yet to be ratified by four African countries, namely Botswana, Mozambique, Sa_ Tomé and Príncipe and South

²⁴ *Id.* at 196.

²⁵ The exception is Morocco which is not a member to the African Union, but a party to the ICESCR

²⁶ Udombana, *supra* note 16, at 1190-91.

Africa. Still many African countries have made declarations and reservations against the ICESCR.²⁷

This paper tries to answer two main research questions. The first question is whether or not the African Human Rights System can be instrumental in reinforcing judicial implementation of socio-economic rights domestically? Secondly, it will provide an answer as to whether or not these rights are judicially implemented by the judiciary in Africa?

Obviously, it is not possible for the thesis paper to consider the domestic context of all African states. For reasons of manageability and focus, the paper will confine itself examining the experience of Ethiopia and South Africa.

Ethiopia and South Africa are member states to the African Charter adopting different legal systems and judicial traditions (civil law and common law), in which case the experience of one could inform other African countries who may identify themselves with either of the two legal systems. The fact that the rights jurisprudence is well developed in South Africa can be indicative of possible areas of reform for African countries where the role of the judiciary might have been unduly limited.

Research methodologies to be employed for the research are library based research on available literature and legal instruments, case analysis and interview. Existing literatures on

²⁷ Office of the United Nations High Commission for Human Rights, ICESCR ratification status as at October 7, 2007. (accessible at <http://www.ohchr.org/english/bodies/ratification/3.htm>)

the subject will be reviewed in order to identify issues that will arise in the process of answering the research questions. Likewise, analysis of cases by the African Commission, the South African Supreme Court and Ethiopia's courts will be made. To complement the less developed and the less organized case reporting system in Ethiopia, interview will be conducted on a targeted individual.

This thesis paper has four Chapters and a conclusion part. Each of these Chapters has introductory and concluding sections. And the substantive part of the thesis begins at Chapter two.

Chapter Two examines the African Human Rights System and socio-economic rights standards established by same. This Chapter begins by providing background information on the Region's Human Rights System. Secondly, it discusses general principles of human rights law enshrined in the African Charter as they relate to socio-economic rights. Latter, it examines socio-economic rights guaranteed by the African Charter focusing on the rights to health, education, housing and food. Moreover, it describes states' obligation vis-à-vis socio-economic rights as articulated by the African Commission. At last, the Chapter discusses whether or not states have obligation to recognise socio-economic rights as legal entitlements.

Once the normative standards on socio-economic rights and the corresponding states' obligation are discussed in Chapter Two, Chapter Three will examine constitutional and other legal factors affecting judicial implementation of the rights in South Africa and

Ethiopia. Accordingly, the Chapter begins by examining constitutional entrenchment of justiciable socio-economic rights in the two countries. It, then, discusses the status of the Charter as well as the jurisprudence of the African Commission in the domestic legal systems of the selected countries. Furthermore, the Chapter will deal with procedural rules affecting the right of access to courts, emphasizing on the rules pertaining to public interest litigation. At the end of this Chapter, therefore, we will be able to see opportunities and responsibilities domestic judicial bodies have in enforcing socio-economic rights.

Chapter Four examines performance of judicial bodies in South Africa and Ethiopia in implementing socio-economic rights.

The thesis paper ends by providing conclusions.

Chapter Two - Socio-Economic Rights under the African Human Rights System

2.1 Introduction

Regional human rights systems are established with a view to complement international efforts in promoting and protecting human rights. These systems established so far are the European Human Rights System, the Inter-American Human Rights System and the African Human Rights System. Regional system of human rights established in the African continent is the African Human Rights System.

The African Human Rights System, specifically the African Charter, is acclaimed for guaranteeing justiciable socio-economic rights. As the same time, it is viewed by some others as normatively deficient and ineffective. This Chapter examines the promise of the African System in terms of guiding states in implementing socio-economic rights through domestic judicial.

The Chapter begins by providing background information on the African Human Rights System. Thereafter, it will discuss general principles of human rights law enshrined in the African Charter as they relate to socio-economic rights. Next, the Chapter explores socio-economic rights guaranteed by the African Charter focusing on the four basic socio-economic, namely the rights to health, education, housing and food. Before

concluding, the Chapter discusses the states' obligations vis-à-vis the rights in general, and obligation to recognise socio-economic rights as justiciable rights in particular.

At this juncture, it should be noted that the region's socio-economic rights jurisprudence that will be referred to in this Chapter is limited to the works of the African Commission. It doesn't include the recently established African Court of Human Rights, which has not started rendering decision at the time the writing of this thesis paper is completed.

2.2 The African Human Rights System

On May 23, 1963 some independent African States met in Addis Ababa, Ethiopia; and expressed their conviction for human rights by adopting the Charter of the African Union (or the OAU Charter).²⁸ As a matter of preamble and purpose, the OAU Charter affirmed faith to the United Nations Charter and the United Nations Universal Declaration of Human Rights.²⁹ For this reason, the adoption of the Charter is viewed as the beginning in the development of the region's human rights system.

²⁸ Fatasah Ouguergouz et al, *The African Charter on Human and People's Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, 2 (Kluwer Law International, 2003).

²⁹ Charter of the Organization of the African Union, adopted on May 25th, 1963 [hereinafter OAU Charter]. One reference to the Charter made in respect to human rights is found in the Charter's 9th preamble, which affirms member states' adherence to the Charter of the United Nations and the United Nations Universal Declaration of Human Rights. Another provision that made reference to human rights is Article II (1) (e), which declared that one of the purposes of the OAU is promoting international cooperation "having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights". This document is now abrogated and replaced by the constitutive act of the African Union adopted in Lome, Togo on 11th July 2000. [hereinafter AU Constitutive Act]

Though a good beginning, adoption of the OAU Charter means little in terms of establishing the Region's Human Rights System. The Charter fails to expressly provide human rights obligation of states towards individuals and peoples' under their jurisdictions. Even more so, it emphasizes on the principles of states sovereignty and non-interference in the internal affairs of states (Article III). As to the reason why the OAU Charter emphasized on these principles, it is pointed out that in 1963 majority of African States were under colony and the focus of the OAU at that time was on decolonization and non-interference into domestic affairs of independent states.³⁰ Indeed, this feature of the OAU Charter goes against the *raison d'être* of regional and international human rights systems which rather emphasize on states' limited sovereignty on matters of human rights.

Consequently, the OAU remained complacent towards gross violations of human rights in a number of independent countries by unduly emphasizing on the stated principles at the expense of human rights.³¹ This failure of the OAU's subsequently led to the idea of developing a strengthened regional protection of human rights in the continent. This idea was pushed further by several groups and then resulted in the adoption of a resolution by

³⁰ Ouguergouz et al, *supra* note 28, at 2.

³¹ U.O.Umozurike, *The African Charter on Human and People's Rights*, 77(4) *The American Journal of International Law* 902, 903(1983). Professor Umozurike, once Chairman of the African Commission, explained that failure to condemn the massacres of thousands of Hutus in Burundi in 1971 and 1972, the brutal regimes as Id Amin of Uganda (1971-1979), Marcias Nguema of the Equatorial Republic of Guinea (1969-79), Jean-Badel Bokassa of the Central African Republic (1966-79) are examples showing the OAU's failures in promoting and protecting human rights in the continent.

the United Nations Commission on Human Rights in 1978, which endorsed the idea of establishing regional human rights commissions in non-existing places, including in Africa.³²

With this end in view, the UN organized a number of seminars in the continent, and the last meeting held in Banjul, the Gambia, in 1981, produced final draft of the principal human rights instrument in the continent- the African Charter on Human and Peoples' Rights (the African Charter, also known as the Banjul Charter).³³ The African Charter was unanimously adopted by OAU heads of states at the OAU summit conference in Nairobi in June 1981, and entered into force in 1986.³⁴ Adoption of the African Charter is described as "the first major concession by African States in the area of human rights; it is the one which beyond any doubt marks the advent of a new era in the field of human rights in Africa".³⁵

Unlike the OAU Charter, the African Charter is a human rights instrument per se in the sense that it establishes human rights standards and also provides for mechanisms of rights protection. Unlike the European Convention on Human Rights, where membership to the European Union is conditional upon ratification, membership to the now the

³² *Id.* at 903-904. Also, Fatasah Ouguergouz et al, *supra* note 28, at 33.

³³ Umozurike, *supra* note 31, at 904.

³⁴ African Charter, *supra* note 7.

³⁵ Ouguergouz et al, *supra* note 26, at 5.

African Union³⁶ is not dependent on a state's ratification of the Charter. In view of the voluntary nature of becoming a party to the African Charter, current ratification status of the Charter demonstrates African countries significant drift in their conception of states' sovereignty from that reflected in the OAU Charter.

There are different reasons offered to explain why such a big and important step was taken by the OAU.³⁷ More relevant to our discussion, we will focus on the OAU document reported to have influenced the drafting of the African Charter.³⁸ This document provides a description of ideas and principles considered by the OAU to be vital to the African continent. Ideas described as such in the document include: the need to address specific human rights problems to Africa; to emphasize on the importance of economic, cultural and social rights in Africa; the need to eliminate apartheid; and the link between human and peoples' rights. It follows, therefore, that socio-economic rights considerations form the basis for the drafting of the African Charter.

³⁶ OAU is transformed into African Union or AU in 2002.

³⁷ Okoth-Ogendo cited in Vincent O. Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions*, 82-83 (Martinus Nijhoff, 2001).

Okoth-Ogendo, for example gave, three main reasons. First, the Charter of OAU's affirms commitment to the UN Charter and the UDHR, and member promotion and protection of human rights was part of the obligations of member states as a consequence of adopting the Charter and ratifying other international human rights instruments. Second, there was no institutionalized regional system of human rights protection in the continent, despite formal commitment to this effect. And the third reason he gave was Africa's need to develop human rights norms and principles which are founded on the historical traditions and values of the African civilizations.

³⁸ Rapporteur's Report OAU Doc CM/1149(XXXVII) Annex 1 p. 3 paras 10 & 11, cited by Kenneth Asamoah Acheampong, *Reforming the substance of the African Charter on Human and Peoples. Rights: Civil and Political Rights and Socio-economic Rights*, 185 Footnote No. 4, 2 AHRLJ (2001).

Until it transformed into the African Union at the beginning of this millennium,³⁹ the OAU regime has further adopted several other regional human rights instruments which now, together with the African Charter, constituted the African Human Rights System. These instruments are: the Convention Governing Specific Aspects of Refugee Problems in Africa (1969);⁴⁰ the African Charter on the Rights and Welfare of the Child (1990);⁴¹ and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (also known as African Human Rights Court Protocol) (1998).⁴²

The OAU Charter was replaced by the Constitutive Act of the African Union (the Constitutive Act). Adopted in 2001, the Constitutive Act underscored the importance of human rights in the African Union.⁴³ The Constitutive Act, besides acknowledging the UN Charter and the UDHR as the OAU Charter did, it proclaims promotion and protection of human and peoples' rights in accordance with the African Charter and

³⁹ OAU Charter and AU Constitutive Act, *supra* note 29.

⁴⁰ AU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted in 10th September 1969, CAB/LEG/24.3.

⁴¹ African Charter on the Rights and Welfare of the Child, adopted in July 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

⁴² Protocol to the African Charter on Human and Peoples' Rights on the Establishment an African Court on Human and Peoples' Rights, adopted in 9 June 1998, OAU doc. CM/2051 (LXVII).

⁴³ Kithure Kindiki, *The Normative and Institutional framework of the African Union relating to the Protection of Human Rights and the Maintenance of international peace and surety: Critical Appraisal*, 3 African Human Rights Law Journal 97, 101 (2003).

The AU Constitutive Act makes “promotion of gender equality”; “respect for democratic principles, human rights, the rule of law and good governance”; “promotion of social justice to ensure balanced economic development”; “respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities” are proclaimed by the AU’s Constitutive Act as functional principles of the AU (Art. 4).

relevant human rights instruments as one of the major objectives of the African Union (Art. 3 sub-articles (e) and (h)). What can be considered “remarkable”⁴⁴ about the Constitutive Act is that it envisages humanitarian intervention against member states committing gross violation of human rights, i.e. war crimes, genocide and crimes against humanity (Art. 4 (h)).

The AU regime further developed the Regional System by adopting the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (2003).⁴⁵

Over times, therefore, the OAU and the AU regimes have adopted several human rights instruments enriching the African Human Rights System. Still, the African Charter remained to be the central human rights document in the African Region. In fact, all the human rights instruments adopted subsequent to the Charter consider the same as their foundational document.

As far as socio-economic rights are concerned, the African Charter establishes a more protective mechanism of implementation than that of the international system. The Charter guarantees civil, political, social, economic and other human rights in a single document. More importantly, it establishes a quasi-judicial treaty supervising body,

⁴⁴ Ouguergouz, *supra* note 28, at 5.

⁴⁵ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted in July 2003.

namely the African Commission on Human and Peoples' Rights (the Commission) having a mandate to receive complaints from individuals and groups on socio-economic rights in the same manner as that of civil and political rights. Moreover, the mandate of the Commission is that states by becoming parties to the Charter are deemed to have accepted the jurisdiction of the Commission. For these reasons, the African Human Rights System can be instrumental in reinforcing the justiciability of socio-economic rights in the continent.

Indeed, these features of the African System makes it distinct from the international one, which so far has largely excluded socio-economic rights from the consideration of treaty monitoring bodies in concrete cases. It is to be noted that except the UDHR the other two foundational human rights constituting the International Bill of Rights,⁴⁶ namely the ICCPR and the ICESCR, provide for the two categories of rights in a separate documents. Moreover, the treaty monitoring body on the ICESCR or the Committee on the ICESCR has no power to consider complaints from individuals' and groups'; whereas the long established Human Rights Committee (HRC) has such mandate concerning rights guaranteed by the International Covenant on Civil and Political Rights (ICCPR). Still,

⁴⁶ International Bill of Rights is constituted by the three international human rights instruments regarded by the United Nations as foundational instruments. The three constituent instruments are the UDHR, the ICCPR and the ICESCR. United Nations, Fact Sheet No.2 (Rev.1), *The International Bill of Human Rights* (accessible at <http://www.unhchr.ch/html/menu6/2/fs2.htm>)

member states to the ICCPR are subjected to the jurisdiction of the HRC only if they have become parties to the Optional Protocol I.⁴⁷

It must be noted that the Commission's decision is not legally binding. It is rather a recommendation which member states may or may not follow. For this reason, some have described the Commission as a "toothless bulldog".⁴⁸ Nevertheless, the recommendations of the Commission certainly have important normative values in developing the Region's human rights jurisprudence.

To complement human and peoples' rights protection mandate of the Commission, the African Court of Human Rights is now established.⁴⁹ As the name indicates, the Court has the mandate to issue binding decisions on complaints submitted to it in accordance with the Court's establishing Protocol.

⁴⁷ Optional Protocol to the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976.

Article 1 reads:

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

⁴⁸ Nsongurua J. Udombana, *Human Rights and Contemporary issues in Africa*, 125 (Malthouse Press Limited, 2003).

⁴⁹ African Human Rights Court, *supra* note 42, Article 2.

Certainly formal establishment of the Court is an important step in strengthening the Region's System of Human Rights Protection. Because of the negotiated rules enshrined in the Protocol, however, the complementarity function of the Court could be negatively and significantly affected. According to the Protocol, states can be subjected to the jurisdiction of the Court only upon becoming parties to the Protocol. Moreover, states' membership to the Protocol does not automatically entitle individuals and groups bring complaints directly to the Court. In order that individuals and groups have direct access to the Court, the concerned member state needs to make a separate declaration to this effect.⁵⁰ As a matter of fact, only twenty-four of the fifty-three member states to the African Charter have become parties to the Protocol as at 15th October 2007.⁵¹ In view of the binding nature of the Court's decision, one may at this point question whether or not member states' seriously consider socio-economic rights guaranteed by the African Charter as justiciable rights.

Having examined developments in the Region's Human Rights System, some have in fact commented that the African System can play a positive role in complementing and contributing for the effective enhancement of human rights in the continent.⁵² On the other hand, there are those who seriously doubt the accuracy of the above comment. Those who doubt the effectiveness of the African System sometimes go farther stating

⁵⁰ *Id.* Articles 5 (3) and 34 (6).

⁵¹ Ratification Status of the African Court of Human Rights as at 15th October 2007. (accessed from <http://www.africa-union.org/root/au/Documents/Treaties/List/Protocol%20on%20the%20African%20Court%20on%20Human%20and%20Peoples%20Rights.pdf>)

⁵² Mugwanya, *supra* note 8, at 185.

that the System is bent towards cultural relativism, hence, they say, not inline with the universal effort in ensuring protection of human rights. To substantiate their claim, they often cite the self serving statements uttered by some corrupt African leaders like Mobutu of Zaire.

What we have discussed so far doesn't in fact support the sceptics view. Moreover, in the upcoming Sections of this Chapter we will see that the sceptics view is unfounded. In the mean time, it is important to consider two Articles of the Charter which expressly affirm the African Regional Human Rights System's faith to international human rights norms (Articles 60 and 61). And I quote these Articles:

Article 60

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

Article 61:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

These Articles put the African human rights system within the positive influence of international and other regional human rights norms and principles.⁵³ Moreover, as we will see in the up-coming Sections, the African Commission in numerous occasions has utilized these provisions to develop the Region's human rights jurisprudence in conformity with international human rights norms and principles.

2.3 The African Charter and General Principles of Human Rights Law

In the previous Section we have seen that developments in the field of human rights in Africa have resulted in the establishment of African Regional Human Rights System capable of complimenting the international effort for ensuring universal protection of human rights. Also, we have seen how the Region's System in general can be useful in reinforcing the idea of justiciability of socio-economic rights. In this Section, we will examine the contents of the African Charter focusing on general principles of human rights law important in reinforcing judicial implementation of the rights. The importance of this exercise is that in some jurisdictions the principles we are to examine have been effectively utilised to enforce the rights. The significance of these principles in particular lies in legal systems that are ambivalent to the idea of justiciability.

The African Charter has expressly enshrined several of these principles. One such principle enshrined in the African Charter is the principles of indivisibility and interdependence of human rights. In its preamble the Charter proclaims: "civil and

⁵³ *Id.* at 159.

political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”.⁵⁴ The implication of this principle is that “fulfilling civil and political rights would be as important as fulfilling economic and social rights, not just in the instrumental roles but also in their substantive constitutive role”.⁵⁵

Though it does not fully answer the question of justiciability, the principle of indivisibility and interdependence challenges the prevalent view which considers socio-economic rights as mere states’ policy objectives as opposed to rights per se. In conjunction with other human rights principles such as human dignity, however, the principles can be considered as to provide some more weight to the idea of justiciability.

Another important principle entrenched in the preamble and also in Article 5 of the Charter is human dignity. The importance of human dignity in the enforcement of human rights in general is manifest from the jurisprudence of German Constitutional Court. Specifically in relation to socio-economic rights, the importance of human dignity is evident from the jurisprudence of the South African Constitutional Court. We will see

⁵⁴ African Charter, supra note 6, Preamble par. 8.

⁵⁵ Sam Amadi, *Programmatic and Conceptual Paralysis in Protecting and Promoting Economic, Social and Cultural Rights in Africa*, Paper presented at a colloquium 17 - 19 March 2002 Socio-Economic Rights Project, CLC, UWC (2002 Socio-Economic Rights Project, CLC, UWC) (accessible at http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/conferences/samuel_amadi_paper.pdf/preview_popup/file)

how dignity is used by the latter Court as we discuss socio-economic jurisprudence of South Africa in the last Chapter.

Though not expressly provided in the Charter, but can be inferred from the text of the Charter (or constitutional provisions of countries adopting democratic constitutions) is the principle of rule of law. As what the jurisprudence of the Hungarian Constitutional Court suggests, this principle has been utilized by the country's Constitutional Court in giving effect to socio-economic rights. By emphasizing and elaborating the principle of rule of law, the Court invalidated significant part of the State's proclamations introducing massive welfare cuts.⁵⁶

Yet other important principles of human rights law the Charter expressly enshrined in Arts. 3 and 2 respectively are the rights to equality and non-discrimination. It is to be noted that the UN Human Rights Committee has interpreted these principles independently of the rights guaranteed by the ICCPR with the effect of reinforcing rights which have direct bearing on socio-economic rights.⁵⁷ Also, in *Purohit and Others v The*

⁵⁶ Andras Sajó, *How the Rule of Law Killed Hungarian Welfare Reform*, 5 (1) Eastern European Constitutional Review, pp.31-41, (1996), cited by Lord Leter of Henre Hill QC & Colm O'Cinneide, *The Effective Protection of Socio-economic Rights*, in Yash Ghai and Jill Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Courts in Implementing Economic, Social and Cultural Rights*, pp.17-22, 21 (INTERIGHTS, 2004).

⁵⁷ For example in *Hendrika S. Vos v The Netherlands*, Human Rights Committee Communication No. 218/1986 : Netherlands. 29/03/89., The UN Human Rights Committee used the principle of non-discrimination autonomously embodied in Article 26 of the ICCPR, and found the Netherlands government's violation for extending unemployment benefits to married men in exclusion of married women. These principles have thus been used to give effect to socio-economic rights.

Gambia,⁵⁸ the African Commission has used these principles when it examined the right to health claims of persons with mental disability. Experience in some domestic jurisdictions likewise suggests that these principles could be effectively utilized in places where legal norms tend to be ambivalent to the idea of justiciability of socio-economic rights.⁵⁹

The Charter does not provide for the rights to equality in the formal sense only. Cognizant of the difficult situation some members of society are in, the Charter incorporates the idea of affirmative action. It provides in Article 18 (4) children's, women's, the aged and disabled persons' right to special protective measures. Still, it is commented that in view of Africa's past and present history of unfair discrimination against certain racial, national, and ethnic and language groups, limiting social groups deserving affirmative actions to the aforementioned four social groups is said to be too restrictive.⁶⁰

No matter how these principles are enshrined in the Charter (and possibly by domestic laws as well), the potential instrumentality of these principles can be translated into practice if and when judicial bodies are willing and assertive in enforcing same in

⁵⁸ Purohit and Others v The Gambia, par. 49, (2003). Communication 241/2001 - Purohit and Moore/The Gambia *Sixteenth Annual Activity Report Of The African Commission On Human And Peoples' Rights 2002 – 2003*. [hereinafter Purohit and Others v The Gambia]

⁵⁹ Centre on Housing Rights and Evictions, *50 Leading Cases on Economic, Social and Cultural Rights: Summaries*, 5 (2003).

⁶⁰ Acheampong, *supra* note 38, at 195-196.

concrete socio-economic rights cases. Nevertheless, the principles do provide judges with the legal tool to give effect to socio-economic rights.

2.4 Socio-economic Rights Guaranteed by the African Charter

Having dealt with general principles of human rights incorporated in the African Charter, this Section will examine socio-economic rights guaranteed by the Charter. Because group or collective rights as well as some civil and political rights enshrined in the Charter are closely associated with socio-economic rights, it is important that this Section briefly touches upon other rights with significant implications to socio-economic rights. Accordingly, this Section begins by providing description of civil and political rights, , and other rights,

Civil and political rights enshrined in the Charter are in many ways similar to those guaranteed by other international instruments. These rights include: the right to life and integrity of the person (Art. 4); the right to the respect of the dignity inherent in a human being and the right against all forms of slavery, slave trade, torture and cruel, inhumane and degrading treatment (Art. 5); the right to liberty and security of the person (Article 6); freedom of association (10); freedom of movement and allied rights, including the right to seek asylum and protection of non-nationals against arbitrary expulsion (Art. 12); right to participate in public affairs and their right access to public resources (Art. 13) and the right to property (Art.14).

The second category of rights that have significant implications on socio-economic rights are group, collective or peoples' rights. List of such rights incorporated in the Charter include: all peoples' right to equality (Art. 19); the right to self-determination (Art. 21), the right to development (Art. 22), the right to peace and security (Art.23) and the right to environment (Art. 24). Article 24 stipulates the right of people for a "general satisfactory environment favorable to their development". Therefore, socio-economic rights guaranteed in the African Charter are not only of individuals, but also of peoples'.

Individual socio-economic entitlements the Charter expressly refers to are: the right to work under equitable and satisfactory condition; the right to receive equal pay for equal work (Art. 15); the right to health (Art. 16); the right to education (Art. 17); the right of the aged and the disabled to special measures of protection in keeping with their physical or moral needs (Art. 18 (4)). Articles 18 also obligates states to take care of the mental health and moral of the family (18 (1)); to assist the family; and to ensure elimination of discrimination against women and protection of the rights of women and the child in accordance with international declarations and covenants (18(3)).

