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The Potential of Directive Principles of State Policy for the Judicial Enforcement of Socio-Economic Rights: A Comparative Study of Ethiopia and India

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Executive Summary

This thesis examines and explores the potential of Directive Principles of State policy (DPSP) for the judicial enforcement of socio-economic rights by taking Ethiopia and India as a comparative study. DPSP have brought additional discourse on the constitutional protection of human rights in general and socio-economic rights in particular. The objective of this thesis is to assess whether DPSP as a constitutional principle are helpful for the judiciary to enforce socio-economic rights or whether they are 'pious aspirations and mischievous generalities' which did not have a judicial utility. Through systematic desk review of primary and secondary sources, this thesis has found that DPSP have a huge potential for the judicial enforcement of socio-economic rights.

The Indian experience confirms that the innovative and harmonized interpretation of fundamental rights and DPSP have resulted in the enforcement of socio-economic rights. By reading DPSP with the right to life, the Indian judiciary has managed to enforce the right to food, the right to health, the right to shelter and the right to livelihood as part and parcel of the right to life. Although DPSP are non-justiciable and there is no socio-economic rights in the Indian Constitution, the judiciary by availing the power of judicial review, engaging in activism and liberalizing the standing rules has established enforceable biosphere of socio-economic rights within the ambits of the right to life.

The Ethiopian experience, on the other side of the spectrum, shows that DPSP are mere constitutional principles which have been devoid of judicial application. Nonetheless, the constitutional design of DPSP and socio-economic rights in the Ethiopian Constitution are more favourable for judicial application unlike the Indian Constitution. On the one hand, minimum socio-economic rights can be drawn from DPSP, on the other hand, the justiciability or otherwise of DPSP are not clearly stated in the Ethiopian Constitution and it

gives the judiciary much space for application and interpretation respectively. In addition, the inclusion of socio-economic rights, although with unclear content, in the Bill of Rights gives the Ethiopian judiciary to take a holistic constitutional approach especially through DPSP to enforce socio-economic rights.

Although the absence of judicial review in Ethiopia unlike in India is a significant factor which resulted in the non-judicial enforcement of DPSP and socio-economic rights, the Constitution imposes responsibilities and duties on the judiciary for the enforcement of the constitution in general as article 9(2) states, and human rights and DPSP in particular as article 13(1) and 85 (1) provides respectively. These constitutional duties coupled with the constitutional model of democracy Ethiopia adopts give the judiciary more space to engage in the constitutional order especially in the enforcement of human rights. In this regard, the Ethiopian judiciary can draw lessons as to how to utilize DPSP to enforce socio-economic rights from the Indian counterpart.

Nonetheless, to effectively guard the Ethiopian Constitution, to foster human rights and democratic culture, the judiciary needs to have the power of judicial review like the Indian judiciary. To bring human rights in general, and socio-economic rights in particular to the service of the distant Ethiopian citizenry, liberalization of standing rules and rules of procedure are also required as they have been the engines of the Indian DPSP jurisprudence.

Introduction

This thesis examines the potential of DPSP for the judicial enforcement of socio-economic rights by a systematic investigation of the Indian and Ethiopian experiences in a comparative perspective. DPSP have brought additional constitutional discourse on the protection of socio-economic rights. It is the objective of this thesis to explore and examine the scholarship and jurisprudence on DPSP if they are of any help for the judicial enforcement of socio-economic rights in Ethiopia.

The legal status and judicial cognizance of socio-economic rights under international law is different from civil and political rights as the former have been considered as programmatic and progressive rights unlike the latter which can be enforced immediately.[1] The same fashion has followed in national legal systems as constitutions usually make a distinction between civil and political rights and socio-economic rights.[2] In the venture of constitutionalizing human rights, states have adopted different mechanisms to incorporate socio-economic rights in their constitutions. It is in this context that the framers of the Irish Constitution invented DPSP in 1937 in lieu of socio-economic rights with the aim to give direction to the legislature in making laws while avoiding judicial adjudication.

The Ethiopian Federal Democratic Republic Constitution (Ethiopian Constitution) incorporates socio-economic rights both in the Bill of Rights and DPSP.[3] However, the impact of this constitutionalization has been insignificant in the enforcement of socio-

[1] See Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009).
[2] See Fans Coomans (ed), *Justiciability of Economic and Social Rights: Experiences from Domestic systems* (Intersentia 2006).
[3] See chapter two and ten of the Constitution of the Federal Democratic Republic of Ethiopia (1995), Proclamation No. 1/1995 Federal Negarit Gazeta.

economic rights.[4] The judicial enforcement of socio-economic rights has been very far away from the populace. Although there are multiple factors for the non-judicial enforcement of socio-economic rights, the constitutional stipulation of socio-economic rights both in the Bill of Rights and DPSP, on the one hand, and the constitutional interpretation mechanism and the judicial indifference towards the Constitution, on the other hand, are the main factors. Socio-economic rights in the Bill of Rights lacks content as it is difficult to ascertain what are the rights? Whose rights are they? And who is having a duty? These questions are central in any rights adjudication. Although socio-economic rights in the DPSP are very informative, they lack not only judicial consideration but also legislative and executive attention. As the power of constitutional interpretation is given to the House of Federation,[5] the judiciary usually has detached itself from the Constitution even if it expressly imposes responsibility for the enforcement of the Bill of Rights and DPSP.[6] Thus, despite the constitutional recognition and judicial responsibilities to this effect, socio-economic rights could not find their way to the court room.

Building on the human rights scholarship in Ethiopia,[7] this thesis examines the potentials of DPSP for the judicial enforcement of socio-economic rights. Although it seems far-fetched to argue based on the ideals of DPSP to enforce socio-economic rights in the Ethiopian courts as it stands today,[8] both the Ethiopian Constitution and comparative experience support that such argument can be made and the latter has proved it as successful. Bringing DPSP in the judicial enforcement of socio-economic rights could have lots of repercussions for the judiciary and the constitutional order. For one thing, the judiciary can appreciate its role in

[4] See Girmachew Alemu and Sisay Alemahu (eds), *The Constitutional Protection of Human Rights in Ethiopia: Challenges and Prospects* (AAU press 2009).
[5] Ethiopian Constitution (n 3), Article 62.
[6] ibid, article 13(1) and 85(1).
[7] The existing literature on human rights under the Ethiopian constitution and the constitution itself confirmed the justiciability of human rights including socio-economic rights.
[8] Given the judicial credibility and power to influence the other organs as it has been an instrument of suppression.

the constitutional order especially in the enforcement of human rights. For another, it will give a practical sense for the system of checks and balances which is central in a constitutional democracy as it will check executive excess and legislative tyranny at least concerning human rights and DPSP.

This thesis posits the argument that DPSP can be both a means for the enforcement of socio-economic rights under the Bill of Rights and DPSP as core minimum socio-economic rights can be drawn from it. Although the judiciary did not have an express power to interpret the constitution, it assumes express obligation to defend the constitutional order, to enforce the Bill of Rights and to make use of the DPSP in its task of interpretation. Especially when the executive and the legislative are indifferent to human rights in general and DPSP in particular, the only organ which one should rely on is the judiciary. The judiciary's sense of DPSP in particular has far reaching goals as DPSP are basic constitutional principles which guide the state towards socio-economic and political justice. If the judiciary is not able to counteract executive supremacy and legislative tyranny, the constitutional democracy envisaged by the constitution will lose meaning.

Within this context, this thesis addressed the main research question of what is the potential of DPSP for the judicial enforcement of socio-economic rights in Ethiopia. In order to address this grand research question, the following questions are addressed. What is the role of DPSP in enforcing socio-economic rights? How they are a tool of interpretation for constitutional socio-economic rights? Can they be a means for the enforcement of socio-economic rights through civil and political rights? How they further socio-economic rights by themselves? Can DPSP be judicially enforced? And what is the role of the judiciary in enforcing DPSP?

In order to address the research questions in a systematic manner, understanding the Ethiopian context in light of other jurisdictions which have similar systems is important both in drawing lessons and understanding the strengths and weaknesses. Thus, this thesis adopts a comparative approach. India is chosen as a comparator due to its huge jurisprudence on DPSP from which ample lessons can be drawn for Ethiopia. Although a substantial number of constitutions incorporate DPSP as discussed in chapter one, their respective judiciaries have not yet developed a case law on the topic. For example, even if the Supreme Court of Ghana and Nepal have made DPSP justiciable they have not gone that far in enforcing socio-economic rights. As the lessons which may be learnt from these jurisdictions are discussed in chapter one considering them as a full-fledged comparator is not necessary. Needless to say, in general, the national jurisprudence on socio-economic rights is not developed even so with DPSP. Hence, this thesis contributes much in stimulating further research on DPSP and offering new insights in the national socio-economic rights discourse.

The kind of data the research questions require are found in primary sources such as constitutions, laws and cases, on the one hand, and secondary sources such as books, journal articles and academic pieces, on the other hand. Hence, this thesis is conducted through desk review of primary and secondary sources. The legal and case analysis is feed into the jurisprudence so as to come up with a comprehensive result on the central research question of the thesis.

This thesis is organized into four chapters. The first chapter explores the main pillars of DPSP and justify why the Ethiopian judiciary should consider DPSP as a means to enforce socio-economic rights. The second chapter discusses how the Indian judiciary have used DPSP to enforce socio-economic rights and investigates the engines for the DPSP jurisprudence. The third chapter examines DPSP in the Ethiopian setting and its potential for the enforcement of socio-economic rights. The fourth chapter synthesise the Ethiopian and

Indian experiences and draw lessons. It has also conclusion which concisely presents the findings of the study.

1. Directive Principles of State Policy: A Background

1.1 Introduction

This chapter puts background notes about the potential of DPSP for the judicial enforcement of socio-economic rights. In doing so, it explores the relationship between DPSP and socio-economic rights, on the one hand, and the justiciability of DPSP, on the other hand, by navigating through the constitutions of Ireland, Nepal, Nigeria, Namibia, Lesotho, Sierra Leone, Ghana, Ethiopia and India. It also discusses why the Ethiopian judiciary should make sense of DPSP. The objective is to draw the fundamental pillars of DPSP with a view to build an argument about the potential of these pillars for the judicial enforcement of socio-economic rights in Ethiopia as a basis for the discussion in the coming chapters.

1.2 Directive Principles of State policy: A Mere Constitutional Rhetoric or a Reality?

The discourse on the status of DPSP in constitutions ranges from the claim that they are mere constitutional promises devoid of practicability to fundamental principles which are consumed by the citizenry. This section presents and examines these two assertions about DPSP and will address the question framed in the title. The aim is to shed light on whether DPSP in the Ethiopian constitution is a mere constitutional promise or a reality. If it is a mere promise, can it be a reality and whether lessons can be learnt from other jurisdictions in this regard.

In a common parlance DPSP are principles which guide a government in present action and future direction regarding its nation and people. Mehta notes that DPSP are the ideals which the state must consider in the formulation of policies and making laws in order to secure

'social, economic and political justice' to all.[9] He further notes that DPSP are principles which contain the 'aims and objects of the state' under the constitution.[10] They are a set of principles which give life to the aspirations of the people and the nation.[11] In this regard, Chinnappa states that "directive principles specify the programs and the mechanics of the state to attain the constitutional goals set out in the preamble".[12] According to Metha and Chinnappa, DPSP are both means and ends to attain socio-economic and political justice. They are instrumental in furthering the aspirations of the people and implementing the very aims and objectives of DPSP. Hence, DPSP are core and living constitutional principles.

Similarly Basu notes that the DPSP, "as embodied in part IV of the Constitution [of India] are directions given to the State to guide the establishment of an economic and social democracy, as proposed by the Preamble".[13] They are standards of achievement which guides all government organs in running their business.[14] Ali and Atua note that DPSP are "a collection of constitutional provisions that require a state to carry out certain obligations in fulfilment of its mandate for the citizenry".[15] By the same token Ceazar notes that DPSP are "blue-prints for good governance and social justice for all" which guide the nation to realize its national

[9] SM Mehta, *A Commentary on Indian Constitutional law* (Deep & Deep Publications 1990) 215.
[10] ibid.
[11] See Bertus De Villiers, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 S. Afr. J. on Hum. Rts. 29, 30-34.
[12] Reddy Chinnappa, *The Court and the Constitution of India: Summit and Shallows* (OUP 2010) 73.
[13] Durga Das Basu, *Introduction to the Constitution of India* (15th ed., Prentice Hall of India 1993) 475 as cited by Bikash Thapa, 'Enforceability of Directive Principles with Reference to Judicial Decisions of Nepal',<https://www.academia.edu/2636270/Enforceability_of_Directive_Principles_with_reference_to_Judicial_deci sions_of_Nepal> accessed 19 December 2014.
[14] J Wickramaratne, *Fundamental Rights in Sri Lanka* (2nd ed, Stamford Lake Pvt. Ltd, Pannipitiya 2006) 38 as cited by Danushka Medawatte, 'Non-enforceability of Directive Principles of State Policy: Real Barrier or Fake?'(2012), <https://www.researchgate.net/publication/233980362_Nonenforceability_of_Directive_Principles_of_State_Policy_Real_Barrier_or_Fake> accessed 19 December 2014.
[15]Abdi Jibril Ali and KwadwoAppiagyei Atua, 'Justiciability of Directive Principles of State Policy in Africa: The Experiences of Ethiopia and Ghana', (2013) Ethiopian Journal of Human Rights Vol.1, 1.

ideals.[16] As democracy is a process which is built over time, making DPSP part of the democratic process to advance socio-economic and political development will make DPSP real constitutional principles. As far as a working constitutional democracy is in place, DPSP will continue to be vital tools and inputs for the functioning of state organs namely the legislative, executive and judiciary.

Nonetheless, there are some commentators who argue that DPSP are mere constitutional promises devoid of the mechanism for enforcement. During the constitutional assembly debate of the Indian Constitution some members argued that given "the political and programmatic nature" of DPSP coupled with their non-judicial enforcement, they should not be part of the constitution.[17] Even if DPSP are important without any doubt, Das argues that they should not be part of the main chapter of the constitution but should be included in "an appendix to the Constitution" if it is required.[18] Joshi justifies such assertion by arguing that there should be no room for "political manifestos in a constitution" as constitution transcends short lived political goals.[19] Seervai argues that the inclusion of DPSP in a constitution is simply a rhetorical statement of "hopes, ideals and goals" rather than actual realities backed by political mechanism of enforcement as opposed to legal enforcement.[20] The argument of these authors is twofold. For one thing, DPSP are political ideals and accordingly short lived than other principles of a constitution which is supposed to stay relatively longer. Hence, such short lived political ideas should not be part of the constitution. For another, even if it is said they are durable ideals which guide the functioning of the state, their non justiciability

[16] Onyekachi Wisdom Ceazar, 'The Justiciability of the Fundamental Objectives and Directive Principles of State Policy under Nigerian Law' (2012), <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2140361> accessed 19 December 2014, 3.
[17] Constitutional Assembly Debate Vol. 4 362-364 as cited by Villiers (n 11) 32.
[18] Constitutional Assembly Debate Vol. 4 366-368 as cited by Villiers (n 11) 32.
[19] G Joshi, *The Constitution of India* (1958) 108 as cited by Villiers (n 11) 32.
[20] HM Seervai, *Constitutional Law of India* (1984) 1577 as cited by Villiers (n 11) 34.

will make them empty promises. According to these authors, in both ways DPSP are mere rhetorical than practical principles which a constitutional democracy could not afford to have.

Usman goes on to say that DPSP are a constitutional design defect which compromises the idea of constitutionalism and supremacy of the constitution.[21] He posits a strong argument against the impact of having a non-justiciable DPSP in a constitution. He asserts that

> *[w]hen the political branches fail, there is appeal to the people, who may help vindicate the constitutional right. But, where the majority is the problem, the vindication of constitutional rights needs a non-majoritarian decision-maker, such as the courts, to vindicate rights. With the DPSP being non-justiciable, there is no remedy to the majoritarian problem. If there is no pursuit of the constitutional directive principle by the political branches, then as a practical matter, the constitutional provision is repealed.*[22]

Usman's main argument for considering DPSP as a constitutional design defect is not the very idea of DPSP *per se*, but making them out of the judicial reach. He agrees on the idea of having DPSP in the constitution. But, their non-justiciability according to him will compromise the supremacy of the constitution and make DPSP non-practical.

However, the framers of the Irish Constitution [which were the pioneers in constitutionalizing DPSP] and Indian constitution [followers of the footsteps of the Irish and further developed a huge jurisprudence on DPSP] rationalizes the inclusion of a non- justiciable DPSP in their respective constitutions as follows. The founding fathers of the Irish Constitution states that:

> *They [DPSP] will be there as a constant headline, something by which the people as a whole can judge of their progress in a certain direction; something by which the representatives of the people can be judged as well as the people judge themselves as a whole. We will judge of our progress in a certain direction by asking ourselves how far we have advanced in this direction. They are intended to be directive to the Legislature. They are not to be determined by the courts for this reason-that it is the*

[21] See Jeffrey Usman, 'Non-Justiciable Directive Principles: A Constitutional Design Defect' (2007) 15 Mich. St. J. Int'l L. 643.
[22] ibid, 672.

> *Legislature that must determine how far it can go from time to time, in the set of circumstances, in trying to secure these ideals and aims and objectives.*[23]

Their Indian counterpart in defence of DPSP also provides that:

> *[…] we are going to enter into a new life of contradictions. In politics we will have equality in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one man one vote. How long shall we continue to live with this life of contradictions?*[24]

According to the above assertions, DPSP are constitutional instructions to the government by the people and monitored by the people to advance their overall needs, interests, and rights. In this regard, Gledhill notes that despite the non-justiciability of DPSP, they will affect the decisions of courts as "Magna Carta has affected the decisions of English judges and the Preamble of the American Declaration of Independence has affected the decision of American judges".[25] Hence, the role of DPSP as constitutional principles despite their non-justiciability should not be under-estimated.

Various authors have noted that DPSP do not create rights but describe goals and purposes.[26] Especially Sir Ivor Jennings calls DPSP as "pious aspirations and mischievous generalities".[27] However, Jacobsohn notes that the effectiveness of DPSP depends up on the context.[28] While the Indians have been utilized DPSP and developed huge jurisprudence, the Irish counterpart have not utilized them yet.[29] Jacobsohn further states that despite the non-justicability of DPSP, "they have acquired more than simply hortatory significance in

[23] Bunreachtna hEireann, Dáil Éireann Volume 67, (11 May, 1937), <http://historicaldebates.oireachtas.ie/D/0067/D.0067.193705110029.html> accessed 24 December 2014.
[24] Constitutional Assembly Debate Vol. 11 as cited by Garry Jeffry Jacobsohn, 'The Permeability of Constitutional Borders' (2004), Texas Law Review, Vol. 82: 1763, 1772.
[25] Alan Gledhill, *The Republic of India: The Development of its Law and Constitution* (2nd ed, Stevens & Sons 1964) 161-2 as cited by Thapa (n 5).
[26] Usman (n 21) 649.
[27] Jacobsohn (n 24) 1772.
[28] ibid. 21 Ali and Atua (n 15) 7.
[29] ibid.

informing the meaning of enforceable fundamental rights provisions".[30] Similarly Kumar notes that DPSP have been "a great source of legal, jurisprudential, and constitutional support for the judiciary in delivering their decisions, as well as guiding the governmental bodies in formulating human development policies, and thereby promoting good governance".[31] By the same token, Jeffrey notes that DPSP have influenced how 'Indian courts interpreted fundamental rights, statutes, executive orders and administrative regulations'.[32] What follows at least the Indian experience is concerned is, DPSP are neither 'pious aspirations nor mischievous generalities' as they have used them extensively in their courts to protect fundamental rights.

Hence, constitutionalizing DPSP is a useful undertaking for democratic culture, human rights and social justice as they are dynamic which evolve with time and make a constitution a true living document -which serves the present day demands of the people. They give much space for political dialogue unlike fundamental rights and thereby will enhance the democratic culture.[33] Their moral and political character for governance will give the people a sense of power which is manifested in elections.[34] The judicial sense of the DPSP in the application and interpretation of laws will render justice and uphold them as a constitutional principle.

[30] Jacobsohn (n 24) 1770.

[31] C Kumar, 'International Human Rights Perspectives on the Fundamental Right to Education-Integration of Human Rights and Human Development in the Indian Constitution' (2004) 12 Tul. J. Int'l & Comp. L. 237 265.

[32] Randal Jeffrey, 'Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations' (1993), 27 Colum. J.L. & Soc. PROBS 1, 22 as cited Usman (n 28) 650.

[33] In the case of fundamental rights as noted by Wiktor Osiatynski, *Human Rights and Their Limits (Cambridge University Press 2009)*) 70-99 the game is win or lose. The one who has rights need not compromise for other values or considerations. However, the case of DPSP gives the state much space in time and resources and imposes a positive duty unlike fundamental rights.

[34] If the government is not working towards the fulfilment of DPSP, the people can remove the government in the upcoming election.

Despite the arguments for and against constitutionalizing DPSP, the problem of enforcement is not a peculiar constitutional problem attributed to the nature of DPSP.[35] The enforcement of the fundamental rights chapter of a constitution also suffers from the problem of enforcement although not to the same extent. The same holds true for other constitutional provisions for instance the separation of power, division of power and the independence of the judiciary to mention some. At the same time, there are countries which have showed better progress in the judicial implementation of DPSP for instance India while Ethiopia has failed to even enforce fundamental rights. So, the problem of enforcement is not enough to justify the claim that DPSP are a simple rhetoric.

Thus, the response to the above assertion whether DPSP are mere constitutional rhetoric's or realities depends on the constitutional, democratic and socio-economic setups. The existence of a functioning democracy with a multi-party system which consider the ideals of the constitution in general and DPSP in particular a subject of political debate, a responsive government which respects and advances the wishes of the people as expressed in the constitution [DPSP], a vibrant civil society and active citizenry, and an independent and impartial judiciary which ultimately checks the powers of the legislative and executive will change the aspirations expressed in the DPSP in to a reality. DPSP are practical constitutional principles for the Indian citizenry and to some extent to Ghanaians and Nepalese as will be discussed in section 1.4 in the context of justiciability of DPSP. Whereas, it is a simple rhetoric for Ethiopians as neither the legislative and the executive nor the judiciary make a practical use out of it. However, given the constitutional stipulation of DPSP in Ethiopia and the comparative experience from India as will be discussed in the coming chapters, DPSP have the potential to further the socio-economic rights of Ethiopians and become a reality.

[35] Problem of enforcement is a common constitutional problem especially in the developing world.

1.3 Directive Principles of State Policy and Socio-Economic Rights: Locating the Connection

DPSP as basic constitutional principles which have practical utility are established in the previous discussion. This section explores and locates the relationship between DPSP and socio-economic rights. The aim is to appreciate the potential of DPSP for the implementation of socio-economic rights in Ethiopia, which is the central objective of this thesis.

DPSP and socio-economic rights are closely related. DPSP had been originally conceived in lieu of socio-economic rights.[36] The innovations of DPSP as constitutional principles were necessitated by pragmatic challenges of constitutional rights and the quest for progress, on the one hand, and the need to protect the vulnerable sections of the society from politics, on the other hand.[37] The constitutional challenge to progress is attributed to the practice of the United States Supreme court at the end of the 19th and start of 20th century.[38] The United States Supreme Court had consistently rejected "welfare legislations by the states as a violation of constitutional property rights and freedom of contract".[39] The United States Constitution had been a hurdle to the protection of socio-economic rights as the economy of the state progressed. The political consideration, which come from Europeans, is to make socio-economic rights above politics by constitutionalizing them so as to protect the poor and the weak sections of the society.[40] With these considerations, the European states have adopted different mechanisms to incorporate socio-economic rights in their constitution. This

[36] Osiatynski, *Human Rights and Their Limits* (n 33) 121; see also Wiktor Osiatynski, 'Social and Economic Rights in a New Constitution for Poland', in Andras Sajo (ed), *Western Rights? Post-Communist Application* (Kluwer Law International 1996) 233-269.
[37] Osiatynski, *Human Rights and Their Limits* (n 33) 121.
[38] ibid.
[39] ibid.
[40] As constitutional rights are above political discourse they will limit the majoritarian tyranny in a democracy. For details see Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); Daniel A. Farber, 'Rights as Signals' (2002) 31 J. Legal Stud. 83, <http://scholarship.law.berkeley.edu/facpubs/747> accessed 01 December 2014, 84.

ranges from the incorporation of socio-economic rights[41], to a mention of social democratic state,[42] to the stipulation of DPSP.[43]

The differential treatment of civil and political rights and socio-economic rights at the international level has also impacted the protection of rights at the domestic level. In this regard, Ali and Atua note that "the two separate chapters within some national constitutions: one on justiciable bill of rights containing civil and political rights, and the other on non-justiciable DPSPs containing state duties corollary" to socio-economic and cultural rights is equated with the split of the Universal Declaration of Human Rights (UDHR) "in to the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)".[44] Thus, putting socio-economic rights in the DPSP is dictated by the same logic that underlies the arguments that resulted in the split of the UDHR into two covenants.

In both ways, most of the DPSP are in the socio-economic, political and cultural fields which intend to improve the lives of individuals and bring social justice.[45] Ali and Atua note that "DPSPs contain Economic, Social and Cultural rights framed in terms of state duties instead of individual entitlements."[46] DPSP focus on the states duty to achieve certain socio-

[41] See the 1947 Constitution of the Republic of Italy, <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf > accessed 01 December 2014, Articles 29-47.

[42] See the 1949 Basic Law of the Federal Republic of Germany, <https://www.btg-bestellservice.de/pdf/80201000.pdf> accessed 01 December 2014, Article 20.1.

[43] See the 1937 Constitution of Ireland, <http://www.constitution.org/cons/ireland/constitution_ireland-en.pdf>, Article 45; and the 1978 Constitution of Spain, <http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf>, Sections 39-52; all accessed 20 October 2014. see also Wojciech Sadurski, 'Constitutional Courts in the Process of Articulating Constitutional Rights in the Post-Communist States of Central and Eastern Europe Part I: Social and Economic Rights' (2002) 17 European Univ. Inst., Dep't of Law, EUI Working Paper LAW No. 2002/14, <http://cadmus.eui.eu/dspace/bitstream/1814/192/1/law02- 14.pdf> accessed 16 December 2014.

[44] Ali and Atua (n 15), 2; see also M Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009). It is based on the assumption that socio-economic rights are better implemented in legislative, executive and policy frameworks than judicial enforcement.

[45] see Obinna Okere, 'Fundamental Objectives and Directive Principles of State Policy under the Nigerian Constitution' (1983) 32 Int'l & Comp. L.Q. 214 ; Ali et al (n 2).

[46] Ali and Atua (n 15) 2.

economic goals with a view to establish an economic democracy.[47] Aikman opines that DPSP are "statements of economic rights and policy prescriptions in the social area which guide the government" to render social justice.[48] Ceazar also observes that DPSP are the primary means to achieve constitutional promises of the preamble and are essential conditions to further social, political, cultural and economic development.[49] DPSP are mostly economic rights which states are obligated to insure these rights for the poor and the needy.[50] According to these authors, DPSP are a list of socio-economic rights under the constitution. What follows is, DPSP should be given the protection which is given to socio-economic rights including judicial enforcement and public interest litigation. As judicial enforcement and public interest litigation are useful mechanisms to enforce socio-economic rights, they should be applicable to DPSP too.[51]

In addition to these scholarly writings, the navigation of those constitutions which recognize DPSP reveals that DPSP are mostly a collection of socio-economic rights. DPSP in the Irish Constitution is a statement of socio-economic rights as it deals with the right to adequate livelihood, health, socio-economic security, general welfare and justice.[52] The Indian Constitution contains a long list of socio-economic rights in the DPSP chapter.[53] It ranges from securing social order and justice to adequate living standard to equal pay for equal work to health to food to education to environment to peace and security.[54] Almost the entire lists in the DPSP under the Indian Constitution are related to socio-economic rights. Nonetheless,

[47] Villiers (n 11) 30.
[48] C Aikman, 'Fundamental Rights and Directive Principles of State Policy in India' (1987) 17 Victoria U. Wellington L. Rev. 373, 375-76.
[49] Ceazar (n 16) 4.
[50] Thapa (n 13).
[51] For the potential of public interest litigation for socio-economic rights see Siri Gloppen, 'Public Interest Litigation, Social Rights And Social Policy' (2005) Arusha Conference, New Frontiers of Social Policy, < http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Gloppen.rev.3.pdf> 25 January 2015.
[52] See the Irish Constitution (n 43), Article 45.
[53] See the 1950 Indian Constitution, <http://lawmin.nic.in/coi/coiason29july08.pdf> accessed 03 October 2014, Articles 36-51.
[54] ibid.

the policy for uniform civil code and separation of power may not be directly related to socio-economic rights.[55]

Udombana notes that most constitutions in Africa provide socio-economic rights in the DPSP.[56] For instance the constitution of Nigeria, Namibia, Lesotho and Sierra Leone incorporate socio-economic rights in their DPSP.[57] In these constitutions, the right to adequate standard of living, work, health, education, food, environment, social security, justice and welfare are the basics of their DPSP.[58] Some other African constitutions though include a justiciable socio-economic rights along with civil and political rights, incorporate some of them in to the DPSP. In this regard, the constitution of Ghana and Ethiopia are notable. In these constitutions, socio-economic rights are part of the Bill of Rights.[59] At the same time these rights are also part of their DPSP.[60] Although indirectly related to the socio-economic wellbeing of the people, DPSP extend to other national principles and objectives such as principles of foreign policy, national defence, independency of the judiciary and asylum.[61]

From these constitutions, it is clear that DPSP are a statement of socio-economic rights in the form of state duties. Hence, DPSP should be read with fundamental rights to ensure the indivisibility, interdependence and inherent nature of human rights so that human dignity to be safeguarded and flourished fully. Without guaranteeing socio-economic rights as

[55] ibid, article 44 and 50.
[56] Nsongurua Udombana, 'Keeping the Promise: Improving Access to Socioeconomic Rights in Africa' (2012) 18 Buff. Hum. Rts. L. Rev. 135, 5; see also Ali and Atua (n 15) 9-10.
[57] See the 1999 constitution of Nigeria (Chapter II), <http://www.nigeriarights.gov.ng/files/download/43> , the 1990 constitution of Namibia (Chapter 11), <http://www.wipo.int/edocs/lexdocs/laws/en/na/na001en.pdf> , the 1993 constitution of Lesotho as amended in 2001 (Chapter III), < http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---ilo_aids/documents/legaldocument/wcms_126743.pdf> , the 1991 constitution of Sierra Leone (Chapter II), < http://www.sierra-leone.org/Laws/constitution1991.pdf> , accessed 25 December 2014.
[58] ibid.
[59] See article 24 (economic rights), article 25 (educational rights), article 26 (cultural rights) of the 1996 Ghana constitution, <http://www.wipo.int/edocs/lexdocs/laws/en/gh/gh014en.pdf> accessed 23 December 2014; see article 41 (socio-economic and cultural rights) of the Ethiopian Constitution (n 3).
[60] See chapter six and ten of the Ghana (ibid) and Ethiopian Constitutions (n 3) respectively.
[61] See article 97 of the Namibian Constitution (n 57), article 86 and 87 of the Ethiopian Constitution (n 3) and article 50 of the Indian Constitution (n 53).

envisaged in the DPSP, individuals could not meaningfully enjoy their civil and political rights and may not lead a dignified life. Locating socio-economic rights at the centre of DPSP will bring the ideals of DPSP into a common place with fundamental rights and the duty bearers of the latter should take note of the former as they are part of the Bill of Rights in a constitution.