Closer examination of the African Charter reveals that Charter does not expressly recognize some basic socio-economic rights as the right to housing and shelter; the right to social security; the right to adequate standard of living; and freedom from hunger. Given these rights importance in the Africa continent, one can say that such rights should have found express recognition in the Charter. In this regard, Professor Joe Oloka-

Onyango described this shortcomings of the Charter as a “significant let down from the promise of the preamble, and belie what could have been an altogether novel and radical approach to the interconnectedness of the two categories of right”.⁶¹ As we will see in the up-coming Section, however, in its landmark decision of *SERAC v Nigeria*⁶² the Commission ruled that the right to housing and the right to food to be implicitly recognized by the Charter.

One explanation for the Charter’s failure to expressly recognize these rights could be "an endeavour not to guarantee rights which have no chance of being realized".⁶³ However, for Udombana, the more convincing explanation is bad faith on the part of the then authoritarian rulers of Africa who were more interested in discriminatory political practices than ensuring equitable living standard.⁶⁴

⁶¹ Professor Joe Oloka-Onyango cited by Danwood Mzikenge Chirwa, *Toward Revitalizing Economic, Social, and Cultural Rights in Africa: Social and Economic Rights Action Centre and the Center for Economic and Social Rights v. Nigeria*, 15, 10 Human Rights Brief Volume Issue 1 (2002). (<http://www.wcl.american.edu/hrbrief/10/1africa.cfm> accessed on April 17, 2007)

⁶² *SERAC v. Nigeria*, 155/96 The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria *Fifteenth Annual Activity Report Of The African Commission On Human And Peoples' Rights 2001 – 2002* [hereinafter *SERAC v Nigeria*]

⁶³ Philip Kunig quoted by Nsongurua J. Udombana, *Social Rights are Human Rights: Actualizing the Rights to Work and Social Security in Africa*, 39 Cornell Int'l L.J. 181, 187-188 (2006).

⁶⁴ *Id.* at 188.

2.5 Selected Socio-Economic Rights and the African Commission's Jurisprudence

The rights to health, education, food and housing are considered as basic socio-economic rights (they are also referred to as survival rights). In this section, therefore, we will consider normative standard of the rights in Africa as further developed by the jurisprudence of the African Commission.

2.5.1 The Right to Health

The right to health is enshrined in Art.16 of the Charter. This Article provides every individual's right to "enjoy the best attainable state of physical and mental health" (Art. 16(1)). In *Purohit and Others v The Gambia*,⁶⁵ noting that that the right to health is "vital to all aspects of a person's life and well-being, and is crucial to the realization of all the other fundamental human rights and freedoms", the Commission held that the right embodies "the right to health facilities, access to goods and services to be guaranteed to all without discrimination".

As a matter of obligation, states are duty bound to "take necessary measures with a view to protect the health of people and to ensure that they receive medical attention when they are sick" (Art. 16(2)). In *Purohit and Others v The Gambia*, the Commission has ruled that although African countries generally are not in a position to provide to all people with all the materials and facilities necessary for the full enjoyment of the right.

⁶⁵ *Purohit and Others v The Gambia*, supra note 58, at par. 80.

Notwithstanding, it held that states are required to “to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realized in all its aspects without discrimination of any kind”.⁶⁶ Furthermore, in *World Organisation Against Torture et al. v. Zaire*⁶⁷ the Commission also held that failure on the part of government to provide basic services such as safe drinking water and electricity and shortage of medicine for persons in prisons is a violation of Article 16 of the Charter.

Closely related to the right to health is peoples’ right to a “general satisfactory environment favorable to their development” (Art.24), which the Commission considered to mean the right to healthy environment.⁶⁸ In *SERAC v. Nigeria*, the Commission held that the two rights recognize “the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual”.⁶⁹ Although Article 24 makes no mention of states’ obligation in relation to the right to healthy environment, the Commission held that states are duty bound to respect and “to take reasonable and other measures to

⁶⁶ *Id.* par. 84.

⁶⁷ *World Organisation Against Torture et al. v. Zaire*, the Commission's decision on Communications 25/89, 47/90, 56/91 and 100/93 *World Organisation Against Torture et al./Zaire*: 53

⁶⁸ *SERAC v. Nigeria*, supra note 62, at par. 52.

⁶⁹ *Id.* at par. 51.

prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources”.⁷⁰

2.5.2 The Right to Education

The right to education is another basic socio-economic right enshrined in Article 17 (1) of the Charter. Article 17 (1) provides for every individual’s right to education without providing anything further.

Unlike the corresponding Article in the ICESCR, Article 17 (1) of the Charter appears to be deficient in terms of defining the elements of the right to education and the objective of education.⁷¹ Instead, in Article 17 (3) the Charter seems to emphasize states’ obligation to promote and protect the “morals and traditional values recognized by the community. In international human rights law, objective of education is one of the important elements of the right to education expressly provided in the UDHR (26 (2)) and the ICCPR (13(1)).⁷² In rural Africa, where traditional practices disfavoring children, especially the girl child, are impediments in realizing the right to education, how the

⁷⁰ *Id.* at par. 52.

⁷¹ ICESCR, *supra* note 5, Article 13.

⁷² *Id.* Article 13 (1).

Article 13 (1) reads:

“... education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. [Furthermore]... education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace”

Charter guaranteed the right and particularly the level of emphasis the Charter puts on traditional “morals and traditional values” can be troublesome.

Although the African Commission has yet to come up with a jurisprudence detailing the contents of the right to education, other provisions in the Charter as well as positive developments in the Region’s Human Rights System can be useful in understanding the right in conformity with international human rights norms and principles.

When we examine other provisions in the African Charter, we find several ways to avoid the concern we stated before. Obviously, Articles 60 and 61 of the Charter-Articles which provide for importation of international human rights norms and principles in interpreting rights guaranteed by the Charter are one way. Another way is Article 18 (3). According to this Sub-article states are obliged to ensure that right of the child and of women are protected in accordance with international human rights conventions, or even declarations.

Moreover, Article 11 of the African Charter on the Rights and Welfare of the Child restates same idea by stipulating that the right to education should be interpreted in a manner corresponding to the international standard on child rights. More specifically, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights on the Rights of Women in Africa, above guaranteeing the right to education of women in

Article 12, it expressly prohibits practices that negatively affect women's human rights, including the right to education.⁷³

Therefore, in terms of providing a more meaningful and concrete meaning to Article 17 of the Charter, the details of the right to education stipulated in international and regional human rights instruments should be read into it.

2.5.3 Right to Housing

As indicated earlier, though the right to housing is one basic socio-economic right guaranteed in Article 11 of the ICESCR,⁷⁴ the African Charter does not expressly guarantee this right. Notwithstanding, in the landmark decision of *SERAC v. Nigeria* the Commission has found the right to be implicitly recognized by the Charter. The Commission arrived at this conclusion following the combined reading of Articles 14 (right to property), 16 (the right to health) and 18(1) (right to family life). The relevant part of the Commission's decision reads:

⁷³ African Women's Right Protocol, *supra* note 45, at Article 5.

Article 5 of the Protocol provides, among others:

"States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards."

And "harmful Practices" as defined by the protocol in Article 1 (g) " means all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity".

⁷⁴ ICESCR, *supra* note 5, Article 11.

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, ..., the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected.⁷⁵

Quoting from General Comments 4 (1991) of the Committee on ICESCR, the Commission stated that the right to housing at a minimum level obligates states to ensure that "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats".⁷⁶ In the same case, the Commission also stated that when infringement occurs even by non-state actors, states are required to provide access to legal remedy. Apparently in line with the Committee on the ICESCR General Comment 7 (1997), wherein the right to adequate compensation for property loss as a result of eviction is provided, the Commission appealed to the Nigerian government to ensure adequate compensation for victims whose human rights, including the right to housing, is violated by the Nigerian government.⁷⁷

As can be drawn from the interpretation of the Commission, the right to housing can be negatively protected by interpreting other rights guaranteed by the Charter, particularly the right to property. The right to property in the Charter is subject to limitation "in the interest of public need or in the general interest of the community and in accordance with

⁷⁵ SERAC v. Nigeria, supra note 62, at par. 60.

⁷⁶ *Id.* at par. 63.

⁷⁷ *Id.* final part of the decision that recommends relief to the complainants.

the provisions of appropriate laws” (Art. 14). Nothing indicates in the Charter what the “general interest of the community” is or what “in accordance with the provisions of appropriate of law” means. Such a wide limitation clauses obviously open the door for potential abuse by states. However, in various occasions the Commission has held that limitation clauses in the Charter should be interpreted in light of international human rights standards.⁷⁸ Specifically, the Commission has noted that states cannot avoid their international obligations by resorting to limitation or “claw-back” clauses.⁷⁹ Another loophole in Article 14 is exclusion of important matters as compensation for property expropriated in the interest of the community, not to mention just and equitable payment.⁸⁰

2.5.4 Right to Food

The right to food is another basic socio-economic right that the Charter failed to expressly guarantee. The Charter even failed to provide for what is expressly guaranteed in Article 11 (2) of the ICESCR as the “right of everyone to be free from hunger”. In view of the gravity of food problem in Africa and the ensuing effect on human dignity of millions of people who live with the problem year and year out, it is surprising to observe that the right to food found no express recognition in the Charter. Again in *SERAC v. Nigeria* the Commission also found the right to food to be implicitly recognized in the

⁷⁸ Purohit and Others v The Gambia, supra note 58, par. 64.

⁷⁹ For example, Legal Resources Foundation v. Zambia, par. 70, Communication 211/98 Legal Resources Foundation/Zambia (2001).

⁸⁰ Acheampong, supra note 38, at 200.

Charter. On this point, what the Commission ruled is that “[t]he right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation”.⁸¹

In *SERAC v Nigeria* the Commission made repeated reference to international human rights norms, including the ICESCR. The African Commission thus effectively utilized Articles 60 and 61 of the Charter in developing the Region’s human rights jurisprudence. It used these provisions as a corrective tool to address what has been termed as the shortcoming of the Charter.

2.6 States’ Overall Obligations vis-à-vis Socio-Economic Rights

In the previous Section we have examined normative standards of socio-economic rights established by the Charter. In this Section, we will turn to the overall obligation of states in relation to implementing socio-economic and other rights guaranteed by the Charter.

In this regard, Article 1 of the Charter is the main Article. Article 1 provides that member states “shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them”.

⁸¹ *SERAC v. Nigeria*, supra note 62, at 65.

At this point it is important to observe that how the Charter defined states obligation is different from what is provided in Article 2 (1) of the ICESCR.⁸² Unlike the ICESCR, the Charter doesn't use the language of progressive realization. As a result, it is suggested that the Charter imposes immediate obligation on states.⁸³ In other words, states are duty bound to realize socio-economic rights of people under their jurisdiction immediately irrespective of resource availability.

This line of interpretation, however, doesn't seem to be practical. In connection with the right to education former chairman of the African Commission has argued against the idea of immediate obligation saying that it fails to take into account the resources and capacity of African states.⁸⁴ Indeed, it has been repeatedly reported in mainstream international Medias that the continent's prospect of achieving the United Nations poverty related Millennium Development Goals (MDGs) is gloomy. Similarly, the President of African Development Bank, Omar Kabbaj, has said that, "[i]t is now generally agreed that Africa . . . is the one region in the world that is unlikely to achieve

⁸² ICESCR, supra note 5, Article 2 (1).

Article 2 (1) of the ICESCR reads:

"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

⁸³ Fons Coomans, *The Ogoni Case before the African Commission on Human and Peoples' Rights*, 52 ICLQ 749, 751 (2003); OHCHR Human Rights Manual, supra note 1, at 705; and Chirwa, supra note 61, at 15.

⁸⁴ Cited at Amadi, supra note 55, at footnote 12.

the MDGs".⁸⁵ Therefore, resource blind interpretation of all aspects of states obligations vis-à-vis socio economic rights is unrealistic. Nor it is in line with the Commissions jurisprudence.

As the Commission expressly acknowledged in *Purohit and Others v The Gambia*;⁸⁶ due to resource limitations, African countries in general are incapable of ensuring full enjoyment of the right to health. Under this circumstance, the Commission noted, what is required of states is to take concrete and targeted steps, within available resources, with a view to realize all aspects of the right to health. Here, the language of the Commission is remarkably similar to what is provided in Article 2 of the ICESCR. Therefore, not all aspects of obligations in respect to socio-economic rights impose immediate obligation on states.

In addition to the general obligation of states established by Article 1, Articles 24 and 25 of the Charter provide for specific measures states are required to take to give effect to the rights guaranteed by the Charter. As per these two Articles, states are duty bound to promote the rights (Art. 24); ensure independence of courts; and effect establishment of

⁸⁵ Michael Fleshman , *Africa Struggles to attain Millennium Goals Progress and Setbacks in Continent's Efforts to Improve Well-Being*, 17(3) Africa Recovery 1, 10 (2003). (<http://www.un.org/ecosocdev/geninfo/afrec/vol17no3/173mdg.htm> last accessed on June 20, 2007)

⁸⁶ *Purohit and Others v The Gambia*, supra note 58, at par. 84.

national human rights institutions (as human rights commissions and the institution of the ombudsman) (Art. 25).

In *SERAC v. Nigeria*, the Commission has articulated state's obligation vis-à-vis socio-economic rights and other rights guaranteed by the Charter. According to the Commission, all rights in the Charter entail four levels of obligations involving both negative and positive obligations. These are duties to respect, protect, promote, and fulfill the rights.

The Commission's articulation of states' obligation follows the influential idea of Henry Shue which suggests that every basic right entails three types of correlative obligations: 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived'.⁸⁷ It is similar to the one adopted by proponents to the idea of justiciability of socio-economic rights and that which rejects any qualitative difference between categories of human rights.⁸⁸

Obligation to respect relates to the negative obligation of states. It requires states not to interfere in the enjoyment of rights. In other words, it obligates states to "respect right-holders, their freedoms, autonomy, resources, and liberty of their action."⁸⁹ The obligation to protect human rights on the other hand imposes a positive obligation on states to take measures to protect individuals and peoples from interference by non-state

⁸⁷ Coomas, *supra* note 83, at 752.

⁸⁸ Marcus, *supra* note 15, at 58.

⁸⁹ *SERAC v. Nigeria*, *supra* note 62 at par. 45.

actors in the enjoyment of their rights. In the words of the Commission, obligation to protect "generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms".⁹⁰ Obligation to protect may include availing means of redress or remedies for victims of human rights violations. On this point, Udombana commented that implementation of obligation to protect can prove to be difficult because human rights, unlike other legal rights, are basically claims against the state.⁹¹

At the third level of obligation, states are obliged to promote the rights so that individuals will be able to exercise their rights and freedoms. According to the Commission, obligation to promote could be realized for example, "by promoting tolerance, raising awareness, and even building infrastructures."⁹² And the obligation to fulfill human rights imposes "a positive expectation" on a state to "move its machinery towards the actual realisation of the rights."⁹³

This being said about the overall obligation of states, the most important question for our purpose is whether or not states have duty to recognize socio-economic rights as legal entitlements and, if they have such duty, to what extent are they obliged to recognize these rights as justiciable rights. And we will examine this question in the upcoming Section.

⁹⁰ *Id.* at par. 46.

⁹¹ Udombana, *supra* note 63, at 199.

⁹² *SERAC v. Nigeria*, *supra* note 62, at 46.

⁹³ *Id.* at par. 47.

2.8 States' Obligation to Recognize Socio-Economic Rights as Legal Entitlements

It is said that how states should give effect to the obligations they have assumed under international law is for the states to determine- the point being that states should work for the realization of the rights for people under their jurisdiction in one way or another. In other words, states have the margin of appreciation in determining the means of implementation. However, effective realization of rights may involve adoption of specific measures. And one such measure could be recognizing socio-economic and other rights the Charter guaranteed as legal entitlements so that individuals and peoples will get remedy in the event of rights violation. This Section argues that the margin of appreciation states have in determining the means of implementing international human rights obligation is not so wide to allow states render all socio-economic rights obligations as non-justiciable rights.

According to conservative view held by influential scholars, states have a wide margin of appreciation in determining how they should go about in realizing their treaty obligations; hence no specific obligation to recognize socio-economic rights as legal entitlements.⁹⁴ It may be argued that the language of Article 1 of the African Charter supports this view, as it does not specifically prescribe such measure on states.

⁹⁴ Yuval Shany, *How Supreme is the Supreme Law of The Land? Comparative Analysis of the Influence of International Human Rights Treaties upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 Brook. J. Int'l L. 341, 348 (2006).

However, purposive interpretation of Article 1 of the African Charter and the jurisprudence of the African Commission can be used to challenge the conservatives' view.

First, the African Commission, though it recognizes the margin of appreciation states have in determining the modality of implementing the rights, it has however recommended member states to integrate these rights into their constitutions, laws, rules and regulations.⁹⁵ In fact, when Nigeria incorporated the African Charter by legislation, the Commission expressed its approval and commended the motion saying that it should "set a standard for all Africa".⁹⁶ Also, one of the measures "consistently"⁹⁷ advocated by the Committee on the ICESCR⁹⁸ and other treaty monitoring bodies is for the incorporation of socio-economic rights in the constitutions and legislations of member states, to ensure direct applicability of the rights by domestic judicial bodies and other agencies. The idea behind this line of thought is that in order for rights to be meaningful, there ought to be a mechanism to redress rights violations.

Another point that supports the Commission's and the ICESCR Committee's view is Article 26 of the Vienna Convention on the Law of Treaties. This Article provides for the

⁹⁵ *Conclusions and recommendations of a seminar organised in October 1992 in Banjul, The Gambia by the African Commission on Human and Peoples' Rights, together with the Raoul Wallenberg Institute on Human Rights and Humanitarian Law, Sweden, October 1992. Reprinted in the Sixth Annual Activity Report of the African Commission 1992-1993, ACHPR/RPT/6th*. cited by Udombana, supra note 63, at 207.

⁹⁶ *Id.* at 206.

⁹⁷ FAO, supra note 22 at 116.

⁹⁸ Committee on the International Covenant on Economic, Social and Cultural Rights General Comment No 9 (Nineteenth session, 1998), *The domestic application of the Covenant*, par. 8, UN Doc E/1999/22.

established customary international law which states that states should perform their treaty obligations in good faith and that they cannot invoke domestic law as a defence for non-compliance with their international obligations.⁹⁹ This proposition suggests that failure to recognize rights guaranteed in the Charter as legal entitlements in “domestic law, including [constitutional law], could, in theory, be viewed as a violation of international law if a good faith reading of the treaties so requires”.¹⁰⁰

Still another argument can be forwarded based on the principle of effective interpretation.¹⁰¹ This principle is about reading the African Charter in a manner designed to give effect to the provisions it incorporates. According to this principle, implementation of human and peoples’ rights by domestic courts could be much more effective than that of the African Commission or the newly constituted African Court on Human and Peoples’ Rights. Indeed, recourse to the Commission or the Court is often inaccessible to individuals and groups, particularly to disadvantaged groups and their organizations operating at local level.¹⁰² For these reasons, disadvantaged groups will excessively depend on the legal remedies available at domestic level.¹⁰³ Because of the problem of accessibility, individuals and peoples are less likely to get redress for

⁹⁹ See Vienna Convention on the Law of Treaties, adopted in 23rd May 1969. 8 I.L.M. 679 (1969).

¹⁰⁰ Shany, *supra* note 94, at 350.

¹⁰¹ *Id.* at 350.

¹⁰² Sandra Liebenberg, *The Protection of Economic and Social Rights in Domestic Systems*, in Asbjørn et al. (eds.) *Economic, Social and Cultural Rights*, 55 (2 ND ed. 2001) pp. 55-84.

¹⁰³ *Id.*

violation of their rights.¹⁰⁴ Based on the stated principle, it can be argued that the requirement of exhaustion of local remedies stipulated in the African Charter and other international human rights instruments directs towards the duty of states to recognize the rights as legal entitlements. In the words of Shany;

...domestic procedures could be deemed effective from an [international human rights] law perspective only if individuals are able to invoke before municipal courts legal norms which correspond to their internationally recognized human rights. Hence, incorporation of [international human rights] standards into domestic law ...goes a significant way towards ensuring their effectiveness.¹⁰⁵

It should be remembered here that the Commission will consider socio-economic rights claims as justiciable claims, even though the states' domestic law do not recognize the rights as legal entitlements. If this is so, the reasonableness of African Union member states' measure making the rights non-justiciable rights can be challenged. It goes without saying that domestic judicial bodies are presumably more suited than regional or international tribunals in terms of ascertaining and analysing socio-economic rights claims individuals and peoples' have.

In addition, the language of Article 1 the African Charter can somehow be interpreted to reinforce such view. This Article explicitly requires states to recognize the rights and also

¹⁰⁴ As noted in the Second Chapter, decisions of the African Commission are not legally binding. In respect of the African Court on Human and Peoples' Rights, unless states have made formal declaration accepting the jurisdiction of the court, individuals and peoples have no access to it. So far only few states have done that. Secondly, the Court's procedure does not allow non-governmental organizations (NGOs) to litigate before the Court. It should be noted here that more than half of the complaints reached to the African Commission have come from NGOs. In view of the prevailing poverty in Africa, it is difficult to imagine that many victims of socio-economic rights violation will have access to the Court without the support of NGOs.

¹⁰⁵ Shany, *supra* note 94, at 352.

it specifically spells out obligation of states' to adopt legislative measures, of all the other possible measures states may adopt as part of their obligation under the Charter.¹⁰⁶ Accordingly, it can thus be argued that Article 1 of the Charter underlines the importance of legislative measure member states effort in implementing the rights.

Still more, when we scrutinize states' obligation as elaborated by the Commission in *SERAC v Nigeria*, i.e. obligations to respect, protect, promote and fulfill rights, question may arise if compliance with of all these obligations is possible without some degree of legal framework at national level. Particularly, obligation to protect involves providing effective remedy in the event of violation of rights, including violations perpetrated by non-state actors. And, it is difficult to imagine how such obligation would be fulfilled without the rights being recognized as legal rights.¹⁰⁷

Moreover, the emphasis the Committee on the ICESCR placed on judicial remedies is telling of the importance legislative measures have in terms of giving effect to the rights effectively. The Committee in its General Comment 9 (1998) specifically said that overall obligation states have in implementing the Covenant (Article 2 (1)) ““could be rendered ineffective if they are not reinforced or complimented by judicial remedies”.¹⁰⁸ Furthermore, while noting that judicial remedy need not be the only effective remedy for redressing socio-economic rights violations, it has however emphasised the

¹⁰⁶ African Charter, *supra* note 6, Article 1.

¹⁰⁷ Shany, *supra* note 94, at 353.

¹⁰⁸ General Comment No 9, *supra* note 98, at par. 3.

indispensability of judicial remedy in ensuring the right to non-discrimination and other socio-economic rights.¹⁰⁹

In light of what has been discussed above, it can be concluded that margin of appreciation states have in determining the means of implementing the Charter is not wide enough to allow states render all socio-economic rights obligations as non-justiciable rights.

The next and more complicated question that comes up here is member states duty in regard to the jurisprudence of the African Commission. Unlike the Charter, which would normally have legal effect on member states with the blessing of the legislator, the Commission's jurisprudence doesn't seem to envisage legislative will in order to have legal effect on member states. And when the Commission makes quite a robust move in developing the Region's jurisprudence (as it did in *SAREC V Nigeria*), question may arise as to the legitimacy of the Commission's decision over the directly accountable law makers or, as the case may be, framers of a state's constitution.

For some the issue of legitimacy doesn't seem to be concerning as far as member states' obligation is concerned. They argue that the power of law makers to create obligation for a state "encompasses the power to undertake open-ended and dynamic obligations".¹¹⁰ Along this line, it has been argued in the African context that when states become parties to the Charter, they accept the mandate of the Commission in developing the

¹⁰⁹ *Id.*

¹¹⁰ Shany, *supra* note 94, at 389.

jurisprudence of the African Charter, and hence are bound by the Charter as interpreted by the Commission in execution of its mandate.¹¹¹

However, the argument that the Commission's jurisprudence will have the same legal effect on member countries as the African Charter could prove difficult to sustain in constitutional democracies committed to the principle of rule of law.