1.4 Directive Principles of State Policy and the Judiciary: Examining the Suitability of DPSP for Judicial Enforcement

In the previous sections, the basic natures of DPSP as constitutional principles and it close relation with socio-economic rights are established. In this part, the judicial suitability of DPSP will be examined. The objective here is to explore the justiciability or otherwise of DPSP by examining constitutional provisions and consulting judicial decisions with the aim to shed light on whether it can be justiciable in the Ethiopian context which is a subject of discussion in the coming chapters.

DPSP are usually outside of the jurisdiction of the court. Originally as stated in the Irish Constitution, DPSP impose duties only on the parliament [Oireachtas] in making laws not the judiciary even the executive.[62] The judiciary is expressly denied the power to adjudicate cases based on DPSP.[63] In this regard, the framers of the Irish Constitution note that:

> *They [DPSP] are not to be determined by the courts for this reason-that it is the Legislature that must determine how far it can go from time to time, in the set of circumstances, in trying to secure these ideals and aims and objectives…the determination clearly has to be left to the representatives of the people. The people themselves will have to advance in this direction. They will have to be led by their representatives in this direction; their representatives will have to put up policies to them leading in this direction. If they are to be judged from time to time, it is right that they should be judged by their actions in the Legislature and not that somebody like the Supreme Court should become the judge. The people as a whole will have to*

[62] See article 45 of the Irish Constitution (n 43).
[63] ibid.

> *judge the Legislature in that matter, and the Legislature will have to be its own judge in regard to the set of circumstances and the advances which are to be made.*[64]

The Indian Constitution, on the other hand, extends duties on DPSP to all state organs though it specifically excludes judicial adjudication.[65] If the judiciary is excluded from applying DPSP as justiciable claims, one might wonder how it can fulfil this constitutional duty. In clarifying this issue, Chinnappa notes that the non-justiciability of DPSP do not preclude courts to consider them in their interpretation of the Constitution and laws but limits their power to "issue directions to the parliament and the legislature of the states to make laws".[66] Despite the non-justiciable constitutional stipulation of DPSP, the Indian courts have developed a huge jurisprudence by using them extensively to enforce fundamental rights which will be the subject of discussion in the second chapter.

Most African countries which opt to put socio-economic rights in to their respective DPSPs make it expressly non-justiciable. For instance, Nigeria, Namibia, Lesotho and Sierra Leone although consider the fundamental nature of DPSP in the governance of their respective countries but exclude them from their judicial reach.[67] However, unlike the other constitutions, the Constitution of Namibia expressly entitles the court to take note of DPSP in the interpretation of any laws though it did not authorize them to directly apply.[68] Nigerian courts numerously encountered issues involving DPSP; however, they have reaffirmed boldly their non-justiciability by stating that although DPSP imposes duties on the judiciary nonetheless it did not make them justiciable.[69]

[64] Dáil Éireann (n 23).
[65] Indian Constitution (n 35), article 36 and 37.
[66] Chinnappa (n 12), 73.
[67] See section 6(6) (c), article 101, section 25, and section 14 of the Constitution of Nigeria, Namibia, Lesotho and Sierra Leone respectively (n 57).
[68] See article 101 of the Namibian Constitution (n 57)
[69] Arch. Bishop Olubunmi Okogie v. The Attorney General of Lagos State (1981) 2 NCLR 337 as cited by Ceazar (n 16), see also Adeoye Akinsanya, 'Fundamental Objectives and Directive Principles of State Policy in the Nigerian Constitution' (1993) Pakistan Horizon, Vol. 46, No. 2, 23-41.

Those which have both socio-economic rights in the fundamental rights section and DPSP like Ethiopia and Ghana do not say anything about the justiciability or non-justiciability of the DPSP.[70] The implementation of DPSP is the duty of all state organs including the judiciary. In such circumstances, the decision of the judiciary to apply and adjudicate cases based on DPSP depend upon its will and role in the constitution. In Ghana, the Supreme Court makes it justiciable in a number of cases. In *New Patriotic Party v Attorney-General*, the plaintiffs requested the "court to prohibit the government from celebrating the 31st December as public holiday as it marked a military *coup d'etat* of the constitutionally established government."[71] They argue that celebrating the date of the *coup d'etat* is against the system of government which is envisaged in the DPSP especially article 35 and 41.[72] Although there were preliminary objections as to the justciability of DPSP, the court rejected such claim by saying that "the constitution as a whole document is justiciable, if DPSP is not justiciable the constitution may say it so expressly and the very tenor of DPSP supports the view of justiciability".[73] In the second case by a similar plaintiff, *New Patriotic Party v Attorney General*, the court partly changed its position on the justiciability of DPSP.[74] The Supreme Court held that some parts of the DPSP which are related to the fundamental rights may be justiciable while those which stand by their own as rights in the DPSP may not be justiciable by taking into account the views of the constitutional framers.[75] In a later case,

[70] See chapter ten and chapter six of the Ethiopian (n 3) and the Ghanaian (n 59) constitutions respectively.
[71] New Patriotic Party v Attorney-General (1993-94) 2 Ghana Law Reports 35 as cited by Ali and Atua (n 15), 34
[72] Article 35 contains a bundle of principles and objectives for the state. 35(1) states "Ghana shall be a democratic state dedicated to the realization of freedom and justice; and accordingly, sovereignty resides in the people of Ghana from whom Government derives all its powers and authority through this Constitution". The same holds true for article 41. Article 41(b) says "The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly, it shall be the duty of every citizen - to uphold and defend this Constitution and the law".
[73] Ali and Atua (n 15) 34-35.
[74] New Patriotic Party v Attorney-General (1996-97) Supreme Court of Ghana Law Reports as cited by Ali and Atua (n 7) 35.
[75] Seth Yeboa Bimpong-Buta, 'The Role of the Supreme Court in the Development of Constitutional Law in Ghana (LLD thesis, University of South Africa 2005)348-353; see also Atudiwe Atupare, 'Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria' (2014) Harvard Human Rights Journal Vol. 27.

Ghana Lotto Operators Association (and 6 others) v National Lottery Authority, the Supreme Court departed from the framers view of non-justciability of DPSP to consider the Constitution as a living document.[76] By such dynamic interpretation, the Supreme Court considers DPSP as justiciable legal claim which further the enforcement of fundamental rights. In either ways, the supreme court of Ghana makes judicial sense of DPSP. Despite the similarity of constitutional provisions with Ghana, the judiciary in Ethiopia has yet to consider cases involving DPSP to date.[77]

The alleged judicial non-suitability for the enforcement of DPSP is proved otherwise not only in India and Ghana but also in Nepal. Like the Constitution of India, the Constitution of Nepal makes DPSP non-justiciable as they should not be enforced by any court.[78] Nonetheless, the Nepalese Supreme Court has made DPSP enforceable constitutional provisions.[79] In the case of *Suray Prasad Sharma Dhungel v. Godawari Marble Industries and others*[80] the petitioner claimed that the respondents engaged in activities which damage the environment and there by violate the right to life and the clean environment objective of the DPSP in the Constitution.[81] Based on these claims the Supreme Court framed two issues among others, such as "whether the constitution guarantees the right to clean environment as part of the right to life? And whether the court can issue an order against parliament to enact a law?"[82] The Supreme Court responded in the affirmative and issued directives for "the protection of air, water, sound and environment and to take action for the protection of the

[76] ibid.
[77] Ali and Atua (n 15) 39.
[78] See article 24 of the Constitution of the Kingdom of Nepal VS 2047 (1990), <http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1272&context=himalaya> accessed 26 December 2014.
[79] Thapa (n 13).
[80] Suray Prasad Sharma Dhungel v. Godavari Marble Industries and others, WP 35/1992 (1995.10.31), Supreme Court of Nepal, available at <http://www.elaw.org/node/6415> accessed 20 December 2014.
[81] See article 26(4) of the constitution of Nepal which reads "The state shall give priority to the protection of the environment and to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanness, and the state shall also make arrangements for the protection of the rare wild life, the forests and the vegetation".
[82] Suray Prasad Sharma Dhungel v. Godavari Marble Industries and others (n 80).

environment of Godawari area" in accordance with the DPSP.[83] In a number of similar cases, the Supreme Court has affirmed the justiciability of the DPSP and their potential in reading other provisions of the Constitution.[84]

By taking into consideration their fundamental character as a constitutional principle and their impact in realizing the preambular aspirations of the people, the judicial organs of India, Ghana and Nepal have opted to adjudicate cases based on DPSP. Such initiative of the judiciary of course requires some sort of activism in making the constitution a practical document and thereby rendering social and economic justice to the people concerned by performing their role as a guardian of the constitution and justice. Although the main implementing forces for DPSP are 'elections and public opinion', the judiciary assumes a huge responsibility in keeping the constitutional promises alive when the legislative and the executive break these promises.[85] However, if the judiciary failed to do this, the constitutional provisions of DPSP will be mere promises without any utility and they will be constitutional design defects as Usman observes above. Thus, to make DPSP reality, Ethiopian courts can use them both as tools of interpretation in the enforcement of the Bill of Rights and as justiciable claims by drawing minimum core socio-economic guarantees from it as provided in the Constitution and as will be learnt from the comparative experience.

1.5 Why the Ethiopian Judiciary Should Guard DPSP?

Although the legislative and executive branches of government are placed in a good position to advance the ideals of DPSP, on the one hand, and elections and public opinions are influential implementing tools for DPSP, on the other hand, as the discussion in the previous

[83] ibid.
[84] UNEP, *Compendium of Summaries of Judicial Decisions in Environment Related Cases* (2004) <http://www.unep.org/delc/Portals/119/UNEPCompendiumSummariesJudgementsEnvironment-relatedCases.pdf> accessed 27 December 2014, 162-170.
[85] See Villiers (n 11) 33 and Usman (n 21).

sections show, the judiciary assumes a crucial role in guarding and furthering DPSP. In the event of failure by the other organs either to uphold or advance DPSP, the judiciary can play a checking and balancing role. This part examines briefly the *status quo* in Ethiopia and why the role of the judiciary is significant to defend DPSP. In order to do this, it locates human rights within the democratic and constitutional order.

The quest for human rights and democracy, on the one hand, and socio-economic development, on the other hand, has been the source of revolutions in the Ethiopian state. After the removal of the *Derg* regime through armed struggle in 1991 by the Ethiopian People Revolutionary Democratic Front (EPRDF), a new era has been opened for a culture of human rights and democratic governance. In an attempt to give response to these age old claims, the Ethiopian Constitution has made the ideals of human rights and socio-economic development preamblular aspirations for the people who have been long awaited.[86] Specifically, the Ethiopian Constitution has made human rights both one of the fundamental principles of the constitution and the spirit and subject of DPSP.[87]

In the supremacy clause of the Ethiopian Constitution, "a duty to ensure the observance of the Constitution and to obey it" is imposed on "all citizens, organs of state, political organizations, other associations as well as their officials."[88] In addition to such general constitutional duty, the Ethiopian Constitution has stipulated prime responsibility on state organs including the judiciary for the enforcement of human rights and DPSP.[89]

Despite the new hopes for democracy, human rights and social justice, the framers of the Ethiopian Constitution has turned to be-dictators like their predecessors.[90] The EPRDF,

[86] See the preamble of the Ethiopian Constitution (n 3).
[87] ibid, see article 10 and chapter 10.
[88] ibid, article 9(2).
[89] ibid, article 13(1) and 85(1)
[90] For details see Theodore Vestal, *Ethiopia: A Post- Cold War African State* (Greenwood Publishing group 1999).

despite promises of multi-party democratic system end up in a single party system controlling 100% of the seats of parliament, "where it practically makes the executive and the legislative one and the same".[91] Instead of furthering the constitutional aspirations in general and human rights and DPSP in particular, the legislative and the executive organs of the government have been engaged with detrimental activities against the spirit of the Constitution. Rule by law as opposed to rule of law has been the *status quo* in Ethiopia today.[92]

The parliament has continuously enacted laws which compromise human rights. For instance the Civil Society Organizations proclamation, anti-terrorism proclamation and parties' code of conduct to mention some are in contradiction to the constitutionally recognized civil and political rights.[93] In a similar vein, the executive branch of government has been enacting policies and engages in undertakings which impoverish the already impoverished people as it is evident from the eviction of peoples from their lands for dame construction, sugar plantations or commercial agriculture and even urbanization.[94] Specifically the pastoral policy considers pastoralism as a problem and offers settlement as a solution which is not sustainable and has been endangering pastoral means of livelihood.[95]

These actions of the legislative and executive are clear instances of interference in the socio-economic rights and civil and political rights of individuals. The parliamentary oversight over

[91] Adem Abebe, 'Rule by law in Ethiopia: Rendering Constitutional Limits on Government Power Nonsensical' (2012), CGHR Working Paper 1, Cambridge: University of Cambridge Centre of Governance and Human Rights, <http://ehrp.org/wp-content/uploads/2014/05/Adem-Abebe-Rule-By-Law-in-Ethiopia.pdf> accessed 01 September 2014, 11.
[92] ibid.
[93] ibid.
[94] Berihun Adugna, 'Pastoral Development and Settlement in Ethiopia: Laws, Policies and Practices' (2014), Second National Workshop on Pastoralism, Conference Proceeding, Jigjiga University and Tsegaye Araarssa, 'Why Resist the Master Plan?: A Constitutional Legal Exploration' (2014), The Gulele Post, <http://www.gulelepost.com/2014/06/04/why-resist-the-master-plan-a-constitutional-legal-exploration/> accessed 2 December 2014. Though the master plan is not executed yet, there is nothing which prevents the government from implementing it given its almost absolute power. Despite the strong opposition, the government has taken a stand to enforce it in the near future.
[95] Adugna (ibid).

the actions of the executive could not work as the parliament is dominated by one party.[96] The accountability of the executive to the parliament which is the basic feature of democracy is lacking in Ethiopia. Hence, the judiciary is the last state organ which one relies upon for the protection of human rights and DPSP. It is a conventional wisdom that judges are guided by a constitution, laws and their conscience in doing their judicial job. By availing all these, the Ethiopian judiciary needs to awaken from its deep sleep for the enforcement of constitutional rights.

The usual enforcing mechanisms of DPSP, elections and public opinion, did not work in Ethiopia. For one, the enforceability of DPSP has not been a subject of political debate in election campaigns and the general public are not aware of the potentials of DPSP in brining social justice. The debate is limited to the Bill of Rights and other constitutional matters.[97] For other, the usual winner, EPRDF, has not been willing or able to advance DPSP. The judiciary has not made legal sense of DPSP yet. Although it contains the most basic principles which guide the state, it has been absent both in the political and legal discourse. It is considered as if it is an empty constitutional principle devoid of practical utility or application.