That said about obligation of states to recognise socio-economic rights as legal obligations, we now consider one concern states (and also those who oppose to the idea of justiciability of socio-economic rights) express in relation to adopting legislative measures on the rights. It is argued that the content of socio-economic rights too vague to produce judicially manageable standards.

It is true that because of the marginal position socio-economic rights possess in human rights discourse and practice, the jurisprudence in this area of human rights is not well established. The few socio-economic rights cases the African Commission considered as compared to the vast number of civil and political rights can be one proof.

However, the growing body of jurisprudence both at the international and domestic levels can serve as a valuable guide for states in their effort to articulate the contents of these

¹¹¹ Attiya Waries, *The Remedies, Applications and Enforcement Provisions of the African Court on Human and Peoples' Rights* 110, in France Viljoen (Ed), *Judiciary Watch Report-The African Human Rights System: Towards the Coexistence of the African Commission on Human and Peoples' Rights*, (Vol. IV, 2006)pp. 97-121.

rights in their domestic laws. Years of extensive work of United Nations treaty monitoring bodies, particularly the work of the Committee on the ICESCR obviously provide useful guides.¹¹² At the regional level, the jurisprudence of the African Commission, specifically its decision on *SAREC v Nigeria* can also be another guide. Moreover, in a number of jurisdictions socio-economic rights are stipulated as legal rights and/or have been considered in concrete cases by domestic judicial bodies. Notably in two developing countries, namely South Africa and India, the rights have been extensively examined by the judiciary. What is more, in many other jurisdictions these rights have been the subject of judicial scrutiny in connection with cases involving civil and political rights issues or general principles of human rights.

Apart from available jurisprudence, bodies of experts have formulated guidelines that can inform states elaborate the content of socio-economic rights. The main documents in this regard are the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986,¹¹³ the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997¹¹⁴ and the Bangalore

¹¹² Although the Committee's work is not developed in context of concrete cases due to unavailability of individual compliant mechanism, Danie Brand notes that, the ICESCR has undoubtedly influenced the text of the South African Constitution-a constitution considered as exemplary in entrenching justiciable socio-economic rights. See Danie Brand and Christof Heyns(eds), *Socio-economic Rights in South Africa* (Pretoria University Law Press, 2005). pp. 1-8

¹¹³ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) (*accessed from the United Nations website* [http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/\\$FILE/G0044704.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf) on June July 8, 2007)

¹¹⁴ The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997) (*accessed from the United Nations website* [http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/\\$FILE/G0044704.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf) on June July 8, 2007)

Declaration and Plan of Action of 1995.¹¹⁵ Though Bangalore Declaration is adopted in context of commonwealth countries, substantively speaking the Declaration has incorporated useful guides which could be useful for civil law jurisdictions as well.

2. 8 Conclusion

Since the Charter of the Organization of the African Unity is adopted in 1963, Africa has shown a positive gesture in the promotion and protection of human rights in the continent. In this regard, adoption of the African Charter on Human and Peoples' Right in 1981 can be considered as a turning point. Although several factors might have predicated the adoption of the Africa Charter, the need for emphasizing socio-economic rights and other rights with significant implications on socio-economic rights in Africa have formed the basis for the drafting of the African Charter. Now the principal human rights document in the continent, the Charter is ratified by all the fifty three members of the African Union. As the same time, only few declarations or reservations have been made against it.

The African Charter guarantees civil, political, economic, social and cultural rights and group or collective rights in one document, subjecting all the rights to same compliant procedure. Besides, it enshrines fundamental principles of human rights law which could be instrumental in enforcing socio-economic rights through domestic judicial bodies. Still more, the Charter invites application of international human rights in developing human rights jurisprudence in the continent. Consequently, the Commission in several occasions

¹¹⁵ Bangalore Declaration and Plan of Action on Economic, Social and Cultural Rights and the Role of Lawyers. (1995) (accessed from http://www.chr.up.ac.za/centre_projects/socio/compilation1part4.html#6 July 18, 2007)

has utilized these provisions to develop the Region's Human Rights System in conformity with the international human rights norms and principles. In doing so, the Commission confirmed that the African System is not up to cultural relativism, as some skeptics view it.

While the Charter is hailed for the above stated facts, it is criticized for failing to expressly guarantee some basic socio-economic rights as the rights to housing and food. In the land mark decision of *SERAC v Nigeria*, the Commission has, however, innovatively found both rights to be implicitly recognized in other rights guaranteed by the Charter. In arriving at this conclusion, the right to human dignity, the right to health, the right to property and the right to family life guaranteed by the Charter were instrumental for the Commission.

In the same case, the Commission has also articulated states' obligation in respect to socio-economic and other rights, guaranteed by the Charter, making it easier for states to know what is expected of them in ratifying the Charter. For these and other reasons, the Commission's decision in *SERAC v Nigeria* is regarded as a "firm and dynamic approach that may contribute to a better and more effective protection of economic, social and cultural rights in Africa".¹¹⁶

Indeed, the Commission's decision in *SERAC v Nigeria* establishes the Region's Human Rights System stand on the question of justiciability of socio-economic rights. The fact that the Commission considered this case involving a range of socio-economic rights

¹¹⁶ Coomans, *supra* note 83, at 749.

claims and subsequently made a decision on the merits can be taken as a simple proof that socio-economic rights recognized by the Charter are treated by the Commission as justiciable rights. The Commission in fact expressly stated that no right enshrined in the Charter can be made ineffective; and that it will use any of these rights in disposing a case before it.

No matter what the Commission's stand on the justiciability issue may be, one cannot definitively say that states have the obligation to recognize socio-economic rights as legal entitlements so that individuals could vindicate their rights before domestic judicial bodies. This is because the Charter does not specifically prescribe such obligation. However, treaty monitoring bodies, including the Commission, recommend states to recognize the rights as legal entitlements. Treaty monitoring bodies' recommend such measure based on the idea that if rights to have meaning to the right holders there should be a mechanism where rights violations are redressed. Moreover, purposive interpretation of the Charter could lead to the conclusion that states have the duty to recognize at least some of these rights as justiciable rights.

Chapter Three -Constitutional Framework affecting Judicial Implementation of Socio-Economic Rights

3.1 Introduction

The essential point of establishing the normative standard of human and peoples' rights guaranteed by the Charter is to guide states' ensure realization of the rights to peoples in their jurisdiction. As we have observed from the discussion in the previous Chapter, judicial bodies' involvement in the implementation of the rights is important, and in some cases is indispensable. As the African Commission also noted "ability of courts to examine government actions and if necessary, halt those violate human rights or constitutional provisions is, an essential protection of for all citizens".¹¹⁷ This is indeed why courts are referred to as "guardian of human rights".

However, the role domestic judicial bodies play in the implementation of the rights can be significantly affected by states' domestic legal systems. In this regard, what is provided in a state's constitutional document could be decisive. This is because as a matter of practice states tend to view their international obligations in the light of their constitutions, rather than the way around. Accordingly, the extent a state's constitution reflects international norms we have discussed so far could determine domestic judicial bodies' opportunity of implementing the rights. Therefore, to say that domestic judicial

¹¹⁷ *Media Rights Agenda and Others V Nigeria*, Comm. Nos. 105/93, 128/94, 130/94, 152/96, par. 79, 1998-1999 Afr. Ann. Act. Rep., Annex V.

bodies are or are not performing well in the enforcement of the rights we need to examine whether a country's legal system, particularly the country's constitutional framework, is conducive or not. Specifically, whether or not a state's constitution entrenches these rights as justiciable rights; and in the absence of strong constitutional commitment to justiciable socio-economic rights, the status of the African Charter and the jurisprudence of the African Commission in the domestic legal system of states can significantly determine the judiciary's involvement in the implementation of these rights. Still, court procedures particularly procedural rules on legal standing can unduly restrict judicial bodies' opportunity to give effect to the rights.

Accordingly, this Chapter will examine constitutional and other legal issues affecting judicial implementation of socio-economic rights domestically. The Chapter begins by examining constitutional entrenchment of justiciable socio-economic rights in South Africa and Ethiopia. Latter, it will discuss the status of the African Charter and the Jurisprudence of the African Commission in domestic legal systems of the two countries. Thirdly, the Chapter will look into procedural rules on accessing judicial bodies focusing on rules on public interest litigation.

3.2 Constitutional Entrenchment of Socio-Economic Rights as Justiciable Rights

As argued before, state parties to the African Charter have the duty to recognize socio-economic rights, at least some of them, as legal entitlements so that victims of socio-economic rights will be able to invoke these rights before domestic judicial bodies for

redress. One way states may carry out the recognition is by enshrining these rights in their constitutions. In this Section, we will examine constitutional entrenchment of the rights as justiciable rights in South Africa and Ethiopia. Before examining these countries' constitutions, brief discussion will be made on recent trends in and importance of constitutionalizing socio-economic rights.

Recently, there seem to be a growing tendency on the part of states in enshrining socio-economic rights in constitutions. Cass Sunstein noted that “[a] remarkable feature of international opinion-indeed a near consensus-is that socioeconomic rights deserve constitutional protection”.¹¹⁸ He made a distinction between democratic constitutions in the late eighteenth and early nineteenth centuries on the one hand and constitutions in recent period and found a “striking” difference between the two in the sense that the latter made explicit reference to socio-economic rights.¹¹⁹ Similar to the international trend, it is reported that several African countries that have adopted constitutions in recent years have enshrined these rights in their constitutions.¹²⁰

Although a constitution is not the only means for ensuring protection of socio-economic rights at domestic level,¹²¹ it is however an "important mechanism for 'mainstreaming'

¹¹⁸ Cass R. Sunstein, *Designing Democracy What Constitutions Do*, 221 (Oxford University Press, 2001).

¹¹⁹ *Id.*

¹²⁰ John Cantius Mubangizi, *The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation*, 2 Afr. J. Legal Stud. 1, 2, (2006).

¹²¹ Udombana, *supra* note 63, at 206.

respect for the values associated with these rights in the law and policy-making."¹²² In addition, it is commented that since rights violations often occur as a result of domestic legislations, availability of adequate constitutional remedies for such kind of violation may require that the rights be constitutionally guaranteed.¹²³ In other words, constitutional recognition of these rights helps ensure that the rights are protected from “transient legislative majorities”.¹²⁴ Moreover, Scott and Macklem noted that failure to constitutionalize the rights can have far reaching implications on members of society that need these rights most. To use their words:

A failure to entrench social rights is an act of institutional normalization that amounts to a powerful viewing of members of society by society itself. A constitutional vision that includes only traditional civil liberties within its interpretive horizon fails to recognize the realities of life for certain members of society who cannot see themselves in the constitutional mirror. Instead, they will see the constitutional construction and legitimation of a legal self for whom social rights are either unimportant or taken for granted.¹²⁵

That said, we will now examine the constitutions of South Africa and Ethiopia. Our discussion will begin by considering the case of South Africa.

3.3.1 Constitutional Entrenchment of Socio-Economic Rights in South Africa

Constitutional vision set by the 1996 Constitution of South Africa is not limited to civil and political rights. More than that it envisions a society based on democratic values,

¹²² Diamond Ashiagbor quoted by Udombana, *Id.* at 206-207.

¹²³ Shany, *supra* note 94, at 356.

¹²⁴ Herman Schwartz, *The Wisdom and Enforceability of Welfare Rights as Constitutional Rights* 8 No. 2 Hum. Rts. Brief 2, 3 (2001).

¹²⁵ Scott and Macklem quoted by Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 Am. U. Int'l L. Rev. 35, 50, (2006).

social justice and fundamental human rights.¹²⁶ In fact, it is described as a ‘transformative’ Constitution in the sense that it “differs from a traditional liberal model ... as it does not simply place limits on the exercise of collective power (it does that also), but requires collective power to be used to advance the ideals of freedom, equality, dignity and social justice”.¹²⁷

Strong constitutional commitment to socio-economic rights in South Africa is evident not only from the Constitution’s preamble, but also from the Constitution’s declaration on founding values and in its Bill of Rights Section.

The founding values of this Constitution as enshrined in Section One of the Constitution include human dignity; the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; and supremacy of the constitution and the rule of law.

The Bill of Rights Section of the Constitution enshrines civil, political, economic, social, cultural and group rights. It expressly provides for all the four basic socio-economic rights, including the right to food (sec. 27(1) (b), 28(1) (c) and 35 (2) (e)) and the right to housing (sec. 26, 28 (1) (c) and 35 (2) (e) and also 25 (5)) -rights which are not explicitly provided in the African Charter. It also enshrines other socio-economic rights which the

¹²⁶ 1996 Constitution of South Africa, Preamble.

¹²⁷ Danie Brand and Christof Heyns(eds), *Socio-economic Rights in South Africa*, 1 (Pretoria University Law Press, 2005).

African Charter is criticized for not expressly providing for as the right to social security (sec. 27 (1) (c), 27 (2) and 28 (1) (c)); the right to water (sec. 27 (1) (b)).

Speaking of constitutional entrenchment of socio-economic rights in South Africa, Justice Albie Sachs, describes the Constitution as to have provided these rights extensively and explicitly.¹²⁸ Probably for this reason, many commentators see South Africa as a benchmark in terms of constitutional protection of socio-economic rights.¹²⁹

Socio-economic rights in the South African Constitution are formulated differently depending on the degree of vulnerability of a social group. Regarding children and detained persons, the South African Constitution provides for special protection measures that should be accorded to these groups of people.¹³⁰ Accordingly, socio-economic rights in respect of children and detained persons are formulated in such a way to accommodate their special needs.

The precise formulation of socio-economic rights entrenched in the South African Constitution determine entitlements they create and duties they impose on the state.¹³¹

¹²⁸ Justice Albie Sachs, *Social and Economic Rights: Can they be Made Justiciable?* 53 SMU L. Rev. 1381, 1385, (2000).

¹²⁹ Mubangizi, *supra* note 120, at 3.

¹³⁰ Karrisha Pillay, *The Implementation of Economic, Social and Cultural Rights: Some highlights in the experience of South African NGOs* in INTERIGHTS, *Implementing Economic, Social and Cultural Rights in Practice* 13 INTERIGHTS Bulletin, 77 (2000).pp. 77-81.

¹³¹ Danie Brand and Christof Heyns, *supra* note 127, at 3.

Danie Brand has distinguished three groups of these rights-‘qualified socio-economic rights’, ‘basic socio-economic rights’ and socio-economic rights formulated as prohibition of certain conducts.

Rights referred to as ‘qualified socio-economic rights’ are rights formulated as ‘access rights’ limiting the positive obligation of the state to a duty to take reasonable steps, within available resources, to achieve their progressive realization. Rights which are formulated as ‘access rights’ are found primarily in sections 26 and 27 of the Constitution. These rights include the right of access to adequate housing (sec 26); health care services (sec 27(1) (a)); sufficient food and water (sec 27(1) (b)) and social security (sec 27(1) (c)), and these rights place obligation on the State to create an enabling environment for individuals to be able to gain access to these socio-economic rights. The positive duties of the state vis-à-vis these rights, as put in subsections 26 (2) and 27(2), is to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of these rights. Other qualified socio-economic rights include the right to healthy environment (sec. 24 (b)); the right to access to land on an equitable basis (sec 25 (5)) and the right to further education (sec. 29 (1) (b)).

The fact that the Constitution makes repeated reference to ‘progressive obligation’ should not be construed as providing a lesser normative standard. Such reference is rather recognition that socio-economic rights cannot be realized overnight, but over a period of

time.¹³² Also, as we have discussed in the previous Chapter, the idea of progressive realization is not alien to the African Human Rights System.

The second group -‘basic socio-economic rights’- are rights to a particular social good. They are neither formulated as access rights nor qualified by ‘reasonableness’, ‘available resources’ or ‘progressive realization’. These rights are: right of everyone to basic education, including adult education (sec. 29 (1) (a)); rights of children to ‘basic nutrition, shelter, basic health care services and social services (sec. 28 (1) (c)) and rights of detained persons to ‘the provision, at state expense of adequate accommodation, nutrition, reading material and medical treatment’ (sec. 35 (2) (e)).

The third group of these rights relate to rights that are formulated as prohibitions of certain forms of conduct, rather than rights to particular things. For this reason, they are not subjected to special qualifications as ‘qualified socio-economic rights’. These are prohibitions on arbitrary eviction (sec. 26 (3)) and the refusal of emergency medical treatment (sec. 27 (3)).

Besides entrenching a whole list of socio-economic rights, the South African Constitution incorporates fundamental principles of human right law which can serve as a useful tool in advancing enforcement of the rights. These include the right to respect of human dignity (sec. 10) and the right to equality (sec. 9). The right to equality as enshrined in the

¹³² Karrisha Pillay, *supra* note 130, at 77-78.

South African Constitution goes beyond the formal sense of equality. In Section 9 (2) the Constitution envisages special protection measures or affirmative action in respect of a wide range of people, as opposed to the African Charter which restricts groups deserving special protective measures to children, women, the disabled and the elderly.¹³³

Furthermore, in exactly the same way as articulated by the African Commission in *SERAC v Nigeria*, section 7 (1) of the South African Constitution provides the State's duty to respect, protect, promote and fulfill socio-economic rights and other rights guaranteed therein. In view of the fact that *SERAC v Nigeria* decision is rendered years after South Africa's Constitution was adopted, it seems that the Constitution has influenced the jurisprudence of the Commission, rather than the other way around.

On the question of justiciability of these rights guaranteed by the Constitution is clear. It is something decided at the time of constitutional making. The issue was hotly debated in the drafting process of the Constitution; and the debate was culminated by the decision of the Constitutional Court in the First Certification case.¹³⁴ In the First Certification case, the Constitutional Court (acting as a body entrusted with the power to certify the final constitutional document) decided stating that:

[W]e are of the view that ...[socio-economic] rights are, at least to some extent, justiciable. ..., many of the civil and political rights entrenched in

¹³³ Acheampong, *supra* note 38, at 195.

¹³⁴ Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitations Clauses*, 20 SAJHR 448, 448- 449, (2004).

the [new constitution] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.¹³⁵

In the famous case of *Government of the Republic of South Africa v Grootboom*,¹³⁶ the Constitutional Court referred back to the Court's First Certification decision and confirmed the justiciability of the rights by stating that:

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state 'to respect, protect, promote and fulfil the rights in the Bill of Rights' and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. This is a very difficult issue which must be carefully explored on a case-by-case basis.

Another feature of the South African Constitution is that it opens the door for horizontal application of the Bill of Rights. In Section 8 (2) the Constitution stipulates that constitutional rights bind "a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right".¹³⁷ This feature of constitutions, as Sandra noted, "is significant in global

¹³⁵ Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 (1996) (4) SA 744 (CC). par. 78

¹³⁶ *Government of the Republic of South Africa v Grootboom* 2001 (4) SA 46 (CC) [hereinafter Grootboom]

¹³⁷ South African Constitution, Section 8 (2).

context where powerful private entities are increasingly controlling access to essential services and resources”.¹³⁸

In fact, the South African Constitutional Court has applied the provision of Section 8 (2) of the country’s Constitution in holding a private entity accountable for rights violation. In *Hoffmann v South African Airways*, the Court found violation of constitutional rights by the respondent for refusing to employ persons living with HIV/AIDS as cabin attendant.¹³⁹ In disposing the case, the Court cited *inter alia* non-discrimination provision of the African Charter.

When we compare South Africa’s Constitution with the African Charter, we observe that the Constitution is in many ways more protective and developed than the minimum normative standard set by the African Charter. Moreover, the Constitution provides the judiciary with the power of constitutional review, which means that the judiciary has ample opportunity to give effect to these rights as a matter of constitution. It is thus rightly pointed out that socio-economic rights protection in South Africa’s Constitution is generally considered as one of the most progressive in the world.¹⁴⁰

¹³⁸ Sandra, supra note 102, at 69.

¹³⁹ *Hoffmann v South African Airways* (CCT17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235 (28 September 2000). Par. 51

¹⁴⁰ Mubangizi, supra note 120, at 2.

3.3.2 Constitutional Entrenchment of Socio-Economic Rights in Ethiopia

Like the South African one, the constitutional vision set by the 1995 Federal Democratic Republic of Ethiopia's Constitution (Ethiopia's Constitution) goes beyond the traditional civil liberties of the society. The Constitution envisions a society "founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing ... economic and social development". The Constitution's preamble moreover proclaims all members of Ethiopian society's aspiration for "...full respect of individual and people's fundamental freedoms and rights, to live together on the basis of equality and without any sexual, religious or cultural discrimination".

Moreover, in its "Fundamental Rights and Freedoms" part (Chapter III), Ethiopia's Constitution enshrines civil and political rights, socio-economic rights and group rights. "Fundamental Rights and Freedoms" part constitute about one-third of the Constitution (Chapter III, Arts.13-44). For this reason, Dr. Fasil Nahum¹⁴¹ described the Constitution as a document that ranks on equal level with other constitutions which place a high regard to human rights.¹⁴²

¹⁴¹ Dr. Fasil Nahum is a prominent legal scholar in Ethiopia who closely followed drafting of Ethiopia's Constitution. He was Director of Law and Justice Research Institute and special advisor to the Prime Minister. Currently he is a member of the Constitutional Inquiry Commission- constitutional organ in entrusted with the power to recommend on constitutionality of issues.

¹⁴² Fasil Nahum (Dr.), '*Constitutionalism and Protection of Human Rights in Ethiopia*', paper presented at First Symposium on the FDRE Constitution, November 1998 (Prime Minister's Office)

“Fundamental Rights and Freedoms” are divided in to two parts, namely ‘Human Rights’ and ‘Democratic Rights’ While the “Human Rights” part enshrines human rights considered as civil rights;¹⁴³ the “Democratic Rights” part enshrines all the other rights the Constitution guaranteed, i.e. political, social, economic, cultural, environmental and developmental rights.

The categorization used in the Constitution (obviously different from the conventional ways found in literatures) may cast doubt as to whether there is an intention to exclude rights categorized as democratic rights, including socio-economic rights, from the realm of constitutionally guaranteed human rights. Such doubt could in turn create uncertainty as to the possible role of the judiciary in enforcing socio-economic rights.

However, what the holistic reading of the constitutional text shows is that for all purpose and intent socio-economic rights and other rights categorized as democratic rights are human rights. It is possible to provide a list of arguments to substantiate this statement. To provide a simple and more authoritative response, though, I would like to quote what Dr. Fasil Nahom specifically said about the issue:

[t]he point that should be stressed [here],..., is the indivisibility of human rights. Whether it is freedom from want or freedom from fear one is dealing with, respect and enhancement of human rights is geared at ensuring a life of fulfillment and dignity of the human person in society. As long as the indivisibility of human rights is kept in mind, the classification of rights for technical reasons is understandable. It is in this light that the constitutional

¹⁴³ These are right to life, liberty and the security of the person, rights of the accused and detained persons, the right to equality, the right to privacy, freedom of religion.

categorization of fundamental rights and freedoms into human rights and democratic rights should be accepted.¹⁴⁴

Therefore, the fact that socio-economic rights and other rights enshrined in the Constitution are categorized as democratic rights should not be construed to mean that the Constitution doesn't recognize the rights as human rights per se.

The main Article in the Constitution guaranteeing socio-economic rights is Article 41.¹⁴⁵ This Article titled 'Economic, Social and Cultural Rights' provides for a limited list of socio-economic rights formulated mostly in general terms. However, the rights guarantee is not limited to Article 41. Moreover, the Constitution enshrines other rights with significant

¹⁴⁴ Fasil Nahum, *Constitution for the Law of Nations: the Ethiopian Prospect*, 111-112 (The Red Sea Press, Inc., 1997).

¹⁴⁵ Ethiopia's constitution reads:

Article 41 Economic, Social and Cultural Rights

- “1. Every Ethiopian has the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory.
2. Every Ethiopian has the right to choose his or her means of livelihood, occupation and profession.
3. Every Ethiopian national has the right to equal access to publicly funded social services.
4. The State has the obligation to allocate an ever increasing resources to provide to the public health, education and other social services.
5. The State shall, within available means, allocate resources to provide rehabilitation and assistance to the physically and mentally disabled, the aged , and to children who are left without parents or guardian.
6. The State shall pursue policies which aim to expand job opportunities for the unemployed and the poor and shall accordingly undertake programmes and public works projects.
7. The State shall undertake all measures necessary to increase opportunities for citizens to find gainful employment.
8. Ethiopian farmers and pastoralists have the right to receive fair price for their products, that would lead to improvement in their conditions of life and to enable them to obtain an equitable share of the national wealth commensurate with their contribution. This objective shall guide the State in the formulation of economic, social and development policies.
9. The State has the responsibility to protect and preserve historical and cultural legacies, and to contribute to the promotion of the arts and sports.”

implications on socio-economic rights. Still more, the Constitution incorporates general principles of human rights that could be used by judicial bodies to reinforce justiciability of the rights.

When we examine Ethiopia's Constitution in accordance with the distinction of socio-economic rights we used while considering the South African Constitution, we will find that the rights entrenchment is not as strong as that of South Africa.

To begin with 'qualified' or 'access' rights, Ethiopia's Constitution provides that citizens have the "right to equal access to publicly funded social services" (Art. 41 (3)). The provision makes no distinction as to the type of social services provided from the public purse. This provision can therefore be construed to include all social services provided by the state, including education, health, food and housing.

Another right which can be distinguished as "access" or "qualified" rights, but framed in terms of the State's obligation, is enshrined in Article 41 (4). Article 41 (4) provides that "[the] state has the obligation to allocate an ever increasing resources to provide to the public health, education and other social services. The Constitution thus incorporates the idea of progressive realization. However, nowhere in Article 41 is the contents of the rights to education and health are provided. Moreover, the rights to food and housing are not expressly referred to in Chapter III. In this regard, therefore, the Constitution shares resemblance to the African Charter.

Notwithstanding, it can be argued that the right to food and housing form part of Article 41(4). Article 41 (4) is illustrative and therefore the phrase “other social services” includes these two rights as well. Second, since Ethiopia’s Constitution stipulates that human rights guaranteed in the Constitution shall be interpreted in conformity with international instruments ratified by Ethiopia (Art. 13(2)); the fact that Ethiopia is a party to the ICESCR coupled with the jurisprudence of the African Commission in *SERAC v Nigeria* can reinforce the argument.¹⁴⁶ The second argument, however, could be difficult to sustain in the Ethiopian context for, as we shall see in the up-coming Section, international human rights obligations doesn’t seem to create new constitutional rights.

Another ‘qualified’ rights framed as the State’s duty is the right to special protective measures of vulnerable groups. The first category of vulnerable groups guaranteed with such right are the physically and mentally disabled, the aged and children who are left without parents or guardian (Art. 41 (5)). Their right is, however, subject to available resources.

While ‘access’ or ‘qualified’ rights that we have considered in the context of the South African Constitution incorporate the element of “duty to take reasonable steps’, such element is inexistent in the Constitution. It can be argued that, as per the terms of the 13 (2) of the Constitution- a provision which stipulates that constitutional rights should be interpreted in

¹⁴⁶ It is to be noted that though the rights to food and housing are not explicitly provided in the African Charter, in *SERAC v. Nigeria* the African Commission has found the rights to be impliedly recognized in the Charter by combined reading of other rights recognized by the Charter.¹⁴⁶ All the rights the Commission used in finding the rights are provided in the constitution, though with a different degree of emphasis and clarity. Since Article 13 (2) of the Constitution stipulates that fundamental rights and freedoms guaranteed by the constitution should be interpreted in conformity with the UDHR and international human rights instruments ratified by Ethiopia, The rights the Commission used in finding the rights to health and food as impliedly guaranteed in the Charter are right to health, the right to property, the right to family, human dignity, the right to education, the right to work and the right to political participation. All these rights are enshrined in Arts. 41 (4), 34 (3), 24 (1), 41 (4), 42 and 38 respectively.

conformity with international norms and principles- it forms part of the constitutive elements of ‘qualified’ rights guaranteed in the Constitution. For purpose of constitutional litigation, however, it would have been better if such element was explicitly provided in the Constitution.

The only unqualified socio-economic right the Constitution seems to have enshrined is the rights of persons held in custody and persons imprisoned upon conviction and sentencing. In light of the African Commission’s jurisprudence in *World Organisation Against Torture et al. v. Zaire*,¹⁴⁷ the right of detained persons to be treated with dignity guaranteed in Article 21(1) can be interpreted to include the right to be provided with basic social services from the State.

The above mentioned rights are not the only socio-economic rights the Constitution guaranteed. The Constitution also enshrines other socio-economic rights and rights which have significant bearing on the rights. These include: the right to property (Art. 40) and equal property right of women (Art.35 (7)); right of labor (Art. 42); the right to environment (Art.44) and the right to development (Art. 43); the right of the child to be protected from work harmful or hazardous to his/her education, health and wellbeing (Art. 36 (1)(d)), women’s right to affirmative action measures “to enable them to compete and participate on the basis of equality with men in political, social and economic life as well as in public and private institutions” (35 (3), right of orphans to special protective measures (Art. 36 (6)).

¹⁴⁷ *World Organisation Against Torture et al. v. Zaire*, supra note 67.

Moreover, it expressly enshrines general principles of human rights and rights which could be utilized by judicial bodies to enforce socio-economic rights. And examples of these values include: the right to equality and non-discrimination (Art. 25); the right to respect of dignity (Art. 10 (2)); and the right to life (Art. 15).

Still more the Constitution envisages horizontal application of the rights. The supremacy clause of the Constitution provides that the Constitution is the supreme law of the land and “[a]ny law, customary practice or a decision of an organ of state or a public official which contravenes this Constitution shall be of no effect” (Art. 9(1)). Furthermore, in 9 (2) it stipulates that “[a]ll citizens, organs of state, political organizations, other associations as well as their officials have the duty to ensure observance of the Constitution and to obey it” (Art. 9 (2)). Article 9 (2) appears wider in scope than its counterpart provision in the South African Constitution-Section 8 (2). From the point of view of ensuring socio-economic right, therefore, Article 9 (2) can facilitate domestic implementation of obligation to protect of the State in the sense that it provides judicial bodies with the legal tool to enforce constitutionally entrenched human rights provisions on private relations.

We can observe that socio-economic rights entrenchment in Ethiopia’s Constitution is less extensive and explicit than in the South African Constitution. Basic socio-economic rights expressly enshrined in the main Article providing for the rights (Art. 41) are few in number and are formulated much more broadly. This could be for the reason that the Constitution provides for rights that the country’s economy can support. However, the Constitution

doesn't even provide in sufficient detail rights that would entail negative obligations or obligations with insignificant economic implications on the State. As Rakeb pointed out "this does not only give the impression that the interdependence, interrelatedness and indivisibility of human rights is not given due emphasis, but are not also well elaborated as to ensure their justiciability with ease".¹⁴⁸

Considering the fact that the vast portion of Ethiopia's Constitution is devoted to civil and political rights, what Dr. Fasil Nahum noted regarding the level of emphasis Ethiopia's Constitution gives to human rights seems to be generally true only in respect of civil and political rights.

As a federal state, the degree of constitutional entrenchment of socio-economic rights in Ethiopia has other implications as well. Ethiopia is a federal state where legislative functions of the State are shared between states and the federal government (Arts. 50 (1) and (2)). As confirmed by the decision of the House of Federation¹⁴⁹ (a body that it entrusted with the power to decide on constitutional matters (Art. 62 (1)) when states exercise law making functions in the area of their competence, including adopting their own constitutions (Art. 50 (5) and 52 (2) (b)), states have the duty to respect fundamental rights and freedoms guaranteed by the Constitution (Art13 (1)).

¹⁴⁸ Rakeb Melese, Enforcement of Human Rights in Ethiopia, 28 (APAP, 2002). (Accessed from <http://www.apapeth.org/Docs/ENFORCEMENT%20OF%20HR.pdf> on July 12, 2007)

¹⁴⁹ Decision of the House of Federation on States Power Regarding Promulgation of Family Law on April 20, 2000 (Accessed from the House of Federations website http://www.hofethiopia.org/pdf/CI%20Dessionion_1.pdf on 7th August 2007)

The concern however relates to the degree of latitude the Constitution leaves to states in determining socio-economic rights standards in their constitutions. In practice, however, this doesn't seem to be that much a concern as state constitutions adopted so far are not substantially different from the Constitution.¹⁵⁰ As far as human rights provisions of the states' constitution are concerned, it is observed that these constitutions "tend, on the whole, to mimic the federal constitution".¹⁵¹

Despite the Constitution fails to extensively guarantee socio-economic rights as rights per se, it has however recognized these rights in a more detailed manner as the State's policy objectives. In this regard, it even provides for basic socio-economic rights not clearly or expressly referred to in the Fundamental Rights and Freedoms Chapter of the Constitution. The pertinent provision on national policy principles and objectives of government provides that "[t]o the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security".¹⁵²

This rings us to the question of justiciability of constitutionally guaranteed socio-economic rights in Ethiopia. Unlike the South African Constitution wherein authority of courts to hear and decide on allegations of all constitutionally entrenched human rights

¹⁵⁰ Examples are the Amhara, the Southern Nations, Nationalities and Peoples' and of the Oromiya Regional States.

¹⁵¹ Dolores A. Donovan and Getachew Assefa, *Homicide in Ethiopia: Human Rights, Federalism, And Legal Pluralism* 51 Am. J. Comp. L. 505, 507 (2003).

¹⁵² Ethiopia's Constitution, Art. 90 (1).

(socio-economic rights included) is expressly provided,¹⁵³ the Ethiopia's Constitution leaves the question of justiciability unanswered. The pertinent provision reads: "Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power" (Art. 37 (1)). Nowhere in the Constitution is "a justiciable matter" defined. Nor there exists a legislation that provides a comprehensive definition or that establishes standards for determining the justiciability of a constitutional matter. Because the country has not so far submitted state report either to the African Commission or to the Committee on the ICESCR, it is not possible to get information indicating the country's stand on the issue.¹⁵⁴ Therefore, justiciability of constitutionally entrenched socio-economic rights in Ethiopia is not a settled issue; though like in many other jurisdictions civil and political right are generally taken for granted as justiciable rights.¹⁵⁵

As indicated earlier, the wording of the relevant provisions of the Constitution are not that much helpful in elucidating the matter. Even in what appears to be a concrete socio-economic right obligation in Article 41(4)-"obligation to allocate an ever increasing resources to provide to the public health, education and other social services"- it can be controversial to say that the provision can be scrutinized by courts. Commenting on this

¹⁵³ Section 38 of the South African Constitution:

"Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights."

¹⁵⁴ The country has submitted state reports on the United Nations Convention on the Rights of the Child and Convention Against all Forms of Discrimination against Women, but the question of justiciability was not on the table.

¹⁵⁵ General Comment 9, *supra* note 98, at par. 10.

specific provision, Dr. Fasil Nahum said that the assumptions of this Article “seems” correct, for the country emerged from decades of dreadful wars and now is striving to democratize itself based on liberal economic model.¹⁵⁶ However, in view of the fact that 30-40% of the country’s national development program is financed by foreign aid;¹⁵⁷ and the strong influence international financial institutions, namely the International Monetary Fund and World Bank, have in the determination of development plans of developing countries, including Ethiopia, the justiciability of this particular provision could be questionable at best.

Another debatable matter arises from constitutional recognition of some basic socio-economic rights as Fundamental Rights and Freedoms Chapter and as the same time “National Policy Principles and Objectives”, outside of Fundamental Rights and Freedoms Chapter. And yet the rights formulation is not always distinct enough to avoid overlapping elements between rights recognised as rights per se and those recognized as the State’s policy objectives. For example, how is a judge going to examine the State’s duty to allot ever increasing resource to provide social services (41 (4)) without touching upon elements of the provision of 90 (1), which states that within available resources the State’s policies shall aim at providing all access to social services.

¹⁵⁶ Nahum, *supra* note 144, at 165.

¹⁵⁷ Noted by the country’s legislative body when it adopted a Resolution of the House of Peoples’ Representatives of Federal Democratic Republic of Ethiopia on the Five-Year Development Plan on 16 May 2006 (accessed from the parliament’s website <<http://www.ethiobar.net/>> on September 07, 2007)

It should be noted here that court's express duty and responsibility of enforcing constitutional rights is limited to Fundamental Rights Freedom. At the same time it is also possible to argue that everyone's duty "to ensure observance of the Constitution and to obey it" provided in Art. 9 (2) extends court's power to examine policy matters. However, pursuing the latter line of argument would run the risk of ignoring the political question doctrine. The fact that the rights are also recognised as the state's policy objectives (as opposed to rights per se), it means that there is a textually demonstrable constitutional commitment of the state policy objectives to be handled by the political organs of the state. In fact this is what states do when they intend to preclude the judiciary from scrutinizing socio-economic rights claims. Constitutions structured in this manner include the constitutions of Nigeria, Ghana, India, Ireland and Pakistan.¹⁵⁸ Still, it is argued to the contrary that directive principles of a state's policy can be utilized to reinforce socio-economic rights guaranteed by a constitution.¹⁵⁹

¹⁵⁸ Yash Ghai and Jill Cottrell supra note 56, at 1.

¹⁵⁹ Marius Pieterse, *Coming to Terms with Judicial Enforcement of Socio-Economic Rights*, 20 SAJHR 383, 385 Footnote 100 (2004).

Pieterse offers three ways directive principles of state's policy can be utilized in several ways to reinforce socio-economic rights guaranteed by a constitution. He argued:

"First, they indirectly promote accountability, transparency and a culture of justification by putting moral pressure on the legislature and executive to follow through on their socio-economic undertakings and constrain their policy options accordingly. Second, directive principles serve as interpretative guidelines, either for fully entrenched constitutional rights or for legislative provisions. In this guise, socio-economic interests could for instance enter judicial deliberation through the 'backdoor' of civil rights interpretation, hence enhancing the notion of interdependence and indivisibility of civil and social rights. Third, directive principles allow the judiciary to endorse legislative and executive initiatives aimed at social reform firstly by dismissing challenges that aim to frustrate them, and secondly by allowing the other branches of government to justify infringements and/or limitations on civil and political rights with reference to the directive principles. In this manner, directive principles ameliorate the potentially destructive impact of civil liberties on social reform programs (where judicial vindication of civil rights are used to thwart programs aimed at redistributing social capital)."

It should be noted here that in India, where the Constitution regards socio-economic rights as mere Directive Principles of the State Policies, Indian courts have converted several of such principles into justiciable rights.¹⁶⁰ In *Bhagwati Mukti Morcha V Union of India*, for example,

The right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of the State Policy and particularly clauses (e) and (f) of Article 39 and Article 41 and 42 and at the least, therefore, it must include the protection of the health and strength of workers men and women, and the tender age of children against abuse, opportunities and facilities of children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and human conditions work and maternity relief.¹⁶¹

What can further complicate the justiciability of constitutionally guaranteed socio-economic rights in Ethiopia is the ambiguous phrase included in the pertinent constitutional provision, i.e. “any other competent body with judicial power” (Art. 37 (1)). This can open the door for limiting the judiciary’s role in implementing socio-economic rights. Indeed, some socio-economic rights related disputes which have long been decided by lower courts have now been transferred by legislative acts to administrative tribunals. The stated reason for such transfer is expediting the state’s development agenda. Example of disputes now transferred to administrative tribunals

¹⁶⁰ Jill Cottrell and Yash Ghai, *supra* note 56, at 71-72.

¹⁶¹ *Bhagwati Mukti Morcha V Union of India* (AIR (1984)SC 802, at 811-2 quoted at Jill Cottrell and Yash Ghai, *The Role of Courts in the Protection of Economic, Social and Cultural Rights* in Yash Ghai and Jill Cottrell (Eds), *Economic, Social and Cultural Rights in Practice: The Role of Courts in Implementing Economic, Social and Cultural Rights*, 72, (INTERRIGHTS, 2004).pp.58-89.

are: expropriation of landholding (both urban and rural);¹⁶² clearing and taking over of urban land for public interest;¹⁶³ and recently matters relating to state owned houses rented to private individuals¹⁶⁴. What is more, except on compensation issues the courts have no power review over the decisions of the relevant administrative tribunals concerning the first two stated matters. And in respect of state owned houses, their jurisdiction is altogether foreclosed.

The above described legislative measures are taken despite constitutional guarantee of interests to be affected by administrative measures. The Constitution enshrines the right to property, which is subject to expropriation for public use and in advance payment of compensation by the government (Art. 40 (8)). It also provides for environmental rights stipulating that “[a]ll persons who have been displaced or whose livelihoods have been adversely affected as a result of State programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate State assistance” (Art. 44 (2)).

To this date the relevant administrative tribunals continue operating, and no one seems to have challenged the constitutionality of these legislative measures. This situation could leave the impression that determining the justiciability of constitutional rights is the

¹⁶² Expropriation of Landholdings for Public Purposes and Payment of Compensation Proclamation, No. 455/2005 (Negarit Gazeta 11th Year, No. 43, 14th July 2005), Art. 11.

¹⁶³ Re-Enactment of Urban Lands Lease Holding Proclamation, No. 272/2002, (Negarit Gazeta 8th Year, No. 19th, May 2002), Art. 16 (3).

¹⁶⁴ Agency for Governmental Houses Establishment Proclamation, No. 555/2007 (14th Year No. 2, 13th Year December 2007), Art. 6 (3).

prerogative of the legislature. Seen as a precedent, these actions of Ethiopia's legislature could be dangerous. If the legislator, for example, excludes the judiciary from reviewing disputes relating to the negative obligation of the state, particularly disputes on eviction matters; it is proper to ask where the erosion on the courts' jurisdiction on socio-economic rights will end. In view of the principle of separation of powers, which the country have committed itself to, Ethiopia's legislator should not be viewed as having such unrestricted prerogative power.

At this juncture, it is important to note what the Committee on ICESCR noted regarding administrative tribunals and judicial remedies in enforcing Covenant rights. In its General Comment No. 9 (1998), the Committee though noted that administrative tribunals could in many cases provide adequate remedies on violations of socio-economic rights, it has at the same time expressly stated appropriateness of having mechanism for judicial review on administrative procedures.¹⁶⁵

Although the Constitution is not clear on the question of justiciability, the extent to which socio-economic rights should be justiciable in Ethiopia would "ultimately depends on the balancing of the requirements of democratic legitimacy and expertise against the need for an ultimate safety mechanism for protecting basic rights".¹⁶⁶

¹⁶⁵ General Comment No 9, supra note 98, at par. 3.

¹⁶⁶ Lord Leter of Henre Hill QC & Colm O'Cinneide, supra note 56, at 22.

At last, as has been noted in the context of India's judiciary,¹⁶⁷ it can be said that the role of judicial bodies in enforcing constitutionally entrenched socio-economic rights in Ethiopia, it is determined not much on the inherent lack of authority on the constitutional text, but on their assertiveness in utilizing their constitutional duty and responsibility of enforcing fundamental rights and freedoms as provided in Article 13 (1).

3.4 Status of the African Charter in Domestic Legal System of States

As we have seen in the preceding Section, strong constitutional entrenchment of socio-economic rights with a clear textual stand on the rights justiciability provides judicial bodies with ample opportunity to implement these rights as a matter of constitutional law. On the other hand, non-existent or weaker constitutional entrenchment of the rights without express constitutional commitment on the rights justiciability leaves domestic judicial bodies with none if not far less opportunity to implement these rights as a matter of constitutional rights. At this juncture, the potential instrumentality of the African Charter in terms of securing judicial implementation of socio-economic rights by domestic bodies in countries like Ethiopia becomes clear.

However potentially instrumental the Charter is, its actual instrumentality could significantly be affected by the status the Charter has in domestic legal systems of

¹⁶⁷ Dr. S. Muralidhar, *Economic Social and Cultural Rights : An Indian Response to the Justiciability Debate* in Yash Ghai and Jill Cottrell (Eds), *Economic, Social and Cultural Rights in Practice: The Role of Courts in Implementing Economic, Social and Cultural Rights*, 31 (INTERIGHT, 2004).

African countries. And in this Section we will examine the status of the Charter in Ethiopia as well as in South Africa.

As has been indicated before, as far as socio-economic rights are concerned the question of status may not be a significant issue in South Africa. Nevertheless, it could be worth to make a brief discussion on the country's constitutional approach to the issue. This is because the outcome of this exercise could inform other African countries of similar legal tradition like South Africa, but with limited on no constitutional entrenchment of justiciable socio-economic rights.

It should be noted here that scholars have put forward various theories to explain the relationship between international law and domestic law, of which the widely referred ones are monism and dualism. However, such categorization was found to be unhelpful in describing constitutional approach to international obligations (including to the question of status).¹⁶⁸ The reason is that constitutions do not purely reflect either of these theories.¹⁶⁹ For this reason, our discussion in this Section will be focused on what the Constitutions of the two countries, than on the theories.

¹⁶⁸ Eileen Denza, *The Relationship between International Law and National Law*, in Malcolm D. Evans (Ed.) *International Law*, 420-421, (2003).pp. 175-246.

¹⁶⁹ *Id.*

3.4.1 Status of the African Charter in the Domestic Legal System of South Africa

South Africa acceded to the African Charter on 9 July 1996,¹⁷⁰ with a declaration. Declaration South Africa made on the Charter relates to concerns the country has on matters not related to socio-economic rights guaranteed by the Charter. More specifically, it relates to the country's reservation on Charter's long criticized characterization of Zionism and other matters geared at improving human rights protection within the Region's Human Rights System.¹⁷¹

Although the country's parliament is involved in the accession process; it is not clear that the Charter is an Act of Parliament.¹⁷² Even if the Charter is not enacted as national law, it doesn't mean that the Charter has no place in the country's domestic legal system. So far as its provisions are not inconsistent with the Constitution or an Act of Parliament,

¹⁷⁰ List of Countries which have Signed, Ratified/Acceded to the African Union Convention on African Charter on Human and People's Rights (accessible at the African Union Website <http://www.african-union.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>)

¹⁷¹ South Africa's Initial Report to the African Commission on Human and Peoples' Rights. (accessed from the Country's Department of Justice and Constitutional Development at <http://www.doj.gov.za/2004dojsite/policy/african%20charter/africancharter.htm> on 7 September 2007)

When the parliament expressed its agreement for the accession, it decided that a *note verbale* expressing South Africa's view that consultation between state parties should take place on a number of issue including "possible measures to strengthen the enforcement mechanisms of the Charter", "criteria for the restriction of rights and freedoms recognised and guaranteed in the Charter" and bringing the Charter in line with the UN's resolutions "regarding the characterisation of Zionism."

¹⁷² When South Africa submitted its initial report to the African Commission in 14 October 1998, it was expressed in the report that no legislation has been enacted to this effect. Also in the country's First Periodical Report submitted to the Commission in 2005, no mention is made about such legislative measure. (First Periodic Report of South Africa is accessible at the University of Pretoria website http://www.chr.up.ac.za/hr_docs/countries/southafrica.html)

self-executing provisions of the Charter are deemed by the Constitution as directly applicable law (Sec. 231 (4)).¹⁷³ As per the terms of Section 231 (4), therefore, the Charter is lower in status than the Constitution and an Act of Parliament, unless of course the Charter itself has become an Act of Parliament.

Apart from direct application, the Constitution also provides for indirect applicability of the Charter in domestic courts. In Section 39 (1) it obligates courts to consider international law when interpreting the Bill of Rights. Moreover, in Section 233 it establishes courts' duty to opt for interpretation that is consistent with rule or principle of international law when they interpret any legislation. According to Section 233, courts are not obligated to apply any rule or principle of international law available at their disposal.¹⁷⁴ As the Constitutional Court ruled in *Grootboom*, the weight of such principle varies depending on the binding nature of the rule or principle under consideration.¹⁷⁵ Because South Africa is a party to the African Charter, the terms of Section 233 is therefore that rules or principles enshrined in the Charter are binding upon the country's judiciary.

¹⁷³ Section 231 (4) of the Constitution reads:

“Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”

¹⁷⁴ Sibonile Khoza, *Current Developments Realising the Right to Food in South Africa: Not By Policy Alone –A Need For Framework Legislation*, 20 SAJHR 664, 668 (2004).

¹⁷⁵ *Grootboom*, supra note 136.

In sum, in the South African legal system self-executing provisions of the Charter have a status of a law lower in hierarchy than the Constitution. Furthermore, rules and principles enshrined in the Charter are indirectly applicable before domestic courts. For these reasons, in South Africa's domestic law the status of the Charter is that courts have a wide opportunity and also duty to implement socio-economic rights and other rights guaranteed by the Charter.

3.4.2 Status of the African Charter in the Domestic Legal System of Ethiopia

Ethiopia has acceded to the African Charter in 1998¹⁷⁶ as well as to the ICESCR in 1993¹⁷⁷. Article 9(4) of the Ethiopia's Constitution provides that "[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land". Though not explicit as the South African Constitution, the terms of Article 9 (4) suggests that treaties the country ratified are directly applicable law.