The call for the judiciary to make legal sense of the DPSP is an appeal for defence of the constitution in general, and DPSP in particular with a view to protect socio-economic rights. To this end, the judiciary has a constitutional duty to ensure the implementation of the Constitution, enforcement of human rights and DPSP. In a situation like this, the only institution which one needs to rely on is the judiciary as it is best placed to counteract the excess of power of the executive and the legislative at least concerning human rights. If the judiciary failed to do this job, the whole idea of constitution and constitutional democracy

[96] The strict party disciple of the ruling party, EPRDF, has been silencing dissent voices within the party.
[97]The usual debates based on the constitution focuses on the right to self-determination, the ethnic federal system and the priority on individual and group rights to mention the basics.

will be in danger. To make DPSP constitutional realities, the judiciary holds a huge responsibility in the current Ethiopian political legal order.

The call for the judiciary to make sense of DPSP transcends the enforcement of socio-economic rights. In order to uphold the constitutional democracy as envisaged in the Constitution, on the one hand, and to enforce human rights, on the other hand, change in the political legal order is not only desirable but also necessary and inevitable if the Ethiopian state is required to move forward. Neither democratic elections nor armed struggles have brought this change so far. As it stands today, it is very unlikely that periodic elections will bring any positive change given the deterioration of the free, fair and democratic nature of elections in Ethiopia which resulted in the smashing of multi-party democracy and the rising of a single party system which controls 100% of the seats of parliament. Violent revolutions including armed struggle are proved to be ineffective and unable in bringing the desired change in Ethiopia one and again.

Thus, 'judicial revolution' [considered in its active role in defending the constitutional order and delivering social justice to the citizenry] backed by public opinion seems feasible and consistent with the constitutional framework to bring change. If the judiciary stands for the Constitution and acquire legitimacy for its work, the public will stand in allegiance of the judgments of the judiciary which have a huge impact in the execution of judicial judgment. This in turn, not only bring the enforcement of human rights but also tame the country to democratization. Although 'judicial revolution' is not a panacea for the multiple problems which the Ethiopian political legal order faces, it will contribute its fair share for positive change.

1.6 Conclusion

From the above discussions on DPSP, three fundamental pillars as common denominators can be drawn. The first is DPSP are fundamental principles of a constitution which guides the overall activities of the state towards the citizenry. Second, DPSP are mainly directed to socio-economic rights. Third, the judiciary have a role to play for the enforcement of DPSP. Especially in the Ethiopian case the role of the judiciary to guard DPSP is crucial as the legislative and executive organs are unable or unwilling to adhere to the DPSP. Against this background note, the coming chapters examine DPSP in the Indian and Ethiopian contexts with a view to appreciate the potential of DPSP for the judicial enforcement of socio-economic rights.

2. Exploring the Role of Directive Principles of State Policy in the Judicial Enforcement of Socio-Economic Rights in India

2.1 Introduction

The Indian judiciary has used the DPSP in the Indian Constitution to enforce socio-economic rights in light of civil and political rights. This chapter explores how the judiciary use DPSP to enforce socio-economic rights in India with the objective to draw a lesson for Ethiopia. The contribution of judicial review, judicial activism and public interest litigation for the judicial consideration of DPSP are discussed as it is significant for the Indian jurisprudence on human rights. This chapter begins with the discussion on the place of DPSP in the Indian Constitution and continues to explore the engines of DPSP and then discuss the jurisprudences of DPSP in the context of the right to life with specific reference to the right to food, the right to shelter, the right to health and the right to livelihood.

2.2 The Place of DPSP in the Indian Constitution

Before discussing the Indian jurisprudence on DPSP, it is important to appreciate the place of DPSP in the constitutional framework and judicial process. Indians has followed the Irish model of constitutionalizing human rights. They constitutionalize both civil and political rights and socio-economic rights in their constitution although with different headings and judicial consequences. While the former are categorized as fundamental rights and are justiciable in a court of law, the latter are categorized as DPSP which are non-justiciable.[98] The objective of this section is to explore the place of DPSP in the Indian Constitution and how it evolves through judicial action.

The main difference between the DPSP and the Fundamental Rights emanates from the Constitutional design for human rights. Civil and political rights under the nomenclature of

[98] See the Indian Constitution (n 53) Part III & IV.

Fundamental Rights are given better protection in the Indian Constitution. The Constitution provides that all laws which are inconsistent with the fundamental rights are void to the extent of such inconsistency.[99] On the other hand, socio-economic rights which are part of the DPSP are given a different treatment. The Constitution states that although the principles in the DPSP are "fundamental in the governance of the state" and "it is the duty of the state to apply them in making laws," nonetheless they cannot be "enforced by any court."[100] This constitutional stipulation of DPSP has brought issues related to the relationship between Fundamental Rights and DPSP.

The relationship between DPSP and Fundamental Rights has not been consistent since the adoption of the Constitution. A careful review of scholarly works and judicial decisions reveals a three way relationship between DPSP and Fundamental Rights. The *first* is primacy of Fundamental Rights over DPSP; the *second* is both are in equal footing and harmonized result should be achieved in case of contradiction, and the *third* is the primacy of DPSP over Fundamental Rights.[101] In his discussion of the relationship between DPSP and Fundamental Rights, Villiers summarizes their differences as "[f]undamental rights prevent the state from acting, while directive principles provide a framework within which the state is required to act."[102] He further states that while DPSP are 'general and programmatic their enforceability depends on political and moral pressure unlike Fundamental Rights which are specific and enforced by courts by means of sanctions.'[103] These differences resulted in differential judicial treatment towards DPSP and Fundamental Rights.

[99] ibid, article 13.
[100] ibid, article 37.
[101] Jaswal Paramjit, Directive Principles, Jurisprudence, and Socio-Economic Justice in India, (A.P.H. Publishing 1996), 125-217.
[102] Villiers (n 11) 40.
[103] ibid.

In the early days after the adoption of the Constitution, courts did not give space to DPSP unlike Fundamental Rights.[104] In its first engagement with DPSP, the Supreme Court of India in the *State of Madras v Srimathi Champakam Dorairajan* ruled that the order of the state of Madras reserving proportionate seats for different communities according to their number in the medical and engineering schools was against the Fundamental Rights of the Constitution.[105] Although the state of Madras argued that the order was in line with article 46 of the DPSP which protects the weaker sections of the society, especially the scheduled castes and tribes in the promotion of their educational and economic interests, the court noted that the implementation of article 46 should not violate article 29 which is a fundamental right.[106] The court reasoned that the proportionate seat arrangement excluded well qualified applicants from admission solely based on their race, religion, caste or language which is incompatible with article 29.

Although the Constitution does not preclude courts from using DPSP as interpretative guides, in a number of cases courts had avoided even to use them as tools of interpretation. For instance, in the case of *Muir Mills v Suti Mills Mazdoor Union* and *Jaswant Kaur and v sate of Bombay*, the court had refused to interpret the Fundamental Rights in light of the DPSP.[107] Nonetheless, in the *Re Kerala Education Bill case*, the court noted the importance of using DPSP as interpretive tools.[108] In this case, the state tried to provide a system of education by which minorities can administer educational institutions in line with article 45 of the DPSP. However, such action was challenged for its incompatibility with article 14 which deals with the right to equality. Although the court ruled that the bill is unconstitutional for its

[104] See ibid, Chinnappa (n 12), and Villiers (n 11).
[105] State of Madras v Srimathi Champakam Dorairajan, 1951 SCR 525 <http://indiankanoon.org/doc/149321/> accessed 02 March 2015.
[106] ibid.
[107] See Gautam Bhatia, 'The Directive Principles of State Policy: Theory and Practice' <http://ssrn.com/abstract=2411046> accessed 07 January 2015.
[108] In Re: The Kerala Education Bill v Unknown, 1959 1 SCR 995, <http://indiankanoon.org/doc/161666/> accessed on 06 March 2015.

incompatibility with the Fundamental Rights, it mentioned that efforts should be made to harmoniously interpret the DPSP and Fundamental Rights though the later prevails in the event of contradiction.[109] Thus, in the beginning the court had given primacy to Fundamental Rights over DPSP.

The primacy of Fundamental Rights over DPSP had been criticized by both academics and members of the judiciary. Justice Chandrachud in a number of cases has noted that

> *[f]undamental rights which are conferred and guaranteed by part III of the constitution undoubtedly constitute the ark of the constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that the Directive Principles of State Policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual.*[110]

He further observes that

> *Part III and Part IV are like two wheels of a chariot, one no less important than the other. In other words, Indian constitution is founded on the bedrock of the balance between Parts III and IV. This harmony and balance between Fundamental Rights and the Directive Principles is an essential feature of the Basic Structure of the Constitution.*[111]

There are also arguments based on 'the text, history and structure of the Constitution which suggests a holistic reading of DPSP in the constitutional adjudication.'[112] If the DPSP [Part IV] is not having a legal force, it means that some part of the Constitution is not having a legal force which is against the principle that a constitution as a whole is a legal document. In addition, as discussed in the previous chapter, DPSP are fundamental principles which the judiciary should take notice of it in its interpretation task. Due to such strong critique for lack of appropriate consideration of DPSP by the judiciary, the court in a number of cases has tried to harmonize DPSP and fundamental rights. For instance, in the case of *Sajjan Singh v State of Rajasthan, Kesavananda Bharati v State of Kerala, Minerva Mills Ltd. & Ors v*

[109] ibid.
[110] Chinnappa (n 12) 78.
[111] ibid, 79.
[112] See Bahita (n 107).

Union of India, Waman Rao and Ors v Union of India and *Chandra Bhavan Boarding v the State of Mysore* the court harmonized DPSP and fundamental rights.[113] For example, in the last case the court concludes that

> *Freedom to trade does not mean freedom to exploit. The provisions of the Constitution are not erected as barriers to progress. They provide a plan for orderly progress towards the social order contemplated by the preamble to the Constitution…While rights conferred under Part 3 are fundamental, the directives given under Part 4 are fundamental in the governance of the country. We see no conflict on the whole between the provisions contained in Part 3 and Part 4. They are complementary and supplementary to each other.*[114]

In these cases the court ruled that DPSP and fundamental rights are complementary and should be interpreted in a harmonious manner.

Nonetheless, this harmonized and balanced interpretation was not enough for the judiciary as they went to say that DPSP are more important than Fundamental Rights and should prevail in times of conflict. In the case of *Meneka Ghandhi v Union of India* and *Sanjeev Coke Mfg Co v M/s Bharat Coking Coal Ltd* the court gave priority to DPSP with the objective to enforce them not restricted by Fundamental Rights.[115] By referring to DPSPs importance in the constitutional order which can uplift the Indian citizenry, the court held that enforcement of DPSP for the public interest can limit Fundamental Rights.[116] Accordingly, the court extended immunity to laws made for the enforcement of DPSP.[117] Thus, such ruling of the court placed DPSP over Fundamental Rights.

[113] Sajjan Singh v State of Rajasthan, 1965 SCR (1) 933, <http://indiankanoon.org/doc/1308308/> ; Kesavananda Bharati v State of Kerala and Anr, 1973, Supreme Court of India, <http://indiankanoon.org/doc/257876/>; Minerva Mills Ltd. & Ors v Union of India & Ors, 1981 SCR (1) 206, <http://indiankanoon.org/doc/1939993/>; Waman Rao and Ors v Union of India and Ors, (1981) 2 SCC 362, <http://indiankanoon.org/doc/1124708/>; Chandra Bhavan Boarding and v The State of Mysore and Anr , 1970 SCR (2) 600, <http://indiankanoon.org/doc/1801637/> all accessed 06 March 2015.
[114] ibid, Chandra Bhavan Boarding v The State of Mysore.
[115] Maneka Gandhi v Union of India, 1978 SCR (2) 621, <http://indiankanoon.org/doc/1766147/>; Sanjeev Coke Manufacturing v Bharat Coking Coal Ltd, 1983 SCR (1)1000, <http://indiankanoon.org/doc/1195357/>; all accessed 07 march 2015. See also Villiers (n 11) 46.
[116] Villiers (n 11) 46.
[117] Chinnappa (n 12) 81.

However, the primacy of either the DPSP or the Fundamental Rights was not long lived. What followed is the harmonious interpretation of the Constitution which gives effect to both. In the case of *Unni Krishnan v State of Andhra Pradesh* this approach is clearly stated.[118] Commenting on this case, Chinnappa has noted that "to give absolute primacy to one over the other is to disturb the harmony of the constitution… Fundamental Rights are not an end in themselves but are the means to an end. The end is specified in Part IV [DPSP]".[119] Thus, this harmonious approach has been finally adopted.

Thus, what can be learnt from these cases is that DPSP which were originally deemed to be non-justiciable have later on been considered by the judiciary as being equal or even sometimes greater than Fundamental Rights. There are a number of factors which contribute for the judicial consideration of DPSP among which are judicial review, judicial activism and public interest litigation which will be discussed in the next part of this chapter.

2.3 The Engines of DPSP

Despite the expressly non-justiciable nature of DPSP in the Indian Constitution, they assume central place in the human rights adjudication endeavour of the judiciary. There are different factors which help DPSP to get an appropriate place in the judiciary. The basic ones are judicial review, judicial activism and public interest litigation. I call these engines of DPSP which help in the fulfilment of citizen's aspirations and hopes. In order to understand the role of DPSP in the judicial enforcement of socio-economic rights, it is a *sine qua non* to appreciate the role of these engines as they are the once which set DPSP in motion towards socio-economic and political justice. The objective here is to explore how judicial review, judicial activism and public interest litigation elevated DPSP from being principles that the

[118] Unni Krishnan, J.P. and Ors. vs State of Andhra Pradesh and Ors, 1993 SCR (1) 594, <http://indiankanoon.org/doc/1775396/> accessed 07 March 2015.
[119] Chinnappa (n 12) 82.

judiciary did not take cognizance of to principles which have central place in the constitutional adjudication.

2.3.1 Judicial Review

The objective here is not to discuss the notion of judicial review but to examine its role for the enforcement DPSP. The discussion focuses on how judicial review enables the judiciary to uphold the constitutional ideals of DPSP against legislative and executive actions despite their non-justiciability. The main argument is that being a guardian of the Constitution the judiciary can find a way to give life to the various constitutional principles, including DPSP.

Judicial review entitles the judiciary to protect the constitution from legislative and executive intrusion. As Alexander Hamilton in the federalist papers puts it, the judiciary has neither the sword nor the purse but has the power to pass judgments whose enforcement depends on the executive.[120] He further states that courts are appropriately placed to balance the wills of the people and the legislature within the framework of the constitution.[121] In this regard, judicial review plays a crucial role in maintaining and furthering the constitutional ideals as it keeps legislative and executive actions in tune with the constitution. The moral reading of the constitution which judicial review presupposes gives life and content to the ideals of the constitution.[122] It is this task of judicial review which awakens the Indian judiciary to make sense of DPSP in the constitutional adjudication.

The Indian Constitution gives the Supreme Court and High Courts the power of judicial review.[123] This power of judicial review gives these courts the power to decide on the actions of both the legislative and executive void if it is in contradiction with the Constitution. The

[120] Alexander Hamilton, Federalist Paper, Federalist No. 78, <http://www.foundingfathers.info/federalistpapers/fed78.htm> accessed 08 March 2015.
[121] ibid.
[122] For details of moral reading see Ronald Dworkin, *Freedom's Law: The Moral Readings of The American Constitution* (Harvard University Press 1997).
[123] See Indian Constitution (n 53), articles 13, 32, 131-136,143m, 226 and 246.

judiciary is not only the final arbiter among institutions but also a defender of the constitution, democracy and individual liberties.[124] Sharan notes that in federal systems like India "[j]udicial review is a corner-stone of constitutionalism, which implies limited government".[125] He further states that "[…] in circumstances where public opinion is low as are the case in India, the judiciary should rescue the citizenry from executive supremacy and majoritarian tyranny which can make the constitution ill balanced."[126] It is due to this situation that Justice Rao states the following;

> *[t]his court has no more important function than to preserve the inviolable fundamental rights of the people : for the fathers of the Constitution, in their fullest confidence, have entrusted them to the care of this Court and given to it all the institutional conditions necessary to exercise its jurisdiction in that regard without fear or favour.*[127]

Thus, the judiciary assumes the twin tasks of enhancing the constitutional democracy as envisaged by the Constitution and defend the liberty of the citizenry.

Although what would make a basic structure doctrine is not expressly and exhaustively spelled out, the "[d]ignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare state contained in Part IV [DPSP]" are part of the doctrine which is immune from political party and legislature alterations.[128] The "basic structure doctrine" is the invention of the judiciary in its judicial review to maintain the continuity and integrity of "the basic features of the Constitution" as provided by the founding fathers.[129] Thus, the judiciary through judicial review has made DPSP part and

[124] Vibhuti Shekhawat, 'Judicial Review in India: Maxims and Limitations'(1994), The Indian Journal of Political Science, Vol. 55, No. 2, 177-182.
[125] P. Sharan. 'Constitution of India and Judicial Review' (1974), The Indian Journal of Political Science, Vol. 39, No. 4, 526-537, 526.
[126] ibid.
[127] ibid, 526-7.
[128] Sanjay Jain and Aathya Narayan, *Basic Structure constitutionalism: Revisiting Kesavananda Bharati* (Eastern Book Company 2011), 160.
[129] ibid.

parcel of the basic structure doctrine although it is expressly stated that they are not justiciable.

The judiciary as an organ of the state takes seriously its duty towards DPSP and has been applying it in making decisions.[130] In addition, the judiciary on numerous occasions shows that when the legislative and executive organs fail to perform their constitutional duty towards DPSP, it has stepped in defence of DPSP. For instance, in the case of *Central Inland Water v Brojo Nath* and *Ratlam vs Shri Vardhichand* the Supreme Court notes that the duty of the court is not only to apply DPSP but also to make the other organs apply them, and in the event of contrary action prevent such action.[131] In the Ratlam case, the court says that "[w]here Directive Principles have found statutory expression in Do's and Dont's the court will not sit idly by and allow municipal government to become a statutory mockery."[132] In the case of *State of Himachal Pradesh vs a Parent of a Student of Medical College* the court notes that although it is a matter for the legislative and executive to introduce legislation not for the judiciary, the latter can certainly require either the legislative or the executive to carry out their duties under the Constitution if they fail to carry out.[133] Thus, the instrument of judicial review gives the court an active role to uphold and enforce DPSP by itself and to require others to do the same.

More importantly, judicial activism and public interest litigation, which are the corner stone for the DPSP jurisprudence, are the results of judicial review. The citizenry "feels that the administration has become apathetic and non-performing that they have no other option

[130] Paramjit (n 101) 652.
[131] Central Inland Water v Brojo Nath Ganguly & Anr, 1986 SCR (2) 278, <http://indiankanoon.org/doc/477313/>; Municipal Council, Ratlam v Shri Vardhichand & Ors, 1981 SCR (1)97, <http://indiankanoon.org/doc/440471/> all accessed 09 March 2015.
[132] ibid, Ratlam case.
[133] State of Himachal Pradesh v A Parent of a Student of Medical, 1985 SCR (3) 676, <http://indiankanoon.org/doc/596084/> accessed 09 March 2015.

except to approach the judiciary to redress their grievances."[134] This situation coupled with the constitutional mandate of judicial review has led the court to be an activist for the furtherance of "justice- social, economic, and political" to all Indians as aspired by the preamble of the Constitution. Although the [Indian] judiciary has neither the purse nor the sword, it keeps the constitutional promise of the welfare state through DPSP by judicial review.

Nonetheless, the courts' aggressive stand to defend the Constitution and enforce human rights through judicial review has been criticized for stepping in the sphere of competence of the legislative and executive. Pillay argues that as the judiciary has been striking down legislations and giving orders to the executive, it has usurped power which did not belong to it.[135] He proposes a principled approach towards socio-economic rights litigation which can uphold the constitutional legitimacy.[136] Similarly, Abeyratne argues that the judiciary has been engaging with policy making outside of its competence and compromising the legitimacy of the Constitution.[137] Pillay and Abeyrante emphasise on the principle of separation of power and accordingly the judiciary should restrain itself from interfering.

Despite all the criticisms, judicial review has been a basic pillar of constitutionalism, rule of law and democracy.[138] In this regard Lord Browne Wilkinson observes that

> *[t]he fundamental principle [of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases…this intervention is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and…reasonably. If the decision maker exercises his powers outside the*

[134] R Shunmugasundaram, 'Judicial Activism and Overreach in India' (2007), Amicus Curiae Issue 72, 23.
[135] See Anashri Pillay, 'Revisiting the Indian Experience of Economic and Social Rights Adjudication: The Need for a Principled Approach to Judicial Activism and Restraint' (2014), ICLQ Vol. 63, 385–408.
[136] ibid.
[137] See Rehan Abeyratne, 'Socioeconomic Rights in the Indian Constitution: Toward A Broader Conception of Legitimacy' (2014), Brook. J. Int'l L. Vol. 39:1.
[138] See Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001);Mixhael Fordham, *Judicial Review Handbook* (Hart Publishing 2004).

> *jurisdiction conferred, in a manner which is procedurally irregular or is…unreasonable, he is acting ultra vires his powers and therefore unlawfully.*[139]

The judiciary as an organ of a government has to check and balance how the other organs are functioning as it is its duty and mandate in a constitutional democracy. Although the principle of separation of power is a basic element for democracy, the system of checks and balances through judicial review is equally relevant for a functioning democracy. As constitutional rights are beyond political compromises by themselves, the instrument of judicial review will keep them beyond political compromise. Especially, judicial review is important to defend socio-economic rights as the legislative and executive organs are not taking them seriously due to the constitutional or legal differential treatments unlike civil and political rights.[140] Hence, judicial review is an engine for the enforcement of constitutional rights which keeps the legislature and executive to have appropriate laws and policies especially in the area of socio-economic rights.

2.3.2 Judicial Activism

Like judicial review, the discussion on judicial activism focuses on how it helps for the judicial enforcement of DPSP. As mentioned above, although judicial review is the means for judicial activism, the latter gives momentum for the enforcement of DPSP with a great scale and intensity to uplift Indians from socio-economic and political injustice. The main argument is the judiciary's allegiance with the people to advance justice and enforce human rights can balance executive supremacy and majority tyranny. The activist role of the judiciary has enabled the masses to enjoy socio-economic rights as provided in the DPSP despite its non-justiciability.

[139] Chirstopher Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2000), 30.
[140] See Ellie Palmer, *Judicial review, Socio-Economic Rights and the Human Rights Act* (Hart Publishing 2009).

Judicial activism is not a recent phenomenon and it is not Indian invention either. It dates back to 1608 where Justice Coke challenged the power of King James I that the king is not above the law.[141] Although it is born out of the doctrine of judicial independence, it has gone further to address the pertinent social-economic and political problems in a democracy. Chinnappa notes that "Judicial Activism is nothing more and nothing less than the activity to bring social justice to the doorstep of people particularly in areas not covered by any statute made by a legislature."[142] He further states that 'judicial activism is not invented by judges; but jurists and lawyers have used the expression to describe the creative activity of judges in fields not covered by existing law'.[143] Chowdhury observes that "judicial activism depicts the pro-active role played by the judiciary in ensuring that rights and liberties of citizens are protected."[144] Although there are arguments for and against judicial activism in a democracy,[145] it has proved to be useful for the enforcement of human rights in India.[146] It is important to note here that the arguments for and against judicial review are also applicable for judicial activism.

Judicial activism in India has enabled the poor and the marginalized to avail from the fruits of the Constitution. K.G Balakrishnan, who was the Chief Justice of India, in his lecture at Trinity College Dublin outlined three benefits of judicial activism for Indians.[147] The *first* is the liberalization of standing rules so that the marginalized and the poor can access justice

[141] Chinnappa (n 12) 256.
[142] ibid, 257.
[143] ibid.
[144] Payel Chowdhury, 'Judicial Activism and Human Rights in India: a Critical Appraisal' (2011), The International Journal of Human Rights, 15:7, 1055-1071, 1056.
[145] See Kenneth Holland (ed), *Judicial Activism in a Comparative Perspective* (St. Martin's Press 1991) and Michael Kirby, *Judicial Activism: Authority, Principles and Policy in the Judicial Method* (Sweet & Maxwell 2004).
[146] See S. K. Patnaik and Swaleha Akhtar, 'Judicial Activism in India : Myth and Reality' (1997), The Indian Journal of Political Science, Vol. 58, No.1/4, 79-92; Vipin Kumar, 'The Role of Judicial Activism in the Implementation and Promotion of Constitutional Laws and Influence of Judicial Overactivism' (2014), Journal Of Humanities And Social Science, Volume 19, Issue 2, 20-25.
[147] K.G. Balakrishnan, 'Judicial Activism under the Indian Constitution' (2009), A paper presented at Trinity College Dublin, Ireland, <http://www.sci.nic.in/speeches/speeches_2009/judicial_activism_tcd_dublin_14-10-09.pdf> accessed 09 March 2015.

through the procedural device of public interest litigation (PIL). By the same token, Susman observes that through PIL a number of distant voices have been heard in the court room which would otherwise be unheard.[148] *Second*, the judiciary avoided the traditional distinction of negative and positive dimensions of rights. Although fundamental rights are justiciable and DPSP are non-justiciable, the judiciary has adopted a harmonized approach to enforce both civil and political rights and socio-economic rights at the same time. The *third* one is the "inter-relationship of rights approach" which holds that "governmental action which curtailed either of these rights should meet the designated threshold for restraints on all of them."[149] In this regard, the jurisprudence on article 21 of the Indian Constitution which will be discussed in section 2.4 is notable as the judicial creativity of interpretation has transformed the "substantive character of the protection of life and liberty" to include a number of socio-economic guarantees.[150]

It is not only judicial review which makes the court a strong guardian of the Constitution but also its understanding of the constitutional framework in general and DPSP in particular. Furthermore, the judiciary has understood the limits of legalism to reach the poor and the marginalized masses. It is this clear understanding of their role and the impact of the Constitution in uplifting citizens, on the one hand, and the clear picture of social realities, on the other hand, which makes the judiciary to bring the Constitution and the law to the service of the society.[151] In this regard, Shunmugasundaram notes that the role of the judiciary today is not only striking down laws and passing a prohibition order, but also providing "positive affirmative actions, and issuing orders and decrees directing remedial actions."[152] The Indian judiciary has been sensitive to those who could not access rights and justice due to economic,

[148] See Susan D. Susman, 'Distant voices in the Courts of India: Transformation of standing in Public Interest Litigation' (1994-1995), 13 Wis. Int'l L.J. 57.
[149] Balakrishnan (n 147) 14.
[150] ibid, 13.
[151] Jamie Cassels, 'Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?' (1989), 7 Am. J. Comp. L, 497.
[152] Shunmugasundaram (n 134) 23.

social and political circumstances and has been able to bring the constitutional package of rights to these people.[153] Thus, judicial activism has given life to the constitutional fundamental rights and DPSP, which otherwise may not be possible.

2.3.3 Public Interest Litigation

As the case in judicial review and activism, this part discusses how Public Interest Litigation (PIL) has enabled the cases of the poor and the vulnerable to reach court rooms. PIL has been a vital procedural device for the enforcement of human rights both in international courts/commissions and national courts.[154] It has been especially useful for human rights litigation in India and in furthering the socio-economic rights under the DPSP.

The Indian Constitution not only recognizes fundamental rights but also makes the right to get remedy for any violations a fundamental right in and of itself.[155] Given the lack of awareness of rights and resources by the populace, it is difficult for such people to litigate their rights in courts.[156] Due to these practical realities, on the one hand, and being a guardian of fundamental rights, on the other hand, the judiciary introduced PIL with the objective to bring rights and justice to the benefit of the poor and the vulnerable.[157] The Supreme Court in a number of occasions has stated the rationality behind PIL. For instance, in the case of *Gupta v Union of India* the court notes that

> *[w]here a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right ... and such*

[153] See S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2000).
[154] Salvador Herencia Carrasco, 'Public Interest Litigation in the Inter-American Court of Human Rights: The Protection of Indigenous Peoples and the Gap Between Legal Victories and Social Change' (2015), Revue québécoise de droit international; Steven Budlender, Gilbert Marcus SC and Nick Ferreira, *Public interest litigation and social change in South Africa: Strategies, tactics and lessons* (The Atlantic Philanthropies 2014); Siri Gloppen, 'Public Interest Litigation, Social Rights And Social Policy' (2005), Arusha Conference, New Frontiers of Social Policy; Vinodh Jaichand, 'Public Interest Litigation Strategies for Advancing Human Rights in Domestic Systems of Law' (2004), SUR International Journal of Human Rights, Year 1 NO. 1.
[155] Indian constitution (n 53), article 32
[156] Surya Deva, 'Public Interest Litigation in India: A Critical Review' (2009), C.J.Q., VOL 28, ISSUE 1, 24.
[157] See Zachary Holladay, 'Public Interest Litigation in India as a Paradigm for Developing Nations' (2012), Indiana Journal of Global Legal Studies Vol. 19 NO. 2.

> *person or determinate class of persons is by reasons of poverty, helplessness, or disability or socially or economically disadvantaged position, unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ.*[158]

By the same token, in the case of *Bihar Legal Support Society v. The Chief Justice of India & Ors,* the court observes that

> *[t]he majority of the people of our country are subjected to this denial of 'access to justice' and overtaken by despair and helplessness, they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and it is used for perpetuation of domination over large masses of human beings… The strategy of public interest litigation has been evolved by this Court with a view to bringing justice within the easy reach of the poor and disadvantaged sections of the community.*[159]

Hence, it is in the courts attempt to make the constitutional rights a consumable commodity to all Indians that they introduced PIL. Through PIL lawyers, academics, Non-Governmental Organisations (NGOs) and any interested person can bring a case on behalf of a victim or victims in the public interest without being a victim.

In addition to liberalizing the standing rules, the courts have taken a more active roles in PIL cases. Unlike the common law civil and criminal proceedings, the courts are active in asking questions and proposing solutions.[160] As Balakrishnan observes "[e]specially in actions seeking directions for ensuring governmental accountability … the orientation of the proceedings is usually more akin to collective problem-solving rather than an acrimonious contest between the counsels."[161] Furthermore, the courts appoint "fact-finding commissions and amicus curiae on a case by case basis."[162] Thus, the court takes a people friendly approach in the discharge of justice.

[158] Deva (n 156).
[159] K.G. Balakrishnan, 'Growth of Public Interest Litigation in India' (2008), Singapore Academy of Law, Fifteenth Annual Lecture, <http://supremecourtofindia.nic.in/speeches/speeches_2008/8%5B1%5D.10.08_singapore_-_growth_of_public_interest_litigation.pdf> accessed 15 March 2015, 6.
[160] ibid.
[161] ibid.
[162] ibid.