Direct applicability of ratified treaties in Ethiopia can also be inferred from views the state's delegation expressed before United Nations treaty monitoring body and from important decision rendered by the country's highest court. When Ethiopia's third periodic report on the International Convention on the Rights of the Child (CRC) was examined by the United Nations Committee on the International Convention on the

¹⁷⁶ Accession to African Human and Peoples' Rights Charter Proclamation, Proclamation No. 114/1998 (Federal Negarit Gazeta 4th Year, No. 40, June 1998).

¹⁷⁷ Ratification Status of the International Covenant on Economic, Social and Cultural Rights (available at <http://www2.ohchr.org/english/bodies/ratification/3.htm>) Though Ethiopia has deposited the necessary document supporting its accession to the United Nations in 11 Jun 1993, no ratification proclamation has yet been enacted by the country's legislative body.

Rights of the Child in 2006, the country's delegation has explained to the Committee that a treaty, once ratified by the country, becomes directly applicable by courts.¹⁷⁸ In addition, in a recent decision of *Tsedale Demissie v Kifle Demissie*, the cassation division of the Federal Supreme Court (whose interpretation of a law has now become binding on all federal and state courts¹⁷⁹) directly applied a provision of the CRC when it overturned the decision of a State Supreme Court.¹⁸⁰

The relevant Article-Article 9 (4)- refers to ratified treaties only, without stating anything about treaties the country has acceded to as the African Charter and the ICESCR. At this point, question may arise on the direct applicability of the African Charter and the ICESCR in Ethiopia.

Neither the above stated court decision nor the explanation gave by the Ethiopia's delegation to the Committee on the CRC are of much help in giving light to the specific question at hand. This is because the CRC becomes part of the country's law by a ratification proclamation; as opposed to the Charter, for example, which has been adopted by an accession proclamation. Moreover, our opportunity to get similar information in

¹⁷⁸ Committee on the Rights of the Child, (Forty-third session, 2006), Summary Record of the 1162nd Meeting, par 43, CRC/C/SR.1162. (accessed from [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/d4d124fefa4331e3c1257202004827e2/\\$FILE/G0644163.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/d4d124fefa4331e3c1257202004827e2/$FILE/G0644163.pdf) on July 10, 2007)

¹⁷⁹ Federal Courts Proclamation Reamendment Proclamation, Proclamation No. 454/2005 (Negarit Gazeta 11th Year, No. 42, June 2005).

¹⁸⁰ *Tsedale Demissie v Kifle Demissie*, Decision of Cassation Division of the Federal Supreme Court on the 6th November 2007, Cassation File No. 23632.

regard to the Charter and the ICESCR is none, as the country has not yet started complying with its reporting obligations under both instruments.

Notwithstanding, for all intents and purposes the word “ratified” in Article 9 (4) should be considered as to include treaties the country has acceded to. In other words, the African Charter and the ICESCR should be deemed as directly applicable laws. First and for most, as far as Ethiopia’s international obligation is concerned, accession has the same legal effect as ratification. The difference between accession and ratification is that ratification requires prior signature of states to become obligatory under international law, while accession only requires that the instrument of accession is deposited in the relevant body. Ethiopia has acceded to the African Charter and the ICESCR accordingly. And under international law, accession has the same legal effect as ratification.¹⁸¹

Moreover, the legislative body is involved in the accession process. In Ethiopia it is the federal law making body or the House of Peoples’ Representatives that has the power to approve treaty obligations signed by the executive. Secondly, the House promulgates its

¹⁸¹ Office of the United Nations High Commission for Human Rights, Human Rights Treaty Bodies: Glossary of treaty body terminology (Accessible from <http://www2.ohchr.org/english/bodies/treaty/glossary.htm>).

accession to such treaties by the State's official gazette; which means that judges are obliged to apply them on cases or disputes before them.¹⁸²

It should be pointed out here that, as opposed to the Charter, the House's involvement in the accession process of the ICESCR is not clear. For this reason, applicability of the second argument is not certain in respect of the ICESCR.

That said about direct applicability of the Charter and the ICESCR, now we will consider the issues of self-executing character of treaty obligations. Unlike in South Africa, this issue is not directly governed by Ethiopia's Constitution. As the same time, the nature of some socio-economic rights provisions of the Charter or the ICESCR can understandably be regarded as non-self executing, hence may not be directly applicable by courts.

Ethiopia is viewed as a country that largely follows the civil law legal tradition and some of its major codes are taken from French laws. Moreover, like in France, ratified human rights treaties are directly applicable laws. For these reason, consulting the jurisprudence of French courts might be of useful guidance to the judiciary in Ethiopian; and even to the judiciary in other African Countries that identify themselves with the civil law legal tradition.

¹⁸² Federal Courts Proclamation, Proclamation No. 25/1996 (Negarit Gazeta 2ndYear No. 13, 15th February, 1996), Art. 6(1)(a).

The French Combined Court of the Conseil d'Etat in *Rouquette et al*¹⁸³ used two requirements to distinguish non-self-executing provisions of the ICESCR. These are: when the intent of the provision in question is exclusively to govern relationship between states and not to establish rights to individuals; and when a provision establishing the right of individuals is not formulated with sufficient precision or it is conditional.¹⁸⁴ Accordingly, provisions of the African Charter and the ICESCR which would not pass these two standards are likely to be deemed non-self-executing, hence not directly applicable.

In light of what have been discussed above, we can conclude that direct applicability of self-executing provisions in the Charter and the ICESCR is envisaged by the Ethiopia's Constitution. The Constitution, however, doesn't stop there. It also envisages indirect applicability of these and other human rights instruments the country has adopted.

The relevant provision of the Constitution stipulates that human rights guaranteed by the Constitution shall be interpreted in conformity with the principles of the UDHR and other human rights instruments adopted by Ethiopia (Art. 13 (2)). At this juncture, it is worth mentioning the decision of the Cassation Division of Ethiopia's Federal Supreme Court cited above. The Court's ruling makes it clear that international instruments ratified by the country can serve as an interpretive tool for shading light into the provision of

¹⁸³ Cited by Ibrahima Kane, *Direct application of the International Covenant on Economic, Social and Cultural Rights in France and francophone African Countries* in INTERIGHTS, *Implementing Economic, Social and Cultural Rights in Practice* 13 INTERIGHTS Bulletin 1, 53 (2000).pp.53-55.

¹⁸⁴ *Id.*

legislation when literally applied would result in violation of internationally and constitutionally guaranteed rights.

The discussion we have so far doesn't tell us the status international human rights instruments, including the Charter and the ICESCR, enjoy in Ethiopia's legal system. The Constitution doesn't provide a clear answer to this question of status. Looking at the supremacy clause in Article 9 (1), which stipulates that "any law" which contravenes the Constitution shall have no effect, one may suppose that the Constitution prevails in case of conflict between the Constitution and other laws including international law. On the other hand, in Article 13 (2) of the Constitution it is provided that human rights guaranteed by the Constitution shall be interpreted in conformity with the principles of the UDHR and other human rights instruments adopted by Ethiopia. This provision may cast doubt on to the supremacy of the Constitution when it comes to the relationship between the Charter and the ICESCR on the one hand and Fundamental Rights and Freedoms Chapter (Chapter III) of the Constitution on the other.

In this regard, the ruling of the Cassation division of the federal Supreme Court is not clear enough, as the Court applied the provision of the CRC along with similar provision of the Constitution. On the balance, however, the language of the supremacy clause of the Constitution seem towards the idea that Chapter Three of the Constitution is controlling even when a matter falls under treaty obligations the country assumes under international or regional human rights instruments. Indeed, opinion of prominent individuals on the Ethiopian legal system goes in line with this idea. For example, Mr. Tadesse noted that

the phrase ‘any law’ in Article 9(1) is unequivocal and includes international human rights law, hence if inconsistent with the Constitution shall have no effect.¹⁸⁵ Also Professor Scholler regards international human rights instruments the country ratified as Federal Law below the level of the Constitution.¹⁸⁶

Considering the Charter and the ICESCR as federal laws, question may still arise as to the binding nature of these instruments on matters within states’ jurisdictions. As a matter of treaty obligation, Ethiopia is obliged to ensure observance of rights guaranteed by the Charter to all peoples under its jurisdictions (Arts. 1 and 2). In more express terms of the ICESCR, the country is obligated to apply the Covenant equally across states forming the federation (Art. 28). Further argument can be made based on Article 51 (8) of the Constitution, which stipulates that the power to negotiate and ratify international agreements is that of the federal government. Thus, it can be argued that treaty obligations emanating by the act of the federal government pursuant to Article 51 (8) are binding upon states.

As easy as the stated arguments might be from human rights point of view, in established federal countries like the United States of America the issue of federal/state powers vis-à-vis international human rights obligations is a big constitutional issue.

¹⁸⁵ መንበረ ፀሀይ ታደሰ፣ የኢትዮጵያ ሕግና ፍትሕ ገፅታዎች ፣ 175፣ (አዲስ አበባ፣ ኅዳር 1999 ዓ.ም). [in English: Menberethehay Tadesse, Features of Ethiopian Law and Justice, 168 (Menberethehay Tadesse, 2007).

¹⁸⁶ Heinrich Scholler, *Ethiopian Constitutional and Legal Development: Essays on Ethiopian Constitutional Development*, 59 (Vol. 1, Rudiger Koppe Verlag, Koln, 2005).

In sum, the status of the African Charter and the ICESCR in Ethiopian legal system is below the Constitution. Consequently, these instruments do not create new constitutional obligations for the State. However, they are as good as a federal law. Accordingly, courts have a wide opportunity to implement directly self-executing provisions of the Charter and the ICESCR.

3.5 Rules on Access to Justice

Although socio-economic rights are international, constitutional and legislative obligations of the state, judicial implementation of these rights could in effect be rendered impossible or unduly restricted if rule on access to courts are prohibitive. In this Section we will examine the rules on access to courts in South Africa and Ethiopia, focusing on rules pertaining to legal standing. In order to highlight the significance of liberalized rules in the implementation of socio-economic rights, the Section will begin by providing general overview of exemplary rules adopted by the African Commission and the Indian judiciary.

3.5.1 Significance of Access to Justice in the Implementation of Socio-Economic Rights

The question of accessibility of courts become more important in matters of socio-economic rights because the rights “rights are primarily conceived as a means to assist

the least well-off in society”.¹⁸⁷ Therefore, rules on access to courts should take into account problems the poor and the most disadvantaged members of society face in vindicating their rights. To this end, it could be necessary to liberalize procedural rules on accessing justice, especially rules on legal standing.

At regional level, it appears that concern on access to courts is well taken into consideration. According to the rules of procedure of the Commission, not only are individuals and groups who allege violation of rights guaranteed by the Charter is entitled to bring complaints before the Commission. Non-governmental organizations (NGOs) with observer status are also entitled to have access to the Commission including to bring *actio popularis* claims. In fact, majority of complaints the Commission considered, including the well known *SERAC v Nigeria* cases, are brought to the attention of the Commission as a result of the liberal rules on legal standing rules the Commission has.

Notwithstanding the fact that recourse to the African Commission is an option for vindicating socio-economic rights violation in the African Union member states, the primary means of protecting the right remains to be accessible and effective remedies at domestic level.¹⁸⁸ For this reason, it is desirable that domestic rules on access to justice mirror the Commission’s approach. Prohibitive procedural rules not only impedes realisation of victim’s right to get redress for violation of their socio-economic rights. It

¹⁸⁷ Wiles, supra note 125, at 57.

¹⁸⁸ Sandra Liebenberg, supra note 102.

could have the effect of eroding the independence of the judiciary by foreclosing judicial bodies' opportunity in giving effect to rights guaranteed by the Charter.

Obviously, state provided legal aid for those who need it enhances access to courts. However, as in many African countries both in South Africa¹⁸⁹ and Ethiopia¹⁹⁰, constitution limit availability of such scheme to persons suspected of criminal offence. Outside of this scheme, it is primarily for individuals and groups to litigate or have their case litigated. As one can imagine, the poor and the marginalized often lack the necessary expertise and resources for litigating their claims. Assistance by NGOs and other interested persons helping them vindicate their rights would be important. This in turn would require procedural rules to accommodate such need.

In this regard, India's judiciary is referred to as "very active and creative" in finding ways to ensure that the poorest citizens are able to bring claims through public interest litigation (PIL).¹⁹¹ It liberalized the traditional strict rule of *locus standi* and gave standing to those without vested interest, but who are concerned with a 'wrong against a community interest'.¹⁹² It has been said that remedies arising socio-economic rights

¹⁸⁹ The South African Constitution in Section 35 (2) (c) provides the right of arrested, detained and accused persons "to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

¹⁹⁰ Ethiopia's Constitution in Art. 20 (5) provides that : " Accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal representation at state expense."

¹⁹¹ Wiles, *supra* note 125, at 58.

¹⁹² *Id.* at 58.

litigation has resulted in important reforms in India.¹⁹³ Considering the low level of socio-economic rights realization in India, this approach was once recommended as a positive example for Africa.¹⁹⁴

Against this backdrop, we will now examine how the legal systems of South Africa and Ethiopia accommodate the concerns so expressed. In order to give some picture about the judiciary of both countries, discussion will begin by providing brief description of court structure in the respective countries.

3.5.1 Rules on Access to Justice in South Africa

The South African judiciary is constituted of the Constitutional Court, the Supreme Court of Appeal, the High Courts, the Magistrates' Courts and any other courts that may be established or recognized by an Act of Parliament at the level of the High Courts and Magistrates' Courts.¹⁹⁵ While each tier of court has a defined jurisdiction, for the purpose of our discussion we will concentrate on the jurisdiction of the Constitutional Court.

The South African Constitutional Court is the “highest court in constitutional matters”¹⁹⁶ and its jurisdiction is limited to “constitutional matters and issues connected with

¹⁹³ Shadrack B. O. Gutto, *Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights In South Africa*, 4 Buff. Hum. Rts. L. Rev. 79, 100, (1998).

¹⁹⁴ *Id.*

¹⁹⁵ The South African Constitution, Section 166.

¹⁹⁶ *Id.* Section 167 (1) (3) (a).

decisions on constitutional matters”.¹⁹⁷ The Court decides whether or not a matter is constitutional matter.¹⁹⁸ In constitutional matters, the court has concurrent and exclusive jurisdictions. In matters of concurrent jurisdiction, the court acts as an appellate court.¹⁹⁹ In a limited list of matters the Court has exclusive jurisdiction, in which case it acts as a court of first instance.²⁰⁰ These include deciding constitutional issues between organs of the state at national and provincial level and deciding on the constitutionality of a Bill submitted to it by parliamentarians or which the president is reluctant to sign for constitutional concerns.²⁰¹ Another jurisdiction of the court relates to confirming the decision of superior courts on certain matters of constitutional issues. In order for the decision of superior courts invalidating Acts of either the national or provincial legislators and on the conduct of the President to take effect, the Court must confirm it.²⁰²

Rules relating to access to the Court follow from its jurisdiction. First, cases can reach to the Court by way of appeal. Secondly, cases concerning the Court’s exclusive

¹⁹⁷ *Id.* Section 167 (3) (b).

¹⁹⁸ *Id.* section 167 (3) (b) and (c).

¹⁹⁹ *Id.* Sections 167 (3) (a) (b) & (c), 168 and 169.

²⁰⁰ *Id.* Section 167 (4).

Section 167 (4) reads:

“(4) Only the constitutional Court may

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfill a constitutional obligation; or

(f) certify a provincial constitution in terms of section 144.

²⁰¹ *Id.* Section 167 (4) (a) (b) and (c).

²⁰² *Id.* Section 174 (5).

jurisdiction will directly go to it. Third, in some cases the Court will grant direct access “when it is in the interests of justice”.²⁰³

On the question of who can access courts, the South African Constitution follows the Indian model. It allows standing for a broad range of individuals and groups to enforce Bill of Rights before courts. The pertinent article in the country’s Constitution states that a class, group or individual can “approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights” (Sec. 38).²⁰⁴ More importantly for our discussion, it specifically allows litigation in the public interest (Sec. 38 (d)).

Therefore, the rules on access to courts in general, the rules on legal standing in South Africa mirror that of the Africa Commission’s. This in fact has enabled civil society groups in the country to utilize this procedure and litigate socio-economic rights up to the

²⁰³ *Id.* Section 167 (6)

²⁰⁴ *Id.* Section 38.

Section 38 reads:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are-

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

Constitutional Court. The famous *Treatment Action Campaign* case that we will consider in the coming Chapter is a case in point.

3.5.2 Rules on Access to Justice in Ethiopia

As noted before, Ethiopia is a federal country where judicial functions of the State are shared between the federal and state governments. Ethiopia's Constitution envisages three tiers of courts both at the federal and state levels: courts of first instance court, high courts and supreme courts.²⁰⁵ At the federal level, the Constitution establishes the Federal Supreme Court and leaves establishment of Federal High Courts and Federal First Instance Courts to be effected by two-thirds majority vote of the parliament.²⁰⁶ It, however, obligates states to establish Supreme Court, High Courts and First Instance Courts.²⁰⁷ The Federal Supreme Court is declared as the supreme judicial authority.²⁰⁸ The Constitution recognizes establishment of religious and customary courts in specified areas of law.²⁰⁹ However, it prohibits establishment of "[s]pecial or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not follow legally prescribed procedures".²¹⁰

²⁰⁵ Ethiopia's Constitution Art.78 (2) and (3).

²⁰⁶ *Id.* Art. 78 (2).

²⁰⁷ *Id.* Art. 78 (3).

²⁰⁸ *Id.* Arts. 78 (2) and Art. 80 (1).

²⁰⁹ *Id.* Art. 78 (5).

²¹⁰ *Id.* Art. 78 (4).

A state's High Courts and Supreme Court have concurrent jurisdiction over matters falling within the jurisdiction of Federal First Instance Courts and Federal High Courts respectively.²¹¹ While decisions of a State High Court rendered on current jurisdiction matters are appealable to the State Supreme Court, that of the State Supreme Court are appealable to the Federal Supreme Court.²¹²

State Supreme Court is the highest judicial body on state matters and has the power of cassation "over any final court decision on State matters which contains a basic error of law".²¹³ Notwithstanding, the Federal Supreme Court has "power of cassation over any final court decision containing a basic error of law".²¹⁴

One important thing to note regarding the judicial system of Ethiopia is that even though the Constitution declares the Federal Supreme Court to be the "supreme judicial authority" in the country, judicial power as provided in the Constitution, does not grant the Court the ultimate authority to decide on constitutional matters.

When it comes to constitutional review power, Ethiopia follows a different approach from that of the United States model, where final authority of constitutional interpretation rests on the Federal Supreme Court; and also from that followed in South African or

²¹¹ *Id.* Art. 80 (2) and (4).

²¹² *Id.* Art. 80 (5) and (6).

²¹³ *Id.* Art. 80 (3) (b).

²¹⁴ *Id.* Art. 80 (3) (a).

Germany, where a separate court structure or constitutional court is established for adjudicating constitutional matters. The idea of adopting the German model was envisaged in the draft constitutional document, but was changed in the final constitutional document into the Council of Constitutional Inquiry (the Council).²¹⁵

Ethiopia's Constitution entrusts the ultimate authority of constitutional interpretation to the upper house of parliament or the House of the Federation (Art. 83(1)).²¹⁶ The House of Federation is a political body constituted by the representatives of nations, nationalities and peoples forming the Federal State.²¹⁷

The House is granted with such power because, in Ethiopia, the Constitution is viewed not only as legal document, but also a political document.²¹⁸ According to Dr. Fasil's explanation:

Without losing sight of the constitution as the supreme law of the land, its characteristics as the supreme political instrument for self determination, peace, democracy, and socio-economic development are fully exploited. Thus the ultimate interpreter of the constitution is made, not the highest court of law, but the House of Federation. The House of Federation, as the champion of the nations, nationalities and peoples of Ethiopia, whose equality it promotes and whose unity based on their mutual consent it enhances, whose self-determination right it enforces and whose misunderstandings it seeks to solve, it is precisely this political institution that is vested with 'the power to interpret the constitution.'

²¹⁵ Scholler, *supra* note 186, at 136.

²¹⁶ Ethiopia's Constitution, at Art. 83 (1).

Article 83 (1) reads: "All constitutional disputes shall be decided by the House of the Federation".

²¹⁷ *Id.* at Art. 61 (1) and (2)

²¹⁸ Tadesse, *supra* note 185, at 142.

This means in effect that the House of Federation serves as a “constitutional court”.²¹⁹ In this sense, the House of Federation is a domestic judicial body for the purpose of our discussion. Nevertheless, the fact that constitutional review power on matter of constitutional rights is reserved to a political body is a real challenge to the wisdom of protecting human rights (socio-economic rights included) from a society’s transient majority.

As a political body of the State, constitutional review is one among the several functions this House performs.²²⁰ Also, it performs its constitutional review power from professional support it gates from the Council of Constitutional Inquiry.²²¹

The Council of Constitutional Inquiry has preliminary constitutional review power. According to Article 84, it has the power to investigate constitutional disputes, and then to forward recommendations to the House of Federation when its investigation leads to the conclusion that constitutional interpretation is necessary (Art. 84 (3) (b)). If the Council is of the opinion that no constitutional interpretation is necessary, it will remand the case to the concerned court (Art. 84 (3) (a)). The power of the Council is therefore such that it decides as to whether a certain dispute involves constitutional issue or not.

The Council of Constitutional Inquiry (the Council) is a constitutional body comprised of eleven members,²²² mostly of legal professionals and experts, and members of the House.

²¹⁹ Scholler, *supra* note 186, at 85.

²²⁰ See Ethiopia’s Constitution Article 62 for other functions of the House of Federation.

²²¹ Ethiopia’s Constitution, Arts. 82-84.

Its members are: the President Vice President of the Federal Supreme Court, who also serves as the President and Vice President of the Council; six legal experts and three members from the House.²²³

Though the House has the final say on constitutional disputes, according to Professor Scholler it is clear that such power is also given to ordinary courts. He argues that ordinary Courts do have the power to review laws other than those of the Federal and state government.²²⁴ Therefore, the fact that ultimate power of interpreting the Constitution rests on the House should not be interpreted to mean that courts have no role in the enforcement of the constitution, including socio-economic rights enshrined therein. In this regard, Mr. Tadesse outlines five ways (including one similar to the one pointed

²²² *Id.* Art. 82 (2).

²²³ *Id.* Art. 82.

Article 82 reads:

“Structure of the Council of Constitutional Inquiry

1. The Council of Constitutional Inquiry is established by this Constitution.
2. The Council of Constitutional Inquiry shall have eleven members comprising:
 - (a) The President of the Federal Supreme Court, who shall serve as its President;
 - (b) The vice-president of the Federal Supreme Court, who shall serve as its Vice-President;
 - (c) Six legal experts, appointed by the President of the Republic on recommendation by the House of Peoples’ Representatives, who shall have proven professional competence and high moral standing;
 - (d) Three persons designated by the House of the Federation from among its members.”

²²⁴ Scholler, *supra* note 186, at 61.

out by Professor Scholler) in which courts can play a role in the enforcement of the Constitution.²²⁵

First, the supremacy clause stipulates that any decision that contravenes the Constitution is of no effect (Art. 9 (1)), and courts should make sure that their decision is in line with the spirit of the Constitution. Compliance with the command of the supremacy clause would thus require courts engage in constitutional interpretation. Secondly, as per the terms of Article 13 (2) of the Constitution, courts, like any branch of the State, are bound to respect and enforce fundamental rights and freedoms enshrined in the Constitution. Again, in order for courts to live up to their obligation under this provision, they should at least to some extent involve in constitutional interpretation. Thirdly, according to Article 84 (2) of the Constitution, matters that the Council of Constitutional Inquiry examines are limited to constitutionality of laws enacted by the federal or state legislators. The Constitution doesn't preclude courts from examining constitutionality of the executive's decisions or regulations enacted by it. Fourthly, when courts are to refer a matter to the Council of Constitutional Inquiry, there need to be good reasons for them to do so. Automatic referral to the Council for the simple reason that a party requested so will not be in line with the spirit of the Constitution or the responsibilities of the courts. In this regard, courts will have to engage in some form of constitutional interpretation. Lastly, federal courts have jurisdiction over matters arising from the constitution, federal laws

²²⁵ Tadesse, *supra* note 185, at 145-146.

and international human rights instruments.²²⁶ This provision indicates that courts space to interpret the Constitution.

Having considered the structure of judicial system in Ethiopia, we will now consider the question of access to the judicial bodies described above.

The rules on access to judicial bodies follow from the mandates of the concerned institutions. The framework rule on access to judicial bodies is provided in 37 of the Constitution. Article 37 titled “Right of Access to Justice” reads:

1. Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgement by, a court of law or any other competent body with judicial power.
2. The decision or judgement referred to under sub-Article 1 of this Article may also be sought by:
 - (a) Any association representing the Collective or individual interest of its members; or
 - (b) Any group or person who is a member of, or represents a group with similar interests.

Because of the word “everyone” in Sub-article 37 (1), if construed autonomously, the Sub-article can be considered as to have provided liberal rules of standing to the extent of permitting public interest litigation. Seen in conjunction with the subsequent provisions,

²²⁶ Federal Courts Proclamation, supra note 182, Art. 3.

Article 3 states that:

Federal Courts shall have jurisdiction over:

- 1) cases arising under the Constitution, Federal Laws and International Treaties;
- 2) parties specified in Federal Laws;
- 3) places specified in the Constitution or in Federal Laws.

however, Sub-article 1 seems to refer to the party whose interest is directly involved in the dispute. The limited list of possible litigants preceded by the word “also” in Sub-article (2) suggests that constitutional right of access to judicial bodies is limited to the person whose direct interest is at stake and other individuals, groups or associations who can litigate as a class action. In other words, access to courts seems to be limited to those that have direct interest in the outcome of a dispute.

As pointed out earlier, independent reading of Sub-article (1) provides for liberal rules on standing. However, other constitutional provisions and legislations that govern rules on access to judicial bodies generally follow the restrictive approach that could be derived from the combined reading of Sub-articles (1) and (2).

To begin with access to the House of Federation, the Constitution doesn’t envisage direct access to the House of Federation. This might be because the House is not a judicial body per se and that the Council has preliminary jurisdiction on constitutional disputes. Accordingly, individuals and groups can access the House through the Council. And this could be done in two ways. First, when the Council, after considering a case before it, finds it necessary to interpret the Constitution. Consequently, it would refer the matter along with its recommendation to the House.²²⁷ Secondly, when a court referred a case for the Council’s consideration, the Council may decide that there is no reason for constitutional interpretation. In this case, the Council remands the case back to the

²²⁷ Ethiopia’s Constitution, at Art. 84 (1).

concerned court. When this happens, individuals or groups dissatisfied with the Council's decision can lodge an appeal to the House.²²⁸

At this juncture, rules on access to the Council become very important. The relevant provision in the Constitution provides that “[w]here any Federal or State law is contested as being unconstitutional and such a dispute is submitted to it *by any court or interested party*, the Council shall consider the matter and submit it to the House of the Federation for a final decision” (emphasis mine) (Article 84 (2)).

Individuals and groups have direct and indirect access to the Council, though direct access through public interest litigation is not enshrined. Obviously, indirect access is available through court referral of a case to the Council.²²⁹ On the other hand, direct access to the council is available to the “interested party”. The phrase “interested party” is, of course, open to interpretation. However, the language used in the Amharic version of the Constitution (which is the binding version of the Constitution) tends to refer to the party in the dispute.²³⁰ For this reason, one can say that access to the Council through public interest litigation is not envisaged.

²²⁸ *Id.* Art. 84(3).

²²⁹ There is a proclamation which provides for the details on the operations of the Council. When it comes to the rules on access to the Council, however, this proclamation merely restates what is provided in the Constitution. Council of Constitutional Inquiry Proclamation, No. 250/2001, Art. 6 (2), (Negarit Gazette, 17th Year, No. 40, July, 200).

²³⁰ Amharic version of 84 (2) of Ethiopia's Constitution reads:

«በፌዴራል መንግሥት ሆነ በክልል ሕግ አውጪ አካላት የሚወጡ ሕጎች ከዚህ ሕገ መንግሥት ጋር ይቃረናሉ የሚል ጥያቄ ሲነሰና ጉዳዩም በሚመለከተው ፍርድ ቤት ወይም በባለ ጉዳዩ ሲቀርብለት መርምሮ ለመጨረሻ ውሳኔ ለፌዴሬሽን ምክር ቤት ያቀርባል፡፡»

The rules we considered above not the rules currently applicable on courts across the country. In almost all cases, access to regular courts is governed by the 1965 Civil Procedure Code of Ethiopia (the Code). The pertinent provision of the Code establishes a strict standing rule (Art. 33 (2)).²³¹ The provision stipulates that in order for individuals and groups to have access to a court they must have a vested interest in the dispute. In fact, the procedure of class action is enshrined in the Code (Art. 38).²³² Still, only persons whose interest will be directly affected by the outcome of a case can be a party to a class action suit.

In view of what have been discussed on Article 37 of the Constitution, constitutionality of strict rules the Code provides can be challenged. Constitutional challenge can be brought not only based on the autonomous reading of Article 37 (1), but also based on 37 (2) wherein the rights of associations or groups of persons to have access to courts on behalf of others is stipulated without the requirement of vested interest.

²³¹ The 1965 Civil Procedure Code of Ethiopia, Art. 32 (2) (Decree No. 52 of 1965).

Article 32 (2) states: “No person may be a plaintiff unless he has a vested interest in the subject matter of the suit.”

²³² *Id.* at Art. 38.

Article 38 titled “Representative party” reads:

(1) Where several persons have the same interest in a suit, one or more of such persons may sue or be sued or may be authorized by the court to defend on behalf or for the benefit of all persons so interested on satisfying the court that all persons so interested agree to be so represented.”

Despite the stated constitutionality issue, currently courts are implementing literally the provisions of the Code. On a “recent” court case where the strict rule of legal standing was applied, Mr. Tadesse commented that the decision is apparently against constitutionally guaranteed right to representative suit.²³³

However, there are some moves on the part of the legislator allowing public interest litigation on selected disputes before courts as well as for accessing limited quasi-judicial tribunals. Now access to judicial bodies through public interest litigation is expressly permitted on environmental pollution matters.²³⁴ Also, one can bring a complaint in the public interest before national human rights institutions²³⁵, i.e. the Ethiopian Human Rights Commission and Institution of the Ombudsman.

In terms of allowing public interest litigation, the selective (or cautious) move the legislator showed might be for fear that liberalizing the rules on standing could have the

²³³ Tadesse, *supra* note 185, at 145.

²³⁴ Proclamation for the Environmental Pollution Control, No.300/2002, Art.11, (Negarit Gazette 9th Year, No. 12, December, 2002).

Article 11 provides:

“11. Right to standing

- 1) Any person shall have, without the need to show any vested interest, the right to lodge a complaint at the Authority or the relevant regional environmental agency against any pe[r]son allegedly causing actual or potential damage to the environment.
- 2) When the Authority or regional environmental agency fails to give a decision within thirty days or when the person who has lodged the complaint is dissatisfied with the decision, he may institute a court case with in sixty days from the date the decision was given or the deadline for decision has elapsed.”

²³⁵ Ethiopian Human Rights Commission Establishment Proclamation, No. 210/2000, Art. 22(1) (Negarit Gazette, 16th Year, No. 40, July, 2000); and Institution of the Ombudsman Establishment Proclamation No. 211/2000, Art. 22 (1) (Negarit Gazette, 16th Year, No. 41, July, 2000).

effect of opening the floodgates for unmanageable number of claims to be brought before the already burdened judiciary. In the context of socio-economic rights, the concern could even be more as in Ethiopia there are millions of peoples lacking basic necessities of life.

Viewed from practical point of view, however, it can be argued that the legislature is acting over cautious. This is because although parties are allowed to litigate in the public interest, they are unlikely to bring ludicrous claims knowing they are to lose their case on substantive grounds.²³⁶ In this regard, the case of *Soobramoney* in South Africa is cited as “to represents a precedent to demonstrate that judges are sensitive to these issues and are not timorous about drawing the line at unreasonable rights claims to ensure an adequate minimum standard of health care applies to all”.²³⁷

In sum, liberal rules on standing, particularly the idea of public interest litigation, is not fully endorsed in the Ethiopian legal system. In Ethiopia, public interest litigation is not considered as a constitutional right; and that legislative move towards allowing public interest litigation is cautious. One can access judicial bodies through public interest litigation only in respect of environmental pollution issues.

²³⁶ Marie-Pierre Granger (Dr.), *Towards a Liberalisation of Standing Conditions for Individuals Seeking Judicial Review of Community Acts: Je’go-Que’re’ et Cie SA v Commission and Unio’n de Pequenos Agricultores v Council*, 66 *The Modern Law review* 124,134 (2003).

²³⁷ Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 *Am. U. Int’l L. Rev.* 35, 58 (2006).

3.6 Conclusion

Socio-economic rights are enshrined both in the South African and Ethiopia's Constitutions, but with a significantly difference in the degree of entrenchment as well as on the certainty of the rights justiciability. The South African Constitution enshrines whole range of these rights extensively and explicitly. Besides, the language of the Constitution is that all these rights are subject to judicial enforcement. The standards of these rights provided in the Constitution is more than the minimum standard established by the African Charter.

On the other hand, socio-economic rights expressly enshrined in Ethiopia's Constitution are limited in number and the way the rights are defined leaves much to be desired. These rights are provided in the Constitution both as rights and as the same time as the State's policy objectives. Still the justiciability of these rights expressly recognized as rights is not expressly provided. Examination of the constitution's text as well as comparative constitutional law suggests that socio-economic rights recognised as rights per se are more certain to be considered as justiciable. However, how these rights are defined in the Constitution is not in a way as to ensure the rights justiciability with ease.

Accordingly, strong constitutional entrenchment of socio-economic rights with a clear textual stand on the rights justiciability provides South African judiciary with ample opportunity to implement these rights as a matter of constitutional law. In Ethiopia, on the other hand, weaker constitutional entrenchment of the rights without express

constitutional commitment on the rights justiciability provides domestic judicial bodies with far less than the ideal opportunity to implement these rights as a matter of constitutional rights.

For this reason, the potential instrumentality of the African Charter and the ICESCR in facilitating judicial enforcement socio-economic rights by domestic judicial bodies in Ethiopia becomes more evident. In this regard, the status of the African Charter and the ICESCR in the country's domestic legal system is very important.

Indeed, both the South African and Ethiopia's Constitutions provide for direct applicability of the Charter (in the case of Ethiopia the ICESCR as well) in their domestic legal systems. In South Africa, direct applicability of self-executing provisions of the Charter's for one is warranted by approval of the parliament to the country's act of accession. In Ethiopia, act of accession or ratification by the parliament suffices. Though the relevant provision of Ethiopia's Constitution makes no mention of the self-executing element (9 (4)); in view of the nature of some provisions enshrined in the Charter and jurisprudence of other countries such requirement seems inherent in the provision. In both countries, Charter's provisions can be directly applied by courts so long as they are not inconsistent with the respective countries' constitutions. In South Africa, there is additional requirement of consistency with Act of Parliament, unless the Charter is enacted as law by the country's legislator.

Moreover, both Constitutions also envisage for indirect applicability of the Charter by obligating judicial bodies to have due regard to the Charter in interpreting part of the respective constitutions dealing with human rights. The South African Constitution in addition provides for judges an option to have regard to foreign law in interpreting the Bill of Rights. In this regard, the South African Constitution mirrors the African Charter.

Constitutionally entrenched or otherwise applicable socio-economic rights would be meaningful for the rights holders, particularly for the disadvantaged; if these groups of people are able to vindicate the rights before domestic judicial bodies. Whether a country has liberal rules on legal standing facilitates individuals and groups access to courts. In turn, it can facilitate or impede the judiciary's opportunity in implementing these rights. Taking India as an example, the judiciary's innovative approach in liberalizing the strict legal standing rules has enabled groups litigate socio-economic rights, and consequently has brought about important social reforms. Such liberal approach is adopted in the South African Constitution. The South African Constitution above enumerating a broad range of individuals and groups who can access courts, it expressly provides for litigation in the public interest in matters of human rights. In doing so, it widens the judiciary's opportunity in implementing the socio-economic rights guaranteed by the Charter as further entrenched in the country's Constitution. As a result, important socio-economic rights cases have appeared before the Constitutional Court and have been decided by same.

In Ethiopia, on the other hand, public interest litigation is not a constitutional right. The legal system doesn't seem yet ready for embracing such liberal rule of standing rule, though recently there are some cautious moves by the legislature towards this direction. Other than complaints that one can bring before the country's national human rights institutions, public interest litigation before courts is limited to disputes concerning environmental pollution. No matter how one might wish to stretch the meaning and use this window of opportunity to litigate other socio-economic rights, the meaning has its own limits and may not be able to include many other socio-economic rights. And to the extent access to judicial bodies is made not possible, the role the judiciary could play in giving effect to these rights guaranteed by the Constitution, the African Charter and the ICESCR is limited accordingly.

Chapter Four- Judicial Performance in the Enforcement of Socio-Economic Rights

4.1 Introduction

We have seen in the preceding Chapters that the South African legal system provides a favourable framework for judicial implementation of socio-economic rights, while in Ethiopia it is not the same. Nevertheless, domestic judicial bodies both in both countries have wide opportunities to enforce socio-economic rights as matter of constitutional law and/or as the respective country's regional or international obligations.

In this Chapter, we will examine how judicial bodies in South Africa and Ethiopia are or are not enforcing socio-economic rights as constitutional rights. In view of the possible challenges associated with enforcement of constitutionally guaranteed socio-economic rights in Ethiopia, further examination will be made on the performance of Ethiopia's judiciary in implementing the Charter and the ICESCR as a matter of federal law.

4.2 Judicial Performance in South Africa

Indeed a “significant” number of cases involving socio-economic rights have been brought before the South African courts, particularly at the Constitutional Court.²³⁸ In

²³⁸ Mubangizi, *supra* note 120, at 6.

this Section, we will evaluate how the South African Constitutional Court is enforcing socio-economic rights. For the purpose of our discussion, we will focus on four socio-economic rights cases regarded as important decisions of the Constitutional Court, namely *Soobramoney v Minister of Health, KwaZulu-Natal*,²³⁹ *Government of the Republic of South Africa v Grootboom*; *Minister of Health and Others v Treatment Action Campaign and Others*²⁴⁰ and *Khosa and Others v Minister of Social Development and Others, Mahlaule and Others v Minister of Social Development and Others*.²⁴¹

Soobramoney involves the right to health claim of a 41 year old man who was suffering from chronic renal failure resulting from diabetes. The appellant, whose claim was dismissed by decision of a High Court, argued before the Constitutional Court saying that patients who suffered from terminal illnesses and required treatment to prolong their lives were entitled to be provided with such treatment by the State pursuant to section 27(3) of the Constitution. Section 27 (3) provides for the right of everyone not to be denied emergency treatment. He also based his argument on section 11, which guarantees the right to life.

²³⁹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC), 1997 (12) BCLR 1696 (CC)

²⁴⁰ *Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC), 2002 10 BCLR 1033.[hereinafter TAC]

²⁴¹ *Louis Khosa and ors v Minister of Social Development and ors* Case CCT 12/03 and *Salet Mahlaule & anor vs Minister of Social Development & ors*, Case CCT 12/03.[hereinafter khosa]

In writing the judgement of the Court, Justice Chaskalson outlined the philosophy of the Constitution stating that:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.²⁴²

The Court then goes analysing the appellants claim in the light of the relevant constitutional provisions and finally declined to order the treatment the appellant requested.

The Court ruled that the right to life argument of the appellant is inapplicable in determining the case at hand. The Court said the appellants claim is directly governed by section 27 of the Constitution, wherein the right of access to health care, including the right to emergency treatment, is guaranteed.²⁴³ The Court examined the appellant's claim based on Section 27,²⁴⁴ and held that "emergency medical treatment" under section 27(3)

²⁴² *Soobramoney*, supra note 239 at par 8.

²⁴³ *Id.* at par 19.

²⁴⁴ South African Constitution Article 27 states that:

- “(1) Everyone has the right to have access to-
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
- (3) No one may be refused emergency medical treatment.”

of the Constitution does not include the appellant's request for the provision of ongoing treatment of a chronic illness for prolonging life.²⁴⁵

The Court then examined the claim based on section 27(1) (a) in conjunction with (2) of same section. In doing so, the Court considered opinions of experts to determine reasonableness of guidelines developed by hospital authorities to determine patients who qualify for dialysis treatment. The Court made note of resource limitation renal units faced in providing the kind of service the appellant requested to all who needs it, and deemed the guidelines reasonable. It also added that it was not shown that the guideline as applied on the appellant is irrational or unfair.

In coming to this conclusion, the Court noted that the guidelines are advantageous in terms of "allocating scarce resources rationally to ensure that a greater number of patients are cured than would be the case if the dialysis machines were used to keep alive persons with chronic renal failure".²⁴⁶ It further acknowledged that "[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters".²⁴⁷

For the above stated reasons, the Court decided no violation of constitutional rights.

²⁴⁵ *Soobramoney*, supra note 239, at par 19.

²⁴⁶ *Id.* at par. 24 and 25.

²⁴⁷ *Id.* at par 29.

In terms of jurisprudential value, the decision of the Constitutional Court in *Soobramoney* is criticized for doing little for understanding socio-economic rights.²⁴⁸ However, in subsequent decisions the Constitutional Court made extended elaboration of socio-economic rights and the corresponding State obligation in such a way that future cases could be interpreted accordingly. The Court's decision in *Grootboom* is one notable example.

The *Grootboom* case involves the right to housing claims of a group of adults and children evicted from a private land they unlawfully occupied. Applicants in the case were originally informal settlers who moved into a private land due to the difficult situation they were in as informal settlers. Following their eviction they settled on a sports field. However, they were not able to erect shelter on their new settlement area as materials which they could put to use for the purpose are destroyed when they were evicted. Subsequently, they lodged application to a High Court claiming that government has obligation to provide them with adequate shelter or housing until they obtained a permanent place of accommodation. Applicants focused their argument on section 28(1)(c) of the Constitution, which provides for the right of every child to shelter.

The High Court decided in favour of the applicants based on same provision of the Constitution. High Court declared that parents of the evicted children have no

²⁴⁸ Mubangizi, *supra* note at 120, at 6.

independent right to housing, but they have a “derivative right” based on the best interest of the child.²⁴⁹

Unhappy with the decision of the High Court, government lodged an appeal to the Constitutional Court. At this level of the case, the South African Human Rights Commission and the Community Law Centre (University of the Western Cape) joined as *amici curiae*. The *amici curiae* argued in support of applicants stating that those without children are also entitled to the right to housing pursuant section 26 of the Constitution which, according to them, imposes a minimum core obligation on the government to provide access to housing for the applicants. Minimum core obligation in relation to socio-economic rights is a concept developed by the Committee on the ICESCR according to which there is a minimum set of benefits and protections implicit in each right obligating a state party to provide to all persons under their jurisdiction.²⁵⁰

Justiciability of socio-economic rights was not an issue for the Court. The question for the Court rather was "how to enforce them in a given case."²⁵¹ The Court noted that the case can not be decided in abstract, but has to be "carefully explored on a case-by-case basis".²⁵²

²⁴⁹ Karrisha Pillay, *The Implementation of ESCR: The Experience of South African NGOs in INTERIGHTS, Implementing Economic, Social and Cultural Rights in Practice* 13 INTERIGHTS Bulletin 1, 78 (2000).pp.77-80.

²⁵⁰ Committee on the International Covenant on Economic, Social and Cultural Rights General Comment No 3 (Fifth session, 1990), *The nature of States parties' obligations*, par. 10, UN Doc E/1991/23.

²⁵¹ *Grootboom*. Supra note 136, at par. 20.

²⁵² *Id.* at par. 20.

First the Court noted that the government is obliged to ensure, at the very least, that the eviction was conducted humanely; and held that government's action destroying the possessions and building materials of the now respondents constitutes a breach of negative obligation imposed on it pursuant to section 26(1) of the Constitution.

Indeed, enforcing obligation to respect it is easier for the Court to deal with, as it relates to the traditional role of Courts which wouldn't normally put the judiciary at the risk of intruding into the functions of the legislative and the executive organs. I said "normally" because, enforcing obligation to respect with significant social and political implications can potentially create near constitutional crisis situation, as what happened in Hungary.

When the Hungarian government introduced in 1995 a massive welfare reform by proclamations, the country's Constitutional Court struck down significant parts of the legislations on constitutional and other grounds.²⁵³ The decision of the Constitutional Court has contributed for the resignation of the Finance Minister and calls from many members of parliament and government for reform on the Constitution and of the Constitutional Court.²⁵⁴

In *Grootboom*, the Court further examined positive obligations of the State arisen as per section 26 of the Constitution. In this regard, the Court first notes that the right of access to adequate housing stipulated in the Constitution includes the duty to "create the

²⁵³ Yash Ghai and Jill Cottrell, *Supra* note 56.

²⁵⁴ *Id.*

conditions for access to adequate housing for people at all economic levels of our society".²⁵⁵

The Court, however, did not accept minimum core obligation argument forwarded by the *amici curie*. The Court stated that section 26 "does not expect more than is achievable within (the state's) available resources".²⁵⁶ Instead, the Court developed a test of reasonableness on the reasoning that section 26(1) should be read together with subsection 2, which obligates the state to realise the right progressively within available resources. In view of South Africa being not a party to the ICESCR, the Court's rejection of the minimum core concept may not be surprising.

The Court emphasised that that it would not inquire as to "whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent".²⁵⁷ The subject of its inquiry is rather "whether the legislative and other measures taken by the state are reasonable".²⁵⁸ According to the Court, in order for a State's measure to pass the test of reasonableness it has to be "comprehensive and well coordinated; is capable of facilitating the right in question albeit on a progressive basis; is

²⁵⁵ *Grootboom*. Supra note 136, at par. 35.

²⁵⁶ *Id.* at par. 46.

²⁵⁷ *Id.* at par. 41.

²⁵⁸ *Id.* at par. 41.

balanced, flexible and does not exclude a significant segment of society; and responds to the urgent needs of those in desperate circumstances”.²⁵⁹

Court examined the case in light of the test of reasonableness, and on final analysis found violation of section 26 of the Constitution. According to the Court, the State’s measure with a view to ensuring the right of access to housing complies with all the requirements of the reasonableness test, but falls short of fulfilling one requirement which is the obligation not to exclude people in desperate need.

The Court’s reasoning regarding the unfulfilled requirement of reasonableness is put as follows:

A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.²⁶⁰

²⁵⁹ Summary of the *Grootboom* decision by Community Law Centre- University of Western Cape , (accessed from <http://www.communitylawcentre.org.za/Socio-Economic-Rights/case-reviews-1/south-african-cases/constitutional-court-cases/government-of-the-republic-of-south-africa-and-others-vs-grootboom-grootboom-2001-1-sa-46-cc-2000-11-bclr-1169-cc/> on September 16, 2007).

See also *Grootboom*, supra note 136, at pars. 39-44.

²⁶⁰ *Grootboom*. Supra note 136, at par. 44.

Though the Court found violation of constitutional right, the Court's ruling is confined to the State's measures. In other words, the above ruling doesn't suggest that the evictee have the right to get house. In fact, in regard to such claim of the children and the adults, the Court found no breach of the Constitutional right. The court held that since the primary obligation to fulfil socio-economic rights of children rests on parents, the State's immediate obligation to provide shelter applies to children who are removed from their families only. The Court noted that the children in the case were under the care of their parents or families, so it did not grant any relief based on section 28(1) (c).

Once constitutional right is established, the next question for the Court was what kind of relief to order the State. The Constitution gives courts the power to grant appropriate relief to persons whose constitutional rights have been infringed,²⁶¹ including a power to make any other order that may be just and equitable under the circumstances.²⁶² Such a broad remedial power of courts provided in the Constitution "paves the way for the development of a number of creative remedies to redress violations of economic and social rights".²⁶³

Mindful of the sphere of its mandate, the Court did not prescribe a particular policy or program that could be adopted by the State. Nor has it engaged itself in the allocation of state resource in a particular way. What the Court made was a declaratory order requiring

²⁶¹ The South African Constitution, Section 38.

²⁶² *Id.* Section 172(1)(b).

²⁶³ Sandra Lienbenberg, *supra* note 102, at 70.

the government to act to meet the obligations imposed on it by section 26(2), which included the obligation to devise, fund, implement and supervise measures aimed at providing relief to those in desperate need.²⁶⁴ The details of such a revised housing programme was however to be decided by the legislative and executive powers. Progress towards meeting the constitutional duty is made to be monitored by the South African Human Rights Commission.