The court has also adopted epistolary jurisdiction where informal petition through letters, telegrams, newspaper reports and other informal ways are accepted.[163] Due to the legal illiteracy and the financial incapacity to approach a lawyer, it is burdensome for individuals to follow the formal petition procedures and formalities. Even it is also onerous for persons acting for the public interest. In this regard, Sen observes that "it would be an unfair burden to expect a person acting *pro bono* to incur expenses from his own pocket in order to prepare a regular petition to be filed before the court."[164] Once the court is aware of a human rights violation by informal means, for instance in the above stated ways, it does not require a petition which fulfils all the legal requirements; rather it investigates the merits of the case. Moreover, the court established "free legal aid as a fundamental right in criminal cases and it often waived fees, awarded costs and provided other forms of litigation assistance to public interest advocates."[165] Thus, the courts exemptions from the formal procedural rules of petition and free legal aid have helped cases to reach to them, which would have been difficult to reach otherwise.

Despite the advantages of PIL in enabling the cases of the poor and the vulnerable to reach the court room, there are also disadvantages of PIL. The courts engagement with PIL put in question the issue of separation of power as the courts interfere in the policy choices made by the political organs and order these organs the things which they could not implement.[166] Moreover, PIL is not always directed to seek justice but also popularity of PIL advocates.[167]

[163] Sarbani Sen, *Public Interest Litigation in India: Implications for Law and Development* (Mahanirban Calcutta Research Group 2012), 15
[164] ibid.
[165] ibid.
[166] Balakrishnan (n 159) 5.
[167] ibid.

It has also increased the caseload of courts and reduces their efficiency in delivering timely judgments.[168]

Although PIL needs to be regulated properly, it has proved to be an efficient procedural device for human rights litigation. In addition to bringing rights and justice to the home of the poor and the vulnerable, Sen's empirical research on the impact of PIL on law and development in India reveals that they are crucial for furthering both instrumental freedoms and individual capabilities which ultimately further socio-economic and political development.[169] Hence, PIL is a vital procedural engine for socio-economic rights litigation in India.

2.4 Judicial Jurisprudence on DPSP

Article 21 and DPSP of the Indian Constitution are highly connected through judicial engineering. The expansive interpretation of life and liberty has enabled the judiciary to bring the socio-economic guarantees in the DPSP into the realms of article 21.[170] Article 21 reads "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law." The court in numerous cases notes that the right to life cannot be limited to mere animal existence but transcends beyond physical survival and includes the right to food, shelter, clothing, livelihood, health and 'other basic necessities in life' which enable one to lead a life with human dignity.[171] This wider interpretation enables the DPSP to find

[168] ibid, for details see T.R. Andhyarujina, Judicial *Activism and Constitutional Democracy in India* (Bombay: N.M. Tripathi, 1992).
[169] See Sen (n 163).
[170] S.Muralidhar, 'Judicial Enforcement of economic and Social rights: The Indian Scenario' in Coomans (n 2), 239.
[171] See for instance Shantistar Builders v Narayan Khimalal Totame, Civil Appeal No. 2598/1989, (1990) 1 SCC 520, <http://www.escr-net.org/docs/i/404156> ; Francis Coralie Mullin v The Administrator, 1981 SCR (2) 516, <http://indiankanoon.org/doc/78536/> ; Peerless General Finance and v Reserve Bank of India, 1992 SCR (1) 406, <http://indiankanoon.org/doc/1316639/>; Dena Nath and Ors v National Fertilizers Ltd. and Ors, 1991 SCR Supl. (2) 401, <http://indiankanoon.org/doc/1087622/>; Olga Tellis & Ors v Bombay Municipal Corporation, 1985 SCR Supl. (2) 51, <http://indiankanoon.org/doc/709776/>; C.E.S.C. Ltd. Etc vs Subhash Chandra Bose and Ors, 1991 SCR Supl. (2) 267, <http://indiankanoon.org/doc/1510944/>; Shri P. G. Gupta v

an enforceable legal place in article 21. Although these socio-economic rights are part of a non-justiciable DPSP, the judiciary is able to implement them in the right to life adjudication.

Given the special place of the right to life in the Constitution, making these socio-economic rights part of the right to life has huge ramifications. Chinnappa observes that the right to life is "the grandest and the most spacious of all the Fundamental Rights."[172] He further notes that it is "progressively interpreted to comprehend all that makes life flourish, flower, and bear fruit."[173] As a result, the right to life is part of the basic structure doctrine which is immune from any amendments.[174] The implication is that the right to food, to health, to shelter and to livelihood are also immune from amendments as they are part and parcel of the right to life.

This section explores and examines the classical socio-economic rights such as the right to food, the right to shelter, the right to health and the right to livelihood, which have been enforced as part of the right to life. The objective here is to show how DPSP are enforced through Fundamental Rights by taking right to life as an example.

2.4.1 The Right to Food

> *Life without liberty would result in some or the other form of slavery. Liberty cannot be there to a person having an empty stomach. The individual's right to life will have no meaning if the State fails to provide adequate food or food articles. The Indian Constitution provides «right to life» as a Fundamental Right. That right is given a wide interpretation by the Supreme Court so as to include «right to food» so that democracy and full freedom can be achieved and slavery in any form is avoided.*[175]

State of Gujrat & Ors, 1995 SCC, Supl. (2) 182 JT 1995 (2)373, <http://indiankanoon.org/doc/1913799/>; all accessed 18 March 2015.

[172] Chinnappa (n 12) 128.

[173] ibid.

[174] See Aman Ullah and Samee Uzair, 'Right to Life as Basic Structure of Indian Constitution' (2011), A Research Journal of South Asian Studies Vol. 26, No. 2. 393-399.

[175] M.B. Shah, 'The Indian Supreme Court acknowledges the Right to Food as a Human Right' (2006), agriculture & rural development 2, <http://www.rural21.com/uploads/media/ELR_The_Indian_Supreme_Court...0206.pdf> accessed 17 March 2015.

One could not find the right to food in the Indian Constitution. It is diffused through the DPSP. The DPSP provides for "adequate means of livelihood,[176] decent standard of life,[177] raising the level of nutrition and the standard of living."[178] Although these stipulations imply the right to food, there is no express stipulation even in the DPSP about the right to food even so with in the Fundamental Rights chapter.

The right to food finds its place within the right to life once the judiciary innovatively and expansively interpreted article 21. Although the Supreme Court in a number of cases has mentioned that the right to life includes basic necessitates in life such as food, shelter, clothing and others, it made the right to food justiciable in its own as part of the right to life. The coming paragraphs discuss right to food cases with the view to explore how the court relates the right to life with the right to food.

In the case of *Kapila Hingorani v State of Bihar*,[179] the failure of state owned corporations to pay salaries to their employees had resulted in deaths of their employees due to starvation, hunger and suicide. The writ petitioner acting in the interest of the public brought the case to the Supreme Court that their right to life is violated. The court held that there is a violation of the right to life in the context of article 21 read with article 47 which deals with the states duty to raise the level of nutrition and living standard of the people. In this regard, the court specifically notes that "[p]arts III and IV of the Constitution of India contain a large number of rights which guarantee human rights, some of which are akin to the rights enumerated in International Treaties". By citing article 11 of the ICESCR which deals with the right to adequate standard of living [food, clothing and housing] and reading with Article 21 and 47 of the Constitution, the court ruled that there is a human right to food, and hunger is a

[176] Indian Constitution (n 53), article 39(a).
[177] ibid, article 43.
[178] ibid, article 47.
[179] Kapila Hingorani vs State Of Bihar, 2003 Supp (1) SCR 175, <http://indiankanoon.org/doc/1455798/>; accessed 17 March 2015.

violation of the right to food. The court passed orders to the effect that hunger and starvation are prevented, which means to guarantee the right to food to ultimately protect the right to life of the employees.

In addition, in *S. Jagannath vs Union of India & Ors*, the petitioner in the public interest asks the court for the enforcement of environmental and coastal laws for the protection of fragile ecologies.[180] The petitioner further argued that the operation of multi-lateral companies in the fragile ecology has diminished the sustainable development of the region and the people. And this in turn leads to food and nutritional insecurity, which violates article 21 as the petitioner has argued. The court held that there is a violation of article 21 [the right to life] read with article 47 [the right to food] due to the failure to observe environmental and coastal laws. Accordingly, the court ordered the payment of compensation applying the environmental 'principle of polluter pays' and the continuous protection of food and nutritional security of the people.[181]

In a land mark PIL case between *People's Union for Civil Liberties (PUCL) v Union of India* [which is ongoing before the Supreme Court], the right to food has been at the centre of the litigation.[182] PUCL argue that the right to food is included in the right to life and the state assumes an obligation for the enforcement of the right to food and the obligation to provide food when individuals are unable to feed themselves. PUCL further argue that due to the prevalent drought and shortage of food, there has been malnourishment, starvation and hunger deaths, which are a violation of the right to life. The court agrees with PUCL in holding that the right to food is part of the right to life and orders interim measures for the

[180] S. Jagannath vs Union of India & Ors, 1996 Supreme Court of India, < http://indiankanoon.org/doc/507684/> accessed 17 March 2015.
[181] ibid; see also Michael J. McDermott, 'Constitutionalizing an Enforceable Right to Food: A Tool for Combating Hunger' (2012), 35 B.C. Int'l & Comp. L. Rev. 543, 553-7.
[182] See People's Union for Civil Liberties v Union of India (2001) 5 SCALE 303; People's Union for Civil Liberties v Union of India (2001) 7 SCALE 484; People's Union for Civil Liberties v. Union of India & Ors, In the Supreme Court of India, Civil Original Jurisdiction, Writ Petition (Civil) No.196 of 2001, <http://www.escr-net.org/docs/i/401033> accessed 18 March 2015.

distribution of food for the drought affected areas. Unlike other cases where the Supreme Court passes judgment, it did not yet pass a final judgment on the right to food. Nonetheless, the court has been given detailed orders for the provision of food and enforcement of the right to food even by establishing an independent Commission which supervises the implementation of the court orders which are "unique and unconventional."[183] However, it held that there is a violation of the right to food as the state failed to distribute the available food to the drought affected people. Although the court notes that the enforcement of the right to food depends on the availability of resources, it states that food has to be provided for those who did not have any food, and attention should be given to children, the disabled, widows, women, and older persons and other vulnerable groups as part of their human right to life.[184]

The court has gone even further by specifying the calories and nutrients each individual needs based on age, sex and personal circumstances. For instance, "the court specified the minimum quantities of food and nutrition that had to be made available: each child up to the age of six years was to get 300 calories and 8-10g of protein; each adolescent girl 500 calories and 20-25g of protein; and each malnourished child 600 calories and 16-20g of protein."[185] This shows that the justiciability of the right to food is no longer an issue and the court has gone beyond declaring the state's inaction as a violation of the right to food to enforcing the right to food in practice to save the hungry and the needy from death and humiliation.[186]

[183] Sajjad Hassan, 'Rights, Activism and the Poor in India: Supreme Court and the 'Right to Food case' (2011), International Conference: "Social Protection for Social Justice" Institute of Development Studies & Centre for Social Protection, UK, <https://www.ids.ac.uk/files/dmfile/hassan2011therighttofoodcaseinindiacspconferencedraft.pdf> accessed 17 March 2015.
[184] ibid.
[185] S. Muralinhar, 'Economic, Social & Cultural Rights: An Indian Response to the Justiciability Debate' in Yash Ghai and Jill Cottrell (eds), *Economic, Social & Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural rights* (INTERIGHTS 2004), 30.
[186] See also Lauren Birchfield and Jessica Corsi, 'Between Starvation and Globalization: Realizing the Right to Food in India' (2010), Michigan Journal of International Law Vol. 31: 691.

Thus, through judicial innovation the right to food is an enforceable right which imposes the obligation of respect, protect and fulfil on the state like any other justiciable right. Although it is implied in the non-justiciable DPSP, the judiciary finds it in the right to life through creative interpretation of the right to life.

2.4.2 The Right to Shelter

> *The difference between the need of an animal and a human being for shelter has to be kept in view. For an animal it is the bare protection of the body; for a human being it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual.*[187]

The right to shelter or housing is not expressly mentioned in the DPSP. Nonetheless, it can be found with the ideals of a welfare state as aspired by the DPSP in general and phrases like adequate living standard/livelihood and the preambular phrases such as 'justice, social, economic, political'. All these ideals presuppose a minimum shelter or housing. As the case in the right to food, the court has found the right to shelter within the right to life. As Muralidhar notes "[t]hrough an interpretive exercise, the Supreme Court has construed this [right to shelter] as forming part of the right to life…the right to life would take with in its sweep the right to food and a reasonable accommodation to live in".[188]

The courts jurisprudence on the right to life reveals that it contains the right to food, shelter, clothing and other basic necessities in life which can help individuals to live a dignified life. However, the court makes a distinction between the claim for the right to shelter and slum dwellers right against eviction. Although the court reiterates the right to shelter as part of the right to life, it holds a different position when it comes to the eviction of slum dwellers. In a number of cases,[189] the court held that slum dwellers do not have a legal right to live on the

[187] Chameli Singh v State of U.P., 1995(6)Suppl. SCR 827, 1996(2)SCC 549, 1996 (1)SCALE101 , 1995 (9)JT 380, <http://www.indiacourts.in/CHAMELI-SINGH-Vs.-STATE-OF-U.P._48b48fa8-7c5e-4251-b8ad-831352d59538> accessed 18 March 2015.
[188] Muralinhar (n 185) 252.
[189] Olga Tellis (n 171); Municipal Corporation of Delhi v Gurnam Kaur, 1988 SCR Supl. (2) 929, <http://indiankanoon.org/doc/327169/> ; Sodan Singh v New Delhi Municipal Committee, 1989 SCR (3)1038,

land they occupy although the state assumes a duty to provide shelter. Especially in the case of *Olga Tellis v Bombay Municipal Corporation*, the court states the reason why it did not uphold slum dwellers right to shelter. It said that,

> *[n]o one has the right to make use of public property for a private purpose without requisite authorization and, therefore, it is erroneous to contend that pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon…if a person puts up a dwelling on the pavement, whatever may be economic compulsions behind such an act, his use of the pavement would be unauthorized.*[190]

However, in a recent case the High Court passed a judgment in favour of slum dwellers. In *Sudama Singh & Others vs Government of Delhi & Anr*,[191] the petitioners asked the Delhi High Court for an order to stop the eviction of slum dwellers until they are relocated and other convenient places are provided by the state. The respondent argues that although the state assumes an obligation to relocate slum dwellers, the slum dwellers in the present case could not benefit from this obligation as they are located in the 'right of way' which is not covered by the policy. The court ruled in favour of the petitioners as eviction without relocation will leave them without shelter which is against the right to life. The court declared "the respondents claim that the slum dwellers are on the 'right of way' and thereby are not entitled to relocation as illegal and unconstitutional."[192] Referring to the *dictum* of *Chameli Singh V. State of U.P* as discussed below, the court notes that "[w]ant of decent residence, therefore, frustrate the very object of the constitutional animation of right to equity, economic justice, fundamental right to residence, dignity of person and right to live itself." [193] Thus, the judiciary has even changed its previous stand on the right to shelter of slum dwellers as it requires alternative accommodation and residence.