The *Grootboom* decision shows that it is possible, as Professor Sunstein noted, to assess claims of constitutional violations of socio-economic rights, without at the same time requiring more than existing resources will allow.²⁶⁵

On the other hand, the *Grootboom* decision is criticised for failing to enunciate the scope of the right considered. The fact that the Court left socio-economic rights to be developed on case by case basis is said to have left the executive with little guidance as to what is expected of the state in terms of implementation of socio-economic rights.²⁶⁶ It is also argued that Courts have Constitutional obligation not just to declare whether or not there is rights violation, but also to give content of those rights.²⁶⁷

²⁶⁴ *Grootboom*. Supra note at 136, par. 96.

²⁶⁵ Sunstein, supra note 118, at 236.

²⁶⁶ Kevin Iles, supra note 134, at 254.

²⁶⁷ *Id.* at 255.

As a country formally committed to constitutionalism, the Court had to come up with such an innovative decision to address separation of powers concerns. As the Court expressly put it “[t]he precise contour and content of the measures to be adopted are primarily a matter of the legislature and the executive”.²⁶⁸

Surely, whilst enforcing constitutional rights, Courts need to respect Constitutionalism. The need and importance of meeting the demands of constitutionalism in Africa cannot be overemphasized. For this reason, I am of the view that the Court’s approach in this regard should rather be praised.

The third important socio-economic rights case the Constitutional Court dealt with is the *Treatment Action Campaign Case* or the TAC (sometimes referred to as the Nevirapine case).²⁶⁹ In *TAC*, non-governmental organizations challenged government’s health policy on the prevention of mother to child transmission of HIV/AIDS. Government’s policy confined the provision of antiretroviral drug used for reducing the risk of mother to child transmission of HIV virus or Nevirapine to two pilot sites per province. Doctors in the public sector outside these pilot sites were precluded from prescribing the drug for their patients. As a result, only about ten per cent of all births in the public sector could benefit from the policy. Accordingly,

²⁶⁸ *Grootboom*, supra note 136, at par 41.

²⁶⁹ *TAC*, supra note 240.

The government did not contend that the claim is non-justiciable, probably because of established jurisprudence of the Constitutional Court. What the government defended the claim was rather on the basis of separation of power argument.

The Court noted that such argument may be relevant in two aspects.²⁷⁰ One is to what extent the Court, in examining the case, should defer to the decision taken by the executive in formulating policies. And second, what kind of order the Court should make in the event the executive is found to have failed to comply with its constitutional obligations.

Confirming its jurisprudence in *Grootboom*, the Court did not accept the minimum core obligation argument forwarded in support of the claim. The Court held that sections 26 and 27 of the Constitution do not impose obligation on the government that "to go beyond available resources or to realise these rights immediately" to ensure essential basic services to vulnerable individuals.²⁷¹

The Court here also stated that that the formulation of the rights envisage much more focused and restrained role for the courts that centred on whether state duties met the constitutional standard of reasonableness.

²⁷⁰ *Id.* at par. 1.

²⁷¹ *Id.* at par. 32.

The Court examined the case in light of the test of reasonableness, and finally found violation of section 27(1) and (2) of the Constitution. The Court said the State's policy and measures to prevent mother-to-child transmission of HIV at birth fell short of government's obligation under the Constitution and ordered the State to provide the required medication and remedy its programme. One important factor for the Court to reach to the conclusion is undisputed availability of the drug Nevirapine within the State's means.

Unlike *Grootboom*, therefore, in TAC the Court's decision goes beyond mere declaration. However, the Court was cautious not to indulge itself on how the executive should go about in remedying the situation. Accordingly, it has not prescribed the amount of budget the executive should allot for meeting its constitutional obligations.

A more recent case the Constitutional Court considered was *Khosa and Others v Minister of Social Development and Others, Mahlaule and Others v Minister of Social Development and Others*.²⁷² *Khosa* involves two cases initiated by two Mozambican citizens and children with permanent residence status in South Africa who challenged legislation that reserves the right of social assistance to South African Citizens. They based their claim on based on Section 27(1)(c) of the constitution, which guarantees the right of "everyone" to social assistance and Section 9, which prohibits unfair discrimination.

²⁷² *Khosa* , supra note at 241.

The Court noted that the situation of permanent residents is not different to that of the citizens. The Court heard budgetary implications of extending social benefits to permanent residents, which it found to be small. The Court underscored that section 27(1) guarantees the right to social security to “everyone” and held that the right of these vulnerable groups to live in dignity outweighs financial consideration.

Indeed, *Soobramoney*, *Grootboom*, *TAC* and *Khosa* are not the only socio-economic right cases that come before the Constitutional Court and other courts.²⁷³ Nevertheless, they are regarded as important cases in understanding socio-economic rights jurisprudence in South Africa.

From what we have discussed on these four cases, it can be concluded that South Africa’s judiciary, particularly the Supreme Court, has played important role in the implementation of the rights. Also, NGOs contribution in developing socio-economic rights jurisprudence in the country is not negligible. It is also important to observe that basic socio-economic right as the rights to food is not directly and extensively considered by the Constitutional Court. Notwithstanding, socio-economic rights jurisprudence developed by the Court is that the State’s obligation in relation to these rights would be examined accordingly.

²⁷³ Several other socio-economic rights cases are brought before the Constitutional Court and other courts can be found at the Community Law Center-University of the Western Cape website <http://www.communitylawcentre.org.za/Socio-Economic-Rights/case-reviews-1/south-african-cases/>.

Another observation that should be mentioned here is that in none of these four important decisions that the African Charter or the Commission's jurisprudence is referred to.

4. 3 Judicial Performance in Ethiopia

In Ethiopia, few socio-economic rights cases have been considered by the Council. As available data from the Council shows, from February 1999 to May 2005 there were forty two cases brought before the Council, of which not more than fifteen are directly related to socio-economic rights.²⁷⁴ Still only eleven of these cases have been considered by the Council, since the others are rejected by the Council on procedural grounds.

Of these eleven cases, six of them concern the right of labor cases;²⁷⁵ four of them right to housing, specifically eviction and expropriation;²⁷⁶ and the remaining one is about the right to social security.²⁷⁷ In the period under consideration, cases involving other basic-socio-economic right as the rights to health and food are not brought before the Council. However, one case relating to the right to education was rejected on procedural reasons.

²⁷⁴ Federal Democratic Republic of Ethiopia's House of Federation website (http://www.hofethiopia.org/Amharic/pdf/CIC_Deal_Cases4.pdf accessed on September 14, 2007)

²⁷⁵ CCI Case No.a/gu/1/ 10/97 – *Bedelu Teka and Bekele Wodage*, CCI Case No. 2/96 *Tadesse Bekele et al* (204 persons); CCI Case No. 3/96 *Kassahun Woldegebriel* ; CCI Case No. 4/96 *Ex- employees of AA Water Works Authority* (48 persons); CCI Case No.a/gu/1/ 3/97 *Ato Fasil Mere'ed and Ato Birhanu Lidet Yoseph and* CCI Case No.a/gu/1/4/97 *Ato Teklu Enku and Alemu Assefa*

²⁷⁶ CCI Case No. 1/96 *Abrahatsion Belay*; CCI Case No. 6/96 *w/ro Ketsela dehane* (3 persons; CCI Case No. 10/96 *Basha/Kedir Sheik Abdulahi* and CCI Case No. a/gu/1/ 1/97 *Yeshihareg Yimam and Alemu Negassi*

²⁷⁷ CCI Case No.a/gu/1/9/97 *Akalu Mekonen*

While the cases on the right to housing and social security involve the State's obligation to respect; the cases on the right of labor concerns obligations to respect and protect. In all of these cases, the Council held that no constitutionality of issue is involved. Accordingly, it did not refer the matter to the House of Federation for final decision.

From what we have discussed in Chapter Three, judicial enforcement of constitutionally entrenched rights in Ethiopia depends how the rights are viewed or perceived by the judicial bodies and how these bodies are assertive enough in exercising their constitutional mandates.

Although the limited number of cases appeared before the Council might be partly attributable to the following reasons: low level of awareness on the justiciability of the rights; unavailability of lawyers who are willing and able to litigate these rights; and the strict rules on access to the Council. However, the views held by prominent individuals within the Council (and also outside the Council for that matter) are not conducive in terms of ensuring the rights justiciability before the Council.

The view held by two of the prominent members of the Council²⁷⁸ - Hon. Ato Menberetsehay²⁷⁹ and Dr. Fasil - is bent towards the non-justiciability of constitutionally

²⁷⁸ Federal Democratic Republic of Ethiopia's House of Federation website (http://www.hofethiopia.org/Amharic/CIC/CIC_members.html last accessed on September 14, 2007)

²⁷⁹ Mr. Tadesse is a judge at the Federal Supreme Court and vice president of the Court. Also, he is a member of the Council of Constitutional Inquiry Committee (constitutional body with a preliminary jurisdiction on constitutional matters (Arts. 82-84)) and Director of Federal Justice Professional Training Center.

entrenched socio-economic rights. Mr. Tadesse (in a book he authored March 2007) deemed socio-economic rights guaranteed in Article 41, the right to development (Art. 43), and the right to environment (Art. 44) in total and partly the rights to labor (Art. 42) as non-justiciable rights.²⁸⁰ Similarly, Dr. Fasil's view is that what is justiciable or not has to be determined by law (meaning by the legislature), though at the same time he noted that "courts by employing their interpretive power can expand" the realm of justiciability of a certain dispute.²⁸¹ It should be noted here that Dr. Fasil is not particularly referring to disputes involving socio-economic rights, but rather all kind of disputes.

Also, from my five years engagement in human rights work with members of the judiciary both at the federal and state levels in the country, my sense is that the views of these two prominent individuals are shared generally by judges in the country.

Of course, such view precludes judicial bodies' role in implementing socio-economic rights guaranteed by the Constitution, unless the legislator extends its blessing towards their justiciability. However, as Sunstein cautioned, this view poses the risk that constitutional recognition of the rights meaningless.²⁸² Besides, it is to be noted that the Committee on ICESCR has commented that:

²⁸⁰ Tadesse, supra note 185, at 163.

²⁸¹ Nahum, supra note 144, at 150.

²⁸² Cass R. Sunstein, *The Second Bill of Rights: FDR'S Unfinished Revolution and Why We Need It More than Ever*, 213 (Basic Books, 2004).

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.²⁸³

Therefore, generally labelling socio-economic rights as non-justiciable rights not only diminishes the significance the Constitution attaches to the rights, but also could trigger Ethiopia's obligation under international law.

Personally, I don't see why, for example, the right to equal access to publicly funded social services (Art. 41 (1)) cannot be made justiciable. According to Ho. Ato Memebere, socio-economic rights are programmatic rights and as such the rights are better realized by laws which the legislature enacts over times according to circumstances. However, enforcement of this particular provision may not entail decision as to how to distribute the limited resources the State has. It is to be remembered that the Committee on the ICESCR in its General Comment 9 (1998) emphasised on the role of the judiciary in ensuring the right to non-discrimination and other rights. As Article 41 (1) emphasizes on equal access to the current processes of distributing resources, judicial bodies should be able to intervene in this area with greater legitimacy.²⁸⁴

Secondly, it can be argued that the terms of article 13 (1) of the Constitution establishes that, even obligates, courts to enforce the rights. Article 13 (1) states that "[a]ll Federal and State legislative, executive and *judicial organs* at all levels shall have the

²⁸³ General Comment No. 9, *supra* note 98, at par. 10.

²⁸⁴ Lord Leter of Henre Hill QC & Colm O'Cinneide, *supra* note 56, at 22.

responsibility and duty to respect and enforce” provisions of the Constitution on ‘Fundamental Rights and Freedoms’ (italics mine). In light of such explicit reference in conjunction with the principles of indivisibility and interdependence of rights, which the Constitution appears to have endorsed, I see no reason why judicial bodies should be completely excluded from adjudicating socio-economic rights claims based on the constitution or that the court’s role in enforcing socio-economic rights be dependent at the mercy of the legislature.

Furthermore, examination of the structure of Constitution in light of comparative constitutional law suggests that the rights might be intended by the framers of the Constitution to be justiciable. Experience in other jurisdictions shows that when framers of a constitution decide to render socio-economic rights as non-justiciable rights, they enshrine the rights not as rights *per se* but as policy matters. In the Ethiopia’s Constitution, socio-economic rights are guaranteed both as human rights and as state policy objectives and principles. It can therefore be argued that had there been an intention to exclude courts from scrutinizing socio-economic rights claims, the rights wouldn’t have been provided with different formulation in the ‘Fundamental Rights and Freedoms’ Chapter of the Constitution as well.

As noted in the preceding Chapter, both the Charter and the ICESCR are considered lower in hierarchy than the Ethiopia’s Constitution. As a result, they are unlikely to create new constitutional rights in Ethiopia. It is to be remembered also that in Ethiopia’s Constitution the rights to housing and social security are not recognized as rights *per se*

but as policy matters. Accordingly, cases involving these rights may not be considered as constitutional matters by the Council in the first place. However, it is possible to reinforce justiciability of the rights indirectly using other rights guaranteed by the Constitution, for example the right to property and the right to life.

We have seen the unfavourable view held by the relevant judicial body regarding the justiciability of constitutionally enshrined socio-economic rights in Ethiopia. For this reason, the African Charter and the ICESCR can be enforced as federal law by judges.

In the context of Ethiopia, justiciability of the rights guaranteed in these instruments is ensured when it is clearly provided by legislations as such. Labor and property matters, including housing, are extensively regulated by legislations. As a result, the bulk of socio-economic rights relating to labour and property are litigated before courts. However, parties to these cases are mainly non-state actors. In other words, most of the litigations involving socio-economic rights issues are not conducted as a matter of the State's obligation. For this and other reasons we will consider latter, decisions on such cases are not rendered in the framework of the constitution or international or regional instruments.

In this regard, what can be termed as a test case on socio-economic rights was brought before the Federal First Instance Court in March 2006.²⁸⁵ A local human rights NGO

²⁸⁵ *APAP v Ethiopia's Environmental Protection Authority*, Federal First Instance Court, Case No 64902.

called Action Professionals' Association for the People (APAP) instituted a public interest litigation case against Ethiopia's Environmental Protection Authority (EPA) alleging that the Authority is not complying with its obligation to protect people from environmental pollution. It is to be remembered that in matters of environmental pollution, Ethiopia's law permits public interest litigation.

The facts that gave rise to the case is environmental hazard caused by waste disposal of the municipality and several factories located in the outskirts of the capital city- Addis Ababa- into two rivers, namely Akaki and Mojo rivers. Residents along these rivers are low-income farmers who depend on the waters of these rivers for irrigation, sanitation and in places where potable water is not accessible for cooking, and even for drinking. Waste thrown into the rivers caused economic, social and health related problems on the habitants of the locality.

In support of its claim, APAP cited provisions of the Constitution, the African Charter and the ICESCR on the right to healthy environment, in addition to the relevant legislations, i.e. Environmental Protection Organs Establishment Proclamation No.295/2002 and Environmental Pollution Control Proclamation No.300/2002.²⁸⁶ EPA

²⁸⁶ According to the Establishing Proclamation, the EPA ensures that the environmental objectives under the constitutions and the basic principles set out in the Environmental Policy of Ethiopia are realized. Pursuant to Article 3 of Environmental Pollution Control Proclamation the Authority is empowered to take the appropriate legal and administrative measures against the person who in violation of Article 3 sub 1 of this proclamation pollutes or cause any person to pollute the environment. The Authority is also empowered to require such person to clean up or pay for the cost of cleaning up the polluted environment or take all necessary measures up to the closure or relocate the enterprise in violation of environmental protection standards.

on the other hand argued that the relevant legislation doesn't entitle APAP to sue EPA directly. Also, noting it is aware of the problem, EPA alternatively offered list of measures it undertook with a view to alleviate the problem and some of the challenges it faces in terms of fully exercising its authority.

On October 31, 2006 the Court gave a ruling in favour of EPA stating that APAP is not entitled to sue EPA, but the parties which directly caused the pollution. The Court ignored the constitutional law and international law argument and rendered its ruling based on literal interpretation of provisions of the proclamation.

Unsatisfied with the decision of the Federal First Instance Court, APAP lodged an appeal to the Federal High Court. And currently the case is being considered by the Federal High Court

The outcome of the case can be regarded in general as a good example of judicial practice of Ethiopian courts, particularly at lower courts level. These courts excessively rely on legislative rules disregarding constitutional and regional or international human rights instruments. What is discussed below substantiates my assessment regarding the judicial practice.

Indeed, in various forums it has been echoed that courts in Ethiopia are not using international human rights instruments in deciding on cases before them.²⁸⁷ In fact, a study conducted on the Ethiopian justice system in 2005 concluded that though the Constitution stipulates that international instruments ratified by Ethiopia are part of the law of the land, *de facto* these international instruments have not been implemented.²⁸⁸

The fact that the contents of international human rights instruments, including the African Charter and the ICESCR, are not published in the official gazette is cited as one factor contributing for the status quo.²⁸⁹ It must be noted here that when Ethiopia submitted its third report to the Committee on the Convention on the Rights of the Child in 2006, the Committee has specifically recommended that the country should publish the Convention in its official Gazette.²⁹⁰ Had the country had submitted a report either to the Commission or to the Committee to the ICESCR; it is, therefore, high likely that these

²⁸⁷ National Consultation Workshop on ‘*Challenges in Enforcing the International Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child*’ organised by APAP and the Ethiopian Human Rights Commission on November 30, 2007 and A Symposium on ‘*The Role of Courts in the Enforcement of the Constitution*’, organized by Law Faculty -Ethiopian Civil Service College and USAID, May 19-20, 2000, are examples.

²⁸⁸ ዓለም አቀፍ የሕግ ትብብር ማዕከል፣ በኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ አጠቃላይ የፍትህ ሥርዓት ማሻሻያ ፕሮግራም ጥናት ሪፖርት ፣ 160 (የፍትሕ ሥርዓት ማሻሻያ ፕሮግራም ጽ/ቤት፣ መጋቢት 1997 ዓ.ም)። [in English : Center for International Legal Cooperation (CILC), *General Study Report on Justice System Reform Program- Federal Democratic Republic of Ethiopia*, 160 (Ethiopian Ministry of Capacity Building, Justice System Reform Program Office, March 2005).]

²⁸⁹ Though the African Charter is ratified and a proclamation is enacted to this effect, the proclamation doesn’t include the contents of the Charter. The problem with the ICESCR is even worse. Despite the country has deposited the necessary documents to the United Nations Secretary General’s office, there is no proclamation enacted notifying the fact of ratification. As one can imagine, this would make it difficult for judges to take judicial notice of these documents, particularly for judges in lower courts outside of the capital.

²⁹⁰ Concluding Observations of the Committee on the Rights of the Child, Ethiopia (Forty-third session, 2006), par. 9, U.N. Doc. CRC/C/ETH/CO/3.

treaty monitoring bodies would come up with similar recommendations to facilitate judicial implementation of rights guaranteed therein.

What has been stated above, shouldn't however give the impression that international human rights standards are not included in domestic laws or that domestic legislations which could go against international standards are applied in all cases and at all levels of courts in the country. As the Committee on the CRC noted, law reform activities undertaken in the country have tried to harmonize domestic law in light of international standards, especially on areas of women and children's rights. Also, though it is not possible to categorically explain how international human rights instruments are influencing the decision of courts (because of the undeveloped case reporting system in the country, particularly at lower court level), it is observed in some court cases that international human rights instruments influencing court decisions, including the decision of the Federal Supreme Court.

Increasingly, though, international human rights instruments are getting litigated before courts. Lawyers are increasingly invoking human rights instruments in support of their case and there are instances where provisions of international instruments are cited or applied. The recent decision of the cassation division of the Federal Supreme Court on *Tsedale Demissie v Kifle Demissie*²⁹¹ is one good example.

²⁹¹ *Tsedale Demissie*, supra note 180.

However, international human rights instruments mostly referred to on judgments of courts are on civil and political rights. In this regard, there is evidence which shows the ICESCR influencing the decision of the Federal High Court on a right to labor case.²⁹² However, there is no indication that the ICESCR is referred to in other cases and also that the African Charter is referred to in any judgment of a court. In fact, a judge of the Federal High Court, who usually cites international human rights instruments in courts judgements, said he doesn't remember one instance where he referred to the African Charter in any of opinions he wrote as a judge.²⁹³ Explaining the reason why he has not made use of the Charter, he said there is no adequate literature on the Charter and that he has some concerns in regard to the claw-back clauses incorporated in the Charter.²⁹⁴

In Ethiopia, literature on the Region's Human Rights System in general might not be as easily accessible as those on the International System. And judges' awareness of socio-economic rights and other human rights standards established by the Region's Human Rights System could be limited accordingly. In view of what we have discussed in Chapter Two, however, we can say that the concern expressed by the informant judge doesn't seem to be real.

²⁹² *Ethiopia Ihil Nigd v Samson*, Decision of Cassation Division of the Federal Supreme Court on the 8th August 2007, Cassation File No. 29705.

²⁹³ Ato Yalew Teshome, Judge at the Federal High Court, Interview Conducted on 26th August 2007.

²⁹⁴ *Id.*

4.4 Conclusion

In South Africa, numerous socio-economic rights cases have been considered and decided upon by the South African courts, including the Constitutional Court. The judiciary's active involvement in the enforcement of these rights is not however surprising in view of the strong constitutional entrenchment of justiciable socio-economic rights by the country's Constitution. Also, the role NGOs played in bringing socio-economic rights claims and also in developing the country's jurisprudence on the rights is not negligible.

In Ethiopia, on the other hand, the role judicial bodies played in the enforcement of constitutionally guaranteed socio-economic rights leaves much to be desired. Few cases involving the rights have been brought before the relevant judicial body-Council of Constitutional Inquiry. All of these cases are deemed by the Council as not to have constituted a constitutional issue. The decisions of the Council are consistent with the opinion of two influential individuals within the Council who tend to consider constitutionally guaranteed socio-economic rights as non-justiciable rights. It follows that, judicial performance of the Council is in huge contrast with that of the South African Constitutional Court.

Of the numerous cases considered by South African courts, four cases decided by the Constitutional Court are considered as the most important in understanding judicial

implementation of socio-economic rights in South Africa. The four cases are: *Soobramoney*, *Grootboom*, *Treatment Action Campaign and Others* (or *TAC*) and *Khosa and Others* (*Khosa*). And in all of these four cases, socio-economic rights are litigated as a matter of constitutional obligation of the State, as opposed to the State's obligation under the African Charter.

Moreover, the justiciability of the rights claims on the named four cases was not an issue for the Court. The underlying issue for the Court was rather how to apply the rights in a particular case. To this end, the Court developed in *Grootboom* a test of reasonableness to examine the State's compliance with its constitutional obligations. And the Court deems the State's measure reasonable only if it is "comprehensive and well coordinated; is capable of facilitating the right in question albeit on a progressive basis; is balanced, flexible and does not exclude a significant segment of society; and responds to the urgent needs of those in desperate circumstances".²⁹⁵

Accordingly, the Court found rights violations in *Grootboom*, *TAC* and *Khosa* whereas in *Soobramoney* it did not. In all these cases, the Court showed a demonstrated level of sensitivity to the constitutional powers of coordinate state organs, i.e. the legislature and the executive. In cases where it found rights violations, the Court was mindful not to order a relief that prescribes a specific policy option or a specific budgetary allotment. As the case may be, the Court has confined its order to a declaratory judgement. And in

²⁹⁵ Supra note 259.

Soobramoney it relied on the opinions of experts in deciding that no constitutional rights violation.

However, the Court did not accept the minimum core obligation concept developed by the Committee on the ICESCR stating that socio-economic rights claims of individuals and groups will be examined in the context of the collective right of peoples to these rights (South Africa is not party to the ICESCR). In other words, individuals and groups may not claim the State to provide them a particular material good which could eventually give them preferential treatment by the State over other people under similar circumstances. However, individuals and groups can challenge the reasonability of a State's measure as applied to them.

Absent strong constitutional entrenchment and perception of non-justiciability regarding constitutionally enshrined socio-economic rights in Ethiopia, self-executing provisions of the African Charter and the ICESCR do provide courts a wide opportunity to implement the rights guaranteed therein as a matter of federal laws. However, the potentials of regional and international human rights instruments, especially instruments guaranteeing socio-economic rights have not been fully utilised by the country's judiciary.

Low level of implementation could be partly attributable to the limited number of lawyers who are able and willing to frame litigation in the rights framework. However, there is indication that even in cases evidently warranting invocation of the African Charter and the ICESCR, these instruments have been disregarded by a court. In fact, the

general tendency of the judiciary, particularly at lower courts level, is excessive reliance on specific domestic legislations. As a result, most of the cases involving socio-economic rights cases are litigated on the basis of domestic laws, as opposed to the State's obligation under international, regional or constitutional law.

In recent times, there appears a growing trend of applying international instruments, including the ICESCR, by the country's judiciary. However, it is not certain that the African Charter found expression in courts judgements. As far as socio-economic rights are concerned, Ethiopia's accession to the Charter appears little in substance than replicating its international obligation.

Regarding invocation of the Charter, the Constitutional Court of South Africa is similar to Ethiopia's judiciary. Although the Constitutional Court has been active in the enforcement of the rights, on all the four most important socio-economic rights decisions it neither cited the provisions of the African Charter nor the African Commission's jurisprudence. Particularly, the fact that *TAC* and *Khosa* are considered by the Constitutional Court after the Commission's profound decision in *SERAC v Nigeria* puts the added value of the region's jurisprudence on socio-economic rights to the South African judiciary in question. The ICESCR - instrument which South Africa is not a party to- on the other hand has formed part of the deliberations of the Court.

Nevertheless, the performance of the South African judiciary shows that socio-economic rights can and should be implemented by courts whilst maintaining the principles of

separation of powers. Moreover, the judiciary's involvement in socio-economic rights helped maintain the dignity of those whose interests may not be taken into account, or may even be disregarded, by the regular democratic process.

For the above stated reasons, the Constitutional Court's approach to socio-economic rights is regarded as exemplary for other states, both for the affluent and less affluent ones. To quote what, Sunstein, said after examining the *Grootboom* case, the Constitutional Court's approach is "...a novel and highly promising approach to judicial protection of socio-economic rights....[which also has]...provided the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socio-economic rights could not possibly be a good idea".²⁹⁶

²⁹⁶ Sunstein, *supra* note 118, at 236.

Conclusions

Assessment made on judicial implementation of socio-economic rights in South Africa and Ethiopia shows the stark difference that could exist among African Union member states in delivering the promise of the rights guaranteed by the African Charter (in the case of Ethiopia the ICESCR as well). Such difference exists in spite of the fact that judicial bodies in both countries have opportunities and arguably duties to give effect to socio-economic rights as constitutional rights and/or as a matter of obligations the states assume under international law.

A “significant” number of socio-economic rights cases have been brought before the South African judiciary and the judiciary have been active in implementing the rights. This is not the case in Ethiopia. Judicial implementation of these rights as a matter of the state’s obligation is in rudimentary stage. Few of such cases are brought before Ethiopia’s judicial bodies. Moreover, the general perception of the judiciary on the constitutionally as well as internationally guaranteed socio-economic rights is bent towards the idea that socio-economic rights are not justiciable.

Indeed, Ethiopia is not the only African state where socio-economic rights in general are perceived as non-justiciable rights. Many of the fifty-three member states to the African

Charter consider the rights likewise. In fact, some states, like Ghana and Nigeria, constitutionally enshrine the rights as directive principles of state policies rather than as rights *per se* so that the judiciary is excluded from scrutinizing these rights. Regarding civil and political rights, on the other hand, these states generally accept the judiciary's involvement in the implementation of the rights.

The states exclude the judiciary from scrutinizing the rights notwithstanding the states' endorsement of principal international and regional instruments guaranteeing the rights and also against the recommendations of the relevant treaty monitoring bodies.

The principal human rights in the continent-the African Charter-guarantees a list of socio-economic rights and civil and political rights in a single document. A document ratified by or acceded to by all the fifty-three members of the African Union, the Charter proclaims, as a matter of preamble, the equal importance of all categories of human rights for ensuring human dignity, i.e. the principle of indivisibility and interdependence of human rights. Moreover, the jurisprudence of the African Commission is that socio-economic rights guaranteed by the Charter are justiciable.

Moreover, the recommendation of both the African Commission and the Committee on the ICESCR is that states incorporate the instruments in their domestic legal systems to ensure direct applicability of the rights by courts. Specifically, the Committee on the ICESCR in its General Comment 9 (1998) emphasised the role of the judiciary in

implementing the rights, and the indispensability of the same in giving effect to some of these rights.

Indeed, whether or not the judiciary should be involved in the implementation of socio-economic rights guaranteed by international human rights instruments has been a divisive issue. The issue here is what is generally referred to as the justiciability issue. There are two sides to the justiciability issue. On the one side are proponents to the idea of justiciability arguing that these rights can and should be justiciable. On the other side are the opponents who argue to the opposite.

From legal point of view, main arguments put forward by the opponents mainly relate to the nature of states' overall implementation obligation as defined in the ICESCR and other international human rights instruments; formulation of the rights and concerns of constitutionalism, particularly the principle of separation of powers and constitutional checks and balances.

According to the opponents' view, civil and political rights impose negative obligation, while socio-economic rights impose positive obligations. Hence, civil and political rights are legal rights; whereas socio-economic rights are programmatic obligations requiring resource and time. To substantiate their view, they argue based on the nature of states' obligation as defined in the ICCPR and the ICESCR. States' obligation as stipulated under Article 2(1) of the ICCPR is "to respect and to ensure" the rights, thus immediate obligation. On the other hand, states' obligation as per Article 2 (1) of the ICESCR is to

“take steps” within “available resources” for “progressive realization” of socio-economic rights, hence programmatic obligations. Accordingly, the opponents assert, the nature of states’ obligation in respect to socio-economic rights is such that ensuring implementation of these rights is a matter left to the political organs of a state.

The opponents further argue that the way these rights are provided in the ICESCR or other human rights instruments are not clear enough to establish judicially manageable standards. For this reason, making the rights the subject of judicial scrutiny against, they assert, will inevitably put judges in a situation where they would evaluate complex socio-economic policy choices- matters better suited to the more democratically legitimate and functionally competent branches of the state, i.e. the executive and legislative organs.²⁹⁷

To put it differently, as an independent body judicial implementation of socio-economic rights would negatively affect constitutional checks and balances and also result in violation of the principle of separation of powers.

Apparently more concerning in the African context, the opponents further provide two additional arguments. The first argument is that if socio-economic rights are made justiciable courts will have to deal with unmanageable inflow of rights claims. Secondly, they argue that in a continent where the need to nurture principled governance structures is crucial, involving judges to decide on socio-economic rights matters would be counterproductive in terms of nurturing a culture of constitutionalism.

²⁹⁷ Chirwa, *supra* note 61, 14-15.

For these reasons, the opponents conclude that socio-economic rights cannot and should not be justiciable. This view of course forecloses the judiciary's role in the enforcement of the rights, unless of course justiciability of the rights is ensured by the political organs of the state.

On the other side, the proponents argue in favour the rights justiciability first by questioning the assumptions in the opponents' arguments; and secondly by citing recent developments in the jurisprudence of these rights. And, I tend to agree with the idea of the proponents.

To begin with, the proponents do not accept the opponents' idea that socio-economic rights impose positive obligations whereas civil and political rights impose negative obligations. In this regard, they follow the influential idea of Henry Shue who suggested that every basic right entails three types of correlative obligations: 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived'. In fact, this is the idea fully endorsed by the Committee on the ICESCR and similarly used by the African Commission and the Constitutional Court of South Africa.

As the African Commission articulated in *SERAC v Nigeria*, all rights guaranteed by the African Charter impose four levels of obligations, i.e. obligations to respect, protect, promote and fulfil. Obligation to respect entails negative obligation on states. It requires

states not to interfere in the enjoyment of rights. Obligation to protect on the other hand imposes a positive obligation on states to take measures to protect individuals and peoples from interference by non-state actors in the enjoyment of their rights. At the third level of obligation, states are obliged to promote the rights so that individuals will be able to exercise their rights and freedoms. And obligation to fulfill imposes “a positive expectation” on a state to “move its machinery towards the actual realisation of the rights”.

When one explores states’ obligation articulated by the Committee on the ICESCR, the African Commission and the South African Constitutional Court, it becomes clear that not all socio-economic rights impose positive duties on states. Arbitrary eviction is noted to be a case in point. Also, the fact that states have positive obligations in respect to the rights doesn’t necessarily mean that all the measures states are required to adopt have significant cost implications. Nor does it mean that the cost of effecting socio-economic rights obligations always outweighs the cost associated in giving effect to civil and political rights obligations. In this regard, one can compare cost implications of realizing the right of equal access to publicly funded social services on the one hand and ensuring the right to a fair trial or the right to elect and be elected on the other.

Moreover, states’ obligations vis-à-vis socio-economic rights is not that African countries are required to do what they cannot afford to do. In respect to the rights’ aspects full realization of which demands resources beyond the states’ means, what is expected of states is to take reasonable measures within available resources with a view to realise the

rights progressively for all. In other words, in order for a state to be able to live up to socio-economic rights obligations, it doesn't have to be an affluent one. For this reason, always associating the justiciability issue with level of economic development is not warranted. As a matter of fact, socio-economic rights have been extensively examined and enforced by the judiciaries in two developing countries, namely South Africa and India.

Another argument forwarded by the opponents which now seems not to have taken into account recent developments in the field of socio-economic rights relates to availability of judicially manageable standards.

Certainly, over the years there has been a growing body of socio-economic rights jurisprudence established at the international, regional and domestic levels. At the international level, years of work by the United Nations treaty monitoring bodies, particularly the extensive work of the Committee on the ICESCR is notable. Decisions of the African Commission, particularly the “profound” *SAREC v Nigeria* decision, are other examples. Moreover, in a number of jurisdictions socio-economic rights have been considered in concrete cases by domestic judicial bodies. Still more, in many other jurisdictions these rights have been the subject of judicial scrutiny in connection with cases involving civil and political rights issues or general principles of human rights such as the principle of equality and dignity.

Apart from available jurisprudence, bodies of experts have formulated guidelines on the content of the rights, such as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1986, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights of 1997 and the Bangalore Declaration and Plan of Action of 1995.

This is not however to say that available jurisprudence and works of experts enable states articulate judicially manageable socio-economic rights standards as easy as that of civil and political rights. Because of the marginal position socio-economic rights possess in the theory and practice of human rights, there is yet a lot to be done in elaborating the contents of the rights. In fact, the small number of socio-economic rights cases considered by the African Commission (as compared to the vast number of civil and political rights cases it considered) speaks of the rights jurisprudence in the African continent. Nonetheless, already available judicial practices and other sources are good enough to guide states start judicially implementing at least some elements of the rights. In other words, available jurisprudence is sufficient enough to refute the opponents' view which altogether considers socio-economic rights as non-justiciable rights.

If we accept the idea that at least some aspects of the rights have judicially manageable standards, the more complex challenge in relation to the idea of justiciability will be how the judiciary can enforce the rights whilst respecting the principle of separation of powers.

As the opponents cautioned judicial scrutiny of socio-economic rights, unless exercised with due care to the constitutional mandates of coordinate organs of the state, could result in violation of the principle of separation of powers. If the judiciary for example indulges itself in weighing complex policy options or prescribes in a particular way how the state's resource or money should be spent, the judiciary will end up intruding in the constitutional mandates of political organs of the state.

However, complete exclusion of the judiciary for separation of powers concerns is not warrantable. First, not all aspects of the rights would normally trigger the issue of separation of powers. Matters relating to obligations to respect of states are rights aspects which have long been considered as within the traditional mandate of courts. Secondly, it should not be assumed that the judiciary doesn't know its constitutional limits. As the jurisprudence of the South African Constitutional Court demonstrates, the judiciary do know its constitutional limits. The sensitivity this Court showed to the separation of powers concern is evident from the reasoning of its judgements on the important socio-economic rights dealt with in the thesis paper.

Another argument forwarded by the opponents is that if the rights are made justiciable, the judiciary would be over flooded with rights socio-economic rights claims. Given the prevalence of poverty in the continent, such concern appears more appealing in the African context. Still, as the jurisprudence of South African Constitutional Court shows, the concern doesn't seem to be real. The Constitutional Court has managed to prevent frivolous or unwarrantable rights claims. In this regard, the Constitutional Court decision

in Soobramoney is regarded as a notable case. The Court's jurisprudence in Soobramoney and other cases is that individual or group's claims to basic necessities of life would be examined in the light of the collective right of others to have access to similar services. As a result, the judiciary has managed to prevent claims when seen in collective terms are unreasonable.

In addition, after several decades have passed since the relevant international human rights are adopted millions of people in Africa continue to be deprived of basic necessities of life. And yet these rights are left to the exclusive discretion of the political organs, which so far have not delivered sufficiently the promises of the rights. As Justice Yacoob famously stated in Grootboom, "[a] society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality". Also, the learned scholar Sunstein has pointed out that a society must establish minimum socio-economic rights guarantees to its citizens not only because people will not be able to enjoy good lives but also on the ground that democracy requires a certain independence and security of everyone. Both Justice and Yacoob uttered the statements in support of judicial enforcement of the rights. Calling for judicial implementation of the rights, Marcus also said that what "[w]hat marks (socio-) economic rights in comparison to (civil and) political rights is the degree to which their violation is tolerated."²⁹⁸ Therefore, if human dignity is to mean something to the people who need the rights most,

²⁹⁸ David Marcus, *Famine Crimes in International Law*, 97 Am. J. Int'l L. 245, 251 (2003).

the judiciary should be able to enforce the rights in the event political organs of the state grossly violate the rights.

In a continent where the need to build a culture of constitutionalism cannot be overemphasized, however, judicial implementation of socio-economic rights in Africa should be exercised carefully. While enforcing the rights, the judiciary need to be respectful to the constitutional mandates of coordinate political organs of the state. Therefore, judicial power, unless exercised with due regard to the concerns of constitutionalism expressed by the opponents, would be counterproductive.

Another lesson that can be drawn from the South African experience is that in order for the judiciary sustain its legitimacy, it is important that the judiciary acted as a guardian of human dignity rather than as an equalitarian force. In the most important socio-economic rights cases where the Constitutional Court found rights violation, i.e. *Grootboom*, *TAC* and *Khosa*, the Court gave effect to the rights of the marginalized or otherwise disadvantaged members of the community.

In sum, socio-economic rights can and should be made justiciable. Indeed, Sunstein, after examining the *Grootboom* case, said that the South African Constitutional Court jurisprudence on the rights convincingly showed that socio-economic rights can be implemented through judicial means whilst maintaining the principles of separation of powers.

In view of what has been said on the rights justiciability and also African Commission's stand on the justiciability issue, one could hope that domestically African states will consider these rights as justiciable rights. As pointed out earlier, though, many African states preclude the judiciary from scrutinizing the rights. This is because neither the Charter, nor international law for that matter, prescribes that the rights should always be subject to judicial scrutiny.

Because the formulation of overall states' duty provided in Article 1 of the Charter or the counterpart provision in the ICESCR are not clear enough in terms of obligating states to consider judicial remedy as a necessary means or measure. For this reason, whether or not states have duties to ensure justiciability of the rights in their domestic legal systems is arguable. On the one hand, it is argued that states have the margin of appreciation in determining the means of implementing the rights domestically to the extent of excluding the judiciary. On the other hand, it is argued based on rule of customary international law, the international law principle of effective interpretation and other grounds that the margin of appreciation states have is not wide enough to allow states completely exclude judicial bodies from implementing the rights.

Notwithstanding what is argued at the international level, when it comes to domestic implementation of treaty obligations the tendency of states is to regard their constitutions as their point of reference. This is in fact what states committed to constitutionalism or states striving to build a culture of constitutionalism would do as a matter of practice. It

goes without saying in countries like South Africa and Ethiopia where constitutions incorporate the supremacy clause.

At this point, the extent to which a state's domestic legal system, particularly the state's constitution, enshrines the norms and principles of the Region's Human Rights System becomes very important. The extent to which a states constitution reflects these norms and principle can thus be a determinative factor in terms of ensuring judicial implementation of socio-economic rights domestically. Accordingly, to commend or denigrate the performance of domestic judicial bodies in enforcing socio-economic rights, the specifics of each country's domestic legal system, particularly the country's constitution, need to be examined.

This thesis paper has examined judicial implementation of the rights in South Africa and Ethiopia. As one can imagine, the two countries' legal systems have specifics or unique features facilitating or impeding the judiciary's opportunity in giving effect to the rights. To conclude, based on South Africa's and Ethiopia's judiciaries experience, that domestic judicial bodies in Africa are or are not performing well in implementing the rights will be over generalization.

This doesn't however mean that there are no common factors that can help assess the favourability of states' domestic legal systems, thereby evaluate the performance of domestic judicial bodies. In this regard, what the states' constitutions offer on the following three matters become critical: constitutional entrenchment of justiciable socio-

economic rights; in the absence of the first element, the status of international instruments within the domestic legal systems of states; and procedural rules on access to courts, particularly rules on legal standing.

In this regard, one positive trend in the African continent is the increased constitutional recognition of socio-economic rights. Following the international trend, most constitutions of African countries adopted since the end of the 20th Century enshrine these rights. The current constitutions of South African and Ethiopia are two examples.

In terms of ensuring judicial implementation of the rights, however, Constitutional recognition alone could mean little unless the rights are recognized as justiciable rights. It is to be remembered that notwithstanding constitutional recognition of the rights, in Nigeria and Ghana the judiciary is excluded from scrutinizing the rights. Therefore, unless judicial bodies are involved in what is called “judicial activism”, as the Indian judiciary did, these rights are non-justiciable.

The South African Constitution enshrines a whole range of socio-economic rights. The rights so enshrined are provided in a more extensive and explicit manner than the minimum standards established by the African Charter. As the same time, the justiciability of all the rights is something positively answered during the making of the Constitution. Accordingly, South Africa’s judiciary has ample opportunity to implement socio-economic rights as a matter of constitutional law.

On the other hand, textual examination of Ethiopia's Constitution shows that domestic judicial bodies' opportunity in implementing the rights as a matter of constitutional right is not as conducive as that in South Africa. Ethiopia's Constitution enshrines these rights as human rights and also as the State's policy objectives. Still, the Constitution doesn't expressly state that rights recognized as rights per se are justiciable. Moreover, the way these rights are provided in the Constitution is difficult to ensure the rights justiciability with ease. Accordingly, judicial enforcement of rights recognized as rights per se would require some degree of assertiveness on the part of judicial bodies.

The fact that Ethiopia's Constitution stand on the question of justiciability is not clear has resulted in the erosion of the judiciary's opportunity in implementing the rights. Notwithstanding to the view that these rights recognized as rights per se are more certain to be the subject of judicial scrutiny, legislative acts are increasingly narrowing the judiciary's opportunity in implementing the rights. For example, disputes on eviction and state owned houses- matters which had been litigated as a matter of the State's obligation- are now transferred to the jurisdiction of administrative tribunals with the possibility of judicial review only on exceptional grounds. Such laws can be indicative of the legislator's perception that constitutionally guaranteed socio-economic rights are not justiciable rights on their own.

At this point the status of international human rights instruments in the domestic legal system of Ethiopia becomes crucial. According to the Constitution, the African Charter

and the ICESCR do not create new constitutional rights, though they can serve as interpretive tools in giving light to rights guaranteed by the Constitution. However, both the Charter and the ICESCR are as good as federal laws. As a result, it can be said that the judiciary have the opportunity to implement self-executing provisions of these instruments as a matter of federal law.

Still another factor that can affect judicial bodies' opportunity in implementing the rights is procedural rules on access to courts, particularly rules on legal standing. The logic here is that to the extent the rules on legal standing are strict, rights claims that can be brought before judicial bodies would be limited.

In this respect, the South African Constitution provides for a liberal rule of standing on matters of constitutional rights such that rights claims can be brought before courts even through public interest litigation. Consequently, Non-Governmental Organizations and other civil society groups were able to litigate socio-economic rights matters as parties or as *amicus curiae*. The significance of this procedure especially for individuals and groups who are not able to vindicate the rights at all or are not able to articulate their claims is evident from two of the four important socio-economic rights cases considered by the country's Constitutional Court, namely *Grootboom* and *Treatment Action Campaign*.

In Ethiopia, on the other hand, access to courts is not as liberal as that of South Africa. The strict legal standing rule which requires *locus standi* is generally maintained including on human rights matters. The only socio-economic rights matter that can be

claimed before courts through public interest litigation is the right to environment. Except on environmental rights cases, therefore, willing and able civil society groups in Ethiopia cannot replicate best practices of civil society groups in South Africa. Probably for this reason, available data show that non-governmental organizations in Ethiopia have not made it to the list of parties before the relevant constitutional organ, i.e. the Council of Constitutional Inquiry.

In sum, in terms of securing judicial implementation of socio-economic rights, the legal system in Ethiopia is not as favourable as that in South Africa. It is no wonder therefore that the South African judiciary in general, and the Constitutional Court in particular has been active in the implementing the rights. In doing so, the Court proved itself to be the guardian of socio-economic rights. Of the many socio-economic rights the Constitutional Court dealt with, *Soobramoney*, *Grootboom*, *Treatment Action Campaign* and *Khosa* are regarded the most important cases.

In contrast to the South African experience, quite a limited number of cases involving constitutionally guaranteed socio-economic rights have appeared before the Council of Constitutional Inquiry. Of the cases considered by the Council, available data show that the Commission did not find a constitutional issue in any of the cases. Consequently, it referred the matters back to the regular courts.

Indeed, the perception of two influential members within the Council on constitutionally guaranteed socio-economic rights is bent towards the opponents view. Though it is not

possible to conclude, from the available data, that this view is shared as well by the other nine members of the Council, the rulings of the Council on the relevant cases do not contradict the view.

Assuming that Council found a constitutional issue and rights violation at the same time, what the Council would do is forwarding its recommendation to the House of Federation, or the Upper House, for final decision. The House of Federation is a political body that have ultimate decision making power on constitutional matters, including constitutionally guaranteed rights. A political organ assuming such power can be a real challenge to the wisdom of protecting human rights, including socio-economic rights, from the transient majority.

Beneath the Constitution, the instrumentality of the Charter and the ICESCR does not also seem to be well utilized in Ethiopia. Because of the weak case reporting system, particularly at lower courts level, it is hard to ascertain the added value of the in the country's legal system. Nonetheless, based on the cases considered for this thesis paper neither the Charter nor the Commission's jurisprudence has found expression in judicial opinions, while the ICESCR has been referred to by higher courts. In fact, the tendency of lower courts is to rely excessively on domestic legislations than on regional or international instruments the country is a party to. At this point, assessment report conducted on Ethiopia's justice system and which questioned the actual integration of ratified/acceded to international or regional human rights instruments in the domestic

legal system of the country becomes more vivid in relation to the ICESCR and, especially, to the African Charter.

Similarly in South Africa, the African Charter seems to be regarded with less esteem. Although the country's Constitutional Court has been active in enforcing socio-economic rights, neither the African Charter nor the jurisprudence of the African Commission found expression in any of the four most important socio-economic rights cases dealt by the Court. This is so in spite of the fact that some of these cases are considered by the Court after the Commission's profound decision on *SERAC v Nigeria*. In *Hoffmann v South African Airways*, however, the Court has utilized the provisions of the Charter. In respect to the ICESCR, which South Africa is not a party to; the Court has made use of the jurisprudence of the Committee on the ICESCR on several occasions.

Nevertheless, the South African Constitutional Court in substance has enforced socio-economic rights guaranteed by the Charter. It seems for this reason that the Commission, after reviewing the country's periodic report submitted to it after the *Grootboom* decision, did not mention socio-economic rights concerns on substantive grounds.²⁹⁹

This thesis paper does not claim that judicial implementation of the rights in South Africa has brought the desired change in the lives of people who need the rights most. However,

²⁹⁹ African Commission on Human & Peoples' Rights, *Concluding observations and recommendations on the First Periodic Report of the Republic of South Africa*, (Thirty Eighth Ordinary Session, December 2005), (accessed from http://www.chr.up.ac.za/hr_docs/themes/theme02.html on 17th September, 2007).

it can be said that the judiciary has done its part in ensuring the dignity of the poor and vulnerable segments of the South African society whose rights the regular democratic process ignored. In a country where political organs of the state are respectful of the judiciary's constitutional mandate, the desired change is bound to happen eventually. And in African countries where the judiciary is foreclosed from scrutinizing the rights, human dignity in relation to socio-economic life of humans will continue to be at the mercy of the states' political organs, which so far have not delivered sufficiently the promise of the rights. As a result, socio-economic rights guaranteed by the African Charter and /or the ICESCR will remain untapped and unutilized by the people who need the rights most.

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