<http://indiankanoon.org/doc/165273/> ; Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Ors, on 11 October, 1996, <http://indiankanoon.org/doc/1352960/> ; all accessed 18 march 2015.

[190] Muralinhar (n 185) 252-3.

[191] Sudama Singh & Others v Government of Delhi & Anr, on 11 February, 2010, <http://indiankanoon.org/doc/39539866/> accessed 19 March 2015.

[192] ibid, para 62.

[193] ibid, para 41.

In the case of *Chameli Singh V. State of U.P*., the petitioner challenged the State of U.Ps acquisition of land for the construction of houses for *Dalits* whose housing condition has been miserable on the ground that there is no urgency in taking the land which the 1894 Land Acquisition Act requires. The court reiterate its previous jurisprudence on the right to life that it includes the right to livelihood, food, shelter and clothing and other basic needs. It especially held that the right to "[p]rotection of life guaranteed in article 21 encompasses within its ambit the right to shelter to enjoy the meaningful right to life."[194] In upholding the actions of the State of U.P. the court notes that

> *[t]he right to shelter… does not mean a mere right to a roof over one's head but right to all the infrastructure necessary to enable them to live and develop as a human being…In a democratic society as a member of the organised civic community one should have permanent shelter so as to physically, mentally and intellectually equip oneself to improve his excellence as a useful citizen as enjoined in the Fundamental Duties and to be a useful citizen and equal participant in democracy…To bring the Dalits and Tribes into the mainstream of national life, providing these facilities and opportunities to them is the duty of the State as fundamental to their basic human and constitutional rights.*[195]

In this case the court had made the right to shelter an enforceable right through the right to life. Had the court not interpreted the right to shelter as part of the right to life, the state would have not been forced to build the houses for *Dalits*.

Hence, the court's interpretation of the right to life has enabled the poor and the vulnerable to have shelter where they can live, grow and prosper as human beings. Although the courts note that providing housing will have imposed a huge burden on public coffer, the state should provide some sort of shelter where individuals can live their life beyond mere animal existence.

[194] ibid, para 4.
[195] ibid, para 8.

2.4.3 The Right to Health

> *Article 21 imposes an obligation on the state to safeguard the right to life of every person. Preservation of human life is thus of paramount importance. The government hospitals run by the state and the medical officers employed therein are duty bound to extend medical assistance to preserving human life. Failure on the part of the government hospital to provide timely medical treatment to a person in need of such treatment results in the violation of his right to life guaranteed under article 21.*[196]

The right to health is implied from the state's duty to improve public health under article 47 of the DPSP. In addition, the court reiterates the welfare state to argue for the right to health in many of its judgments. Nonetheless, the right to health finds its place within the right to life as is the case for the right to food and shelter. The following paragraphs explore the right to health cases within the ambit of the right to life.

In *Pt. Parmanand Katara vs Union of India & Ors*,[197] the petitioner in a public interest brought a case on behalf of a deceased who died due to the refusal of medical help from state owned hospitals and medical centres after a horrible car accident. The petitioner asked the court to pass an order for free emergency medical help in governmental hospitals and medical centres. The court finds that there is a violation of the right to life due to the refusal of medical institutions to provide help for the injured. In passing the judgment the court notes that

> *[t]here can be no second opinion that preservation of human life is of paramount importance. That is so on account of the fact that once life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man.*[198]

The court further emphasises the government's duty to preserve life and doctors and medical professionals also need to work to save the life of injured individuals. In a similar case,

[196] Paschim Banga Khet Mazdoorsamity v State of West Bengal as cited by Muralinhar (n 185) 245.
[197] Pt. Parmanand Katara v Union of India & Ors, 1989 SCR (3) 997, <http://indiankanoon.org/doc/498126/> accessed 19 March 2015.
[198] ibid.

Paschim Banga Khet Mazdoorsamity v State of West Bengal,[199] the petitioner who fell off a train was unable to get emergency medical help in state owned hospitals and clinics despite his continuous effort to get help. The court ruled that the right to health is part of the scheme of a welfare state as envisaged in the DPSP and denying emergency medical help is against the right to life. The court ordered the payment of compensation to the victim and set a guideline for future mandatory free emergency medical help as part of the protection of life.

In a PIL case of *Rakesh Chandra Narayan vs State Of Bihar*[200] and *Supreme Court Legal Aid Committee vs State Of M.P*,[201] the petitioners in the public interest bring the situation of mental hospitals to the attention of the court by alleging that the situation of these institutions are poor to protect the health of patients. The poor physical infrastructure like lack of water, food, toilets, sanitation and electricity, on the one hand, and human infrastructure like medical professionals who assist patients when they need help, on the other hand, put the life of the patients in danger. The petitioners urged the court to pass an order for the improvement of health services in these institutions. The court accepts the petitioners' plea and has established a 'Committee of Management' which supervises the implementation of its orders for the improvement of these mental institutions. In passing the orders the court notes that

> *[i]n a welfare State it is the obligation of the State to provide medical attention to every citizen. The State has to realise its obligation and the Government of the day has got to perform its duties by running the hospital in a perfect standard and serving the patients in an appropriate way.*[202]

Thus, the court has gone further to improve the situation of patients in mental institutions although the government has been providing health facilities. The establishment of a

[199] Paschim Banga Khet Mazdoorsamity v State of West Bengal & Anr, 1996 SCC (4)37, JT 1996 (6)43, <http://indiankanoon.org/doc/1743022/> accessed 19 March 2015.
[200] Rakesh Chandra Narayan v State of Bihar, 1988 SCR Supl. (3) 306, <http://indiankanoon.org/doc/1505647/> accessed 19 March 2015.
[201] Supreme Court Legal Aid Committee v State of M.P. and Ors, 1995 SC 204, JT 1994 (6) SC 40, 1994 (3) SCALE 1042, 1994 Supp (3) SCC 489, 1994 (2) UJ 623 SC, <http://indiankanoon.org/doc/1774330/> accessed 19 March 2015.
[202] Rakesh Chandra Narayan v State of Bihar (n 200).

'Committee of Management' which monitors the implementation of the court orders is a clear manifestation of the courts commitment for the enforcement of the right to health as it is normally the duty of the executive to implement court orders.

In another PIL case, *Consumer Education & Research v Union of India & Others,*[203] the petitioners urge the court to pass an order for the protection of the right to health of industry workers as they have been exposed to chemicals hazardous to their health. Based on the petitions and further investigation of the situation, the court ordered mandatory health insurance, the substitution of industry high risk materials by low risk materials and the monitoring of the health of the workers as part of the right to health. In ordering these, the court noted that as resource is limited to finance state projects, the provision of these facilities is not unlimited. However, the state has to implement feasible health facilities to protect the health of workers as envisaged in article 47 [public health] read with article 21 [right to life].

The court in a number of the right to health cases emphasises the centrality of health to one's life. For example, in the case of *State of Punjab & Ors v Ram Lubhaya Bagga,* it states that

> *[p]ith and substance of life is the health, which is the nucleus of all activities of life including that of an employee or other viz. the physical, social, spiritual or any conceivable human activities. If this is denied, it is said everything crumbles.*[204]

Thus, this approach of the court has helped the protection of the right to health of Indians through the right to life.

2.4.4 The Right to Livelihood

> *If the right to livelihood is not treated as a part of the constitutional right to live, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.*[205]

[203] Consumer Education & Research v Union of India & Others, 1995 SCC (3)42, <http://indiankanoon.org/doc/1657323/> accessed 19 March 2015.
[204] State of Punjab & Ors v Ram Lubhaya Bagga, on 26 February 1998, <http://indiankanoon.org/doc/1563564/> accessed 19 March 2015.
[205] Olga Tellis (n 171).

The Supreme Court addressed in depth the right to livelihood in the *Olga Tellis* case.[206] The court states that the right to livelihood is stated in article 39(a) and 41 which is non-justiciable although "fundamental in the governance of the country" and guides in the interpretation of fundamental rights. It further notes that as slum dwellers will lose their employment due to the eviction, their inability to work will affect their livelihood which is protected by the right to life. In passing the judgment, the court applied a two-step analysis. The *first* is whether the right to livelihood is part of the right to life? and the *second* is if it is part of the right to life, is it an absolute right? The court responded in the affirmative for the former and in the negative for the latter. In holding the right to livelihood as part of the right to life, it states that "[d]eprive a person of his right to livelihood and you shall have deprived him of his life." Nonetheless, in holding that the right to life [the right to livelihood] is not an absolute right the court invokes the limitations in article 21 which reads "[n]o person shall be deprived of his life or personal liberty *except according to procedure established by law*."[207] Accordingly the court held that although the eviction of the slum dwellers amounts to interference in to the right to livelihood read with the right to life, as the eviction is in accordance with fair and reasonable procedures established by law, there is no violation of the right to life. Thus, the conclusion one can draw from this judgment is that the right to livelihood is part of the right to life and that the grounds for the limitation of the right to life should be followed to limit the right to livelihood.

In the case of *Narender Kumar Chandla v Haryana*[208], the appellate, a Sub Station Attendant was injured and is unable to do his original job. Although the employer hired the appellate for another job with a lower salary, he was dissatisfied and asked the court for reinstatement on the ground that his right to livelihood is violated. The court passed an order requiring the

[206] ibid.
[207] Emphasis mine.
[208] Narender Kumar Chandla v Haryana, 1994 SCR (1) 657, <http://indiankanoon.org/doc/585883/> accessed 20 March 2015.

employer to find the appellate an appropriate job -which fits with his health condition with the salary which he had been paid before the injury. In passing this order the court notes that

> *[a]rticle 21 protects the right to livelihood as an integral facet of right to life. When an employee is afflicted with unfortunate disease due to which, when he is unable to perform the duties of the posts he was holding, the employer must make every endeavour to adjust him in a post in which the employee would be suitable to discharge the duties.*

Thus, the right to livelihood is protecting even the right to work within the larger framework of the right to life.

Moreover, the court has gone further to protect the right to employment of workers through the right to livelihood, which itself is safeguarded by the right to life.[209] The court notes that without gainful employment individuals could not support their livelihood and employers should take the issue of their livelihood seriously as it ultimately affects their right to life, which is the arc of all rights in the Constitution. Hence, the right to livelihood like the right to food, shelter and health is given a shield within the right to life.

2.5 Conclusion

Despite the non-justicibality of DPSP in the Indian Constitution, the Indian judiciary has linked DPSP with Fundamental Rights by appreciating their role in furthering socio-economic and political justice. The courts innovative interpretation of the right to life has enabled the enforcement of the classical socio-economic rights such as the right to food, the right to shelter, the right to health and the right to livelihood. For the judicial enforcement of these socio-economic rights, both the role the Constitution gives to the judiciary and the judiciary's understanding of socio-economic and political realities vis-à-vis legal realities contributes much to the development of these DPSP jurisprudence. Especially, the value of

[209] See for instance Delhi Transport Corporation v D.T.C Majdoor Congress, 1990 SCR Supl. (1) 142, <http://indiankanoon.org/doc/268805/> and Md. Farooque v State of West Bengal, AIR 1995 Cal 98, 99 CWN 31, <http://indiankanoon.org/doc/982252/> accessed 20 March 2015.

judicial review, judicial activism and public interest litigation has been engines for the enforcement of constitutional rights in general and socio-economic rights in particular.

3. Directive Principles of State Policy in Ethiopia: Why they are relevant for the Judicial Enforcement of Socio-Economic Rights?

3.1 Introduction

DPSP have offered additional socio-economic guarantees in the Ethiopian Constitution. Although the Constitution incorporates socio-economic rights in the Bill of Rights, they lack the necessary clarity and content for judicial application. This chapter argues that DPSP have a potential for the judicial enforcement of socio-economic rights both as a means for socio-economic rights in the Bill of Rights and in the DPSP. The first section sheds light on the quest for human rights in Ethiopia as a background. The second section explores the contents of DPSP while the third examines the duty bearers of DPSP. The fourth investigates the role of the judiciary for the enforcement of human rights whereas the fifth section justifies why socio-economic rights should be pursued through DPSP.

3.2 Background on Human Rights

Before the discussion on DPSP, it is important to understand the human rights context in Ethiopia. The objective here is to shed light briefly on the Ethiopian quest for human rights in general and socio-economic justice in particular. Within this prelude, it will be easy to appreciate why DPSP should be used to further socio-economic rights under the constitutional framework.

Arguably, Ethiopia has a long constitutional history both written and unwritten.[210] Nonetheless, the ideals of human rights were rare and even if they were part of the constitutional history they were gifts to the subjects and exercised based on the will of the

[210] Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (The Red Sea Press 1997), 4-27.

Emperor.[211] After the abolishment of the monarchical system, the *Derg* incorporated socio-economic rights driven by its socialist ideology but these rights had a paper value even they were alien to the notion of human rights as their gross human rights violations stand as a testimony.[212] The quest for human rights and democratic governance was at the centre of the national questions in the 1960's and 1970's although hijacked by the *Derg*.[213]

In this regard, Hall notes that "Ethiopia's journey from the ancient kingdom of Aksum to the twentieth century had been a long and arduous pilgrimage, punctuated by many traumas and triumphs along the way".[214] One of the traumas was the socio-economic injustice and the resulted famine and drought.[215] Though the alleged political marginalization of some ethnic groups in the governance and participation of the Ethiopian state gave a new shape to the revolution in the 1960's and 1970's, the existing socio-economic injustice rooted in the feudal system was a common Ethiopian problem.

The famous slogan of 'Land to the Tiller' was a vital organizing tool for the masses given the socio-economic impact of land on the Ethiopian society.[216] Nonetheless, it did not materialize as land has been owned by the state.[217] The implication is that the socio-economic wellbeing of the citizens will largely depend on their attachment to land. Hence, the government

[211] ibid.
[212] See Tsegaye Regassa, 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia' (2009) 3(2) Mizan Law Rev, 298-99. For details of human rights in the Derg regime, see Hiwot Teffera, Tower in the Sky (Addis Ababa University Press 2012).
[213] ibid.
[214] John Hall, *Exploration of Africa: The Emerging nations: Ethiopian in the Modern World* (Chelsea House Publishers 2003) 108.
[215] ibid.
[216] See Daniel Weldegebriel AMBAYE, 'Land Rights in Ethiopia: Ownership, equity, and liberty in land use rights' (2012), FIG Working Week, <http://www.fig.net/pub/fig2012/papers/ts02d/TS02D_ambaye_5521.pdf> accessed 01 January 2015.
[217] ibid.

policies on the use and utilization of land will greatly affect citizen's socio-economic rights either negatively or positively.[218]

As the Ethiopian Constitution is the result of a revolution where mass violations of rights and freedoms had been taken place, it tries to incorporate the values of human rights and democracy as far as it can to assure a future of democratic governance and prosperity where dignity and freedom are respected. As human rights and the claim for democracy had been the organizing principles for the revolution, it is not surprizing that they are given much constitutional legal space.[219] The Ethiopian Constitution restructured the Ethiopian state with new foundations such as liberty, equality and self-determination.[220] It looks as if the state is founded on the ideals of human rights. Even in the substantive parts of the Constitution, human rights are one of the fundamental principles[221] and hold one third of the constitutional space.[222] Furthermore, socio-economic rights are also provided in the DPSP.[223]

The implication of this constitutional undertaking is that the state will nurture a human rights culture in its endeavour to uplift the many Ethiopians who have been under socio-economic and political injustice. The ideas in the DPSP in particular are constant monitoring mechanisms which show the progress of the state in alleviating the age old problems associated with socio-economic rights such as health, food, adequate livelihood, and education. Regassa notes that the overall constitutional human rights framework "gives the

[218] If the government took the land without proper regard for citizens, they may lose their means of livelihood and their overall human rights may be compromised. On the other hand, the utilization of land by giving due attention to the citizens demand will improve their livelihood and improve their socio-economic wellbeing. For instance one can take the examples of the settlement programs of pastoralists in lieu of commercial farming. For details see E Eyasu and A Feyera, 'Putting Pastoralists on the Policy Agenda Land Alienation in Southern Ethiopia' (2010) gatekeeper and Alula Pankhurst and Francois Piguet (eds), *People, Space and the State Migration, Resettlement and Displacement in Ethiopia* (Proceedings of the Workshop held by The Ethiopian Society of Sociologists, Social Workers and Anthropologists and The United Nations Emergencies 2004).
[219] See the preamble of the Ethiopian constitution (n 3), para 6. "Determined to consolidate, as a lasting legacy, the peace and the prospect of a democratic order which our struggles and sacrifices have brought about……"
[220] ibid, Para, 1 & 2.
[221] See the Ethiopian Constitution (n 3), article 10.
[222] Nahum (n 210) 109; see the Ethiopian Constitution (n 3) articles 13-44.
[223] See Ethiopian Constitution (n 3), articles 85-92.

moral force that shapes and influences laws, decisions, practices, and actions taken in the public life of a society".[224]

Failure to further these constitutional principles [DPSP] in legal, policy and practical deeds of the state would be tantamount to a betrayal of the constitutional promises as expressed in the preamble. This in turn would cast in question the integrity of the constitutional democracy which the Constitution has adopted. In this regard, Valdés has noted that it is only when "human rights constitutionally established and implemented that democracy can be theoretically and practically justified as a political means to guarantee human dignity".[225] Hence, failure to uphold the DPSP as part of the Constitution will not only undermine the constitutional democracy but also the quest for human dignity.

3.3 Directive Principles of State Policy

Before discussing the contents of DPSP, it is important to provide some general background within which the DPSP should be understood. To begin with, in a rural and pastoral society where access to education, information, health care and social services are lacking, the recognition of the various civil and political rights under the Ethiopian Constitution and the ratification from various international human rights instruments may not make practical sense. Nevertheless, it does not mean that they are inapplicable to them. The majority of the people have been exploited by successive Ethiopian governments and are impoverished and not in the position to enjoy their civil and political rights.

Due to such historical incidents, the Ethiopian Constitution in its preamble states the aspirations of the people to pursue a socio-economic development with a view to further prosperity, equality and human dignity. Hence, the enforcement of DPSP will be crucial for

[224] Regassa, 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia' (n 212) 302.
[225] Ernesto Garzón Valdés, 'Dignity, Human Rights, and Democracy' (2009) RMM Vol. 0, 253–265 <http://www.rmm-journal.de/> accessed 02 January 2015, 251.

the many Ethiopians as it enables them to enjoy their civil and political rights and thereby be active citizenry who can impact the decision making process of the country. Above all, it enables Ethiopians to leads a decent life rooted in human dignity.

Within this context, this section explores the contents of DPSP such as principles of external relations, national defence, political, economic, social, cultural and environmental objectives vis-à-vis the Bill of Rights. The objective here is to examine their relationship with socio-economic rights so as to use DPSP for the enforcement of the socio-economic rights. It also draws minimum core obligations from DPSP which should be fulfilled immediately. However, it is important to note from the outset that principles of external relations and national defence are indirectly related to socio-economic rights and are discussed here to give a comprehensive overview of DPSP in Ethiopia.

3.3.1 Principles for External Relations

The Ethiopian Constitution is inspired by the principles of international law in devising its principles of external relations.[226] The principles of sovereignty, equality of states, non-interference, and mutual respect are the corner stones of Ethiopian external relations.[227] National interest [the interest of the people] is a precondition to be abided by international agreements and the peaceful resolution of international disputes is also provided.[228] Promoting fraternal relations with neighbouring people and other African countries and advancing economic union is also another objective of the external relations.[229]

[226] Nahum (n 210) 180.
[227] See the Ethiopian Constitution (n 5) article 86 (1) (2) & (3), see also United nations, *United Nations Charter* (signed on 26 June 1945 in San Francisco and Came into force on 24 October 1945), <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> accessed 01 December 2014, articles 2(1) & 2(3); The Constitutive Act of the African Union (adopted in 2000 at the Lome Summit (Togo), entered into force in 2001), <http://www.peaceau.org/uploads/au-act-en.pdf> accessed 01 December 2014, article 4(a) (e) & (g); see also Ali and Atua (n 15) 23.
[228] Ethiopian Constitution (n 3), article 86(4) & (6).
[229] ibid, article 86 (5).

Such principles of external relations may not be directly related to socio-economic rights unlike socio-economic, cultural and environmental objectives. Nonetheless, they are indirectly linked. Recognizing the sovereign equality and mutual respect and adhering to the principle of non-interference, on the one hand, and opting a peaceful means of settling international dispute, on the other, is akin to choosing peace over war, cooperation over isolation, at least in principle. Peace and cooperation when they are based on mutual interest are essential values for socio-economic development. In this regard, the Declaration on Social Progress and Development in its preamble states that "international peace and security on the one hand, and social progress and economic development on the other, are closely interdependent and influence each other…. social development can be promoted by peaceful coexistence, friendly relations and co-operation among States".[230] The declaration further states that "sovereignty, principle of non-interference ...and peaceful coexistence are primary conditions of social progress and development".[231]

On the other hand, war and isolation are inimical to socio-economic development and thereby affect the enforcement of socio-economic rights. Probably there is no better example in proving these assertions than Ethiopia. The Ethiopian state has passed through internal and external wars since the Axumite era and her socio-economic progress have been prevented despite its pioneering ancient civilization. Accordingly, her socio-economic rights performance is so poor to date.

Schmid notes that "the destruction of homes, schools, hospitals, the looting of crops or livestock, the denial of humanitarian relief, and denial of food" are some of the socio-

[230] General Assembly, *Declaration on Social Progress and Development* (Resolution 2542 (XXIV) of 11 December 1969), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProgressAndDevelopment.aspx> accessed 03 January 2015.
[231] ibid, article 3

economic rights which are violated during armed conflict.[232] In addition to the economic cost to finance the war, which would have been used for the enforcement of socio-economic rights, Obidegwu observes the difficulty of recovering from the war/conflict trauma and to pursue socio-economic development.[233]

Hence, the principles of external relations are important as they will make the state focus on socio-economic development with the cooperation of others to make the long awaited development a reality for all Ethiopians. Ethiopia has relative peace for more than two decades.[234] Thus, the state is expected to expeditiously engage in overall socio-economic development to make freedom from want a reality.

One should make a distinction among these principles of external relations to make practical judgments on the conducts of the state. Some principles such as sovereignty and national interest are minimum guides of the state in its external relations which should be automatically followed. For instance article 86 (4) and article 43(3) are similar. Article 43(3) which is in the Bill of Rights provides that "[a]ll international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development". It follows that article 86(4) is not only a principle but a legal right. Nonetheless, cooperation with other states for economic union and fraternal relations are codes of conduct for the state which should be measured progressively.

[232] Evelyne Schmid, 'War Crimes Related to Violations of Economic, Social and Cultural Rights' (2011) 71 ZaöRV, 523-541, 524-25.
[233] see Chukwuma Obidegwu, 'Post-Conflict Peace-Building in Africa: The Challenges of Socio-Economic Recovery and Development' (2004), Africa Region Working Paper Series No. 73, <http://www.worldbank.org/afr/wps/wp73.pdf> accessed 03 January 2015; see also Kosuke Imai and Jeremy Weinstein, 'Measuring the Economic Impact of Civil War' (2000), Working papers, Centre for International Development at Harvard university, <http://www.cid.harvard.edu/cidwp/051.pdf> accessed 03 January 2015.
[234] For details of Ethiopian modern history see Bahru Zewde, *A History of Modern Ethiopia: 1855-1991* (2nd ed East African Studies 2002).

3.3.2 Principles for National Defence

Nations, Nationalities and Peoples as the owners of the Ethiopian Constitution[235] want the national armed forces to reflect the equitable composition of these groups.[236] Given the dominance of some ethnic groups in the national armed forces in the past, this is part of "rectifying the unjust historical relationships" and significant in developing a "sense of ownership" for various ethnic groups.[237] Hence, the principle of equitable representation is one of the first principles for national defence.

Protecting the sovereignty of the nation and fulfilling its responsibilities prescribed under "any state of emergency declared in accordance with the constitution" are the prime national principles for the armed force.[238] In fulfilling these responsibilities, the armed forces should "obey and respect the constitution" and free from any party affiliation.[239] The implication is that the business of the armed force is "to serve the democratically elected government", neither to replace it by *coup d'etat* nor to favour a political group or party.[240] Their loyalty is both to the government in office and the constitution.[241]

These principles of national defence have the potential to guard the Constitution and will be helpful to uphold the constitutional democratic order and human rights from the possible hijacking by undemocratic forces. Like the principles for external relations, they will indirectly further the enforcement of socio-economic rights by creating an enabling environment for the state to execute its policies, laws, strategies and action plans. Without a

[235] See the opening statement of the preamble of the Ethiopian Constitution (n 3) 'We the Nations, Nationalities and Peoples of Ethiopia….'
[236] ibid, article 87(1).
[237] Ali and Atua (n 15) 24.
[238] Ethiopian Constitution (n 3), article 87(3).
[239] ibid, article 87(4) & (5).
[240] Nahum (n 210) 183.
[241] ibid.

constitutional order and democratic government, the enforcement of constitutional socio-economic rights will be blurred.

Some of these principles have to be implemented immediately as the constitutional provision is framed in a clear and specific language, 'shall', requiring the state to implement these national defence principles. For instance, the obligations to respect and obey the Constitution and to be non-partisan are principles which should be implemented immediately without any condition. Failure to implement these principles will amount a blatant violation of the Constitution. However, the principle of equitable representation of ethnic groups in the armed force may need some time as it requires training and resources to do so.

3.3.3 Political Objectives

The Ethiopian Constitution reiterated some of its fundamental tenets such as democracy, self-rule and the rights of Nations, Nationalities and Peoples as enduring political objectives. Democratic principles, such as 'political pluralism, democratic participation, representation, elections, rule of law, human rights and fundamental freedoms, good governance and accountability, and working civic action and civil society'[242], are tools which guide the state towards the "people's self-rule" in the federation.[243] Respecting the "identity of Nations, Nationalities and Peoples" and promoting and strengthening "ties of equality, unity, and fraternity among them" are the other political objective.[244]

Nahum has observed that the political objectives "embody concepts dispersed throughout the constitution, from the preamble to the fundamental rights, to powers and functions of

[242] European Union, *Concepts and Principles of Democratic Governance and Accountability, A Guide for Peer Educator*s (2011), Published under the project: 'Action for Strengthening Good Governance and Accountability in Uganda' by the Uganda Office of the Konrad-Adenauer-Stiftung Konrad-Adenauer-Stiftung, <http://www.kas.de/wf/doc/kas_29779-1522-2-30.pdf?111219190223> 04 January 2015.
[243] Ethiopian Constitution (n 3), article 88(1).
[244] ibid, article 88(2).

government organs".[245] A simple look at the preamble gives the impression that the right to self-determination is the building block of the Constitution as it is the right which gives the various ethnic groups the mandate to take part in the making of the Ethiopian state.[246] The nomenclature of the state as a "Federal Democratic Republic"[247] presupposes that the state is guided by democratic ideals with shared and self-rule.[248] Nations, Nationalities and Peoples are holders of sovereign power under the Constitution and can decide on the ultimate fate of the state even so with promoting their self-rule and respect their identity.[249] They have "unconditional right to self-determination up to secession" and thereby pursue their own socio-economic, cultural and political path.[250] Hence, the political principle of respect for self-rule and once identity is a tiny part of the whole constitutional package. Nonetheless, nurturing these political principles is vital for a country whose ethnic groups have been under national oppression.[251] On the other hand, the principle of strengthening unity and fraternal relations among these groups have a paramount importance in building "one economic community" as aspired in the preamble and assuring the continuous existence of the multi-ethnic Ethiopia.[252]

Although democracy is not a onetime event, the state is urged to behave in a way which promotes the self-rule of the people. By the same token, the duty to promote the unity and fraternal relationship among the ethnic groups is an obligation of conduct. On the other hand, respecting the identity of the ethnic groups is an obligation of result. Fulfilling these

[245] Nahum (n 210), p.184
[246] See the preamble of the Ethiopian Constitution (n 3).
[247] See, article 1 & 52(2).
[248] See for details Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Wolf Legal Publishers 2006); Jorge Anderson, *Federalism: An Introduction* (Forum for Federations 2010); and Ronald Watts, *Comparing Federal Systems* (3rd ed, Institute of Intergovernmental Relations 2007).
[249] See Ethiopian Constitution (n 3), article 8(1).
[250] ibid, article 39.
[251] For the value of self-rule and respect for the identity of ethnic groups as a viable political value see Merera Gudina, 'Ethnicity, Democratisation and Decentralization in Ethiopia: The Case of Oromia' (2007) Eastern Africa Social Science Research Review, Vol. 23, No.1, 81-106.
[252] Ethiopian Constitution (n 3), preamble, Para 5.

obligations of conduct and result will lead to a viable political system in the country which in turn enables the advancement of socio-economic rights. Fielding observes the potential of political liberalization and stability to good economic performance and better human rights protection in South Africa.[253] Dupas and Robinson in their recent study of the cost of political instability and crises in the aftermath of the 2007 Kenyan election have stated that "income, expenditures, and consumption dramatically declined for a broad segment of the rural population for the duration of the conflict".[254] They further note that such ethnic crises, caused by political instability, led women and children to engage in prostitution and to end up in having HIV/AIDS.[255] Hence, the incorporation of the political principles in addition to smoothing the political process will speed up economic performance and enforcement of socio-economic rights.

3.3.4 Economic Objectives

The principle of equality and non-discrimination are central in the economic objectives especially in creating equal opportunity to improve economic wellbeing. The Ethiopian Constitution especially imposes duties on the state "to formulate policies which ensure that all Ethiopians can benefit from the country's legacy of intellectual and material resources…to ensure equal opportunity to improve their economic conditions and to promote equitable distribution of wealth".[256] Due to natural and human catastrophes, such as drought, famine, and war, the Ethiopian people had suffered and been seriously victimized.[257] In order to mitigate and if possible eliminate the results of such victimization, the Ethiopian Constitution imposes duties on the state to "avert any natural and man-made disasters, and, in the event of

[253] David Fielding, 'Human Rights, Political Instability and Investment in South Africa: A Note' (2002) Journal of Development Economics Vol. 67, 173–180.
[254] Pascaline Dupas and Jonathan Robinson, 'The (hidden) Costs of Political Instability: Evidence from Kenya's 2007 Election Crisis' (2012) 99 Journal of Development Economics 314 –329, 314.
[255] ibid.
[256] Ethiopian Constitution (n 3), article 89 (1) & (2)
[257] For details see Mesfin Wolde Mariam, *Rural Vulnerability to Famine in Ethiopia: 1958-77* (Practical Action 1986) and Peter Gill, *Famine and Foreigners: Ethiopia Since Live Aid* (Oxford University Press 2010)

disasters, to provide timely assistance to the victims".[258] Especially the state assumes a special duty to assist 'least developed Nations, Nationalities and Peoples' to foster socio-economic development.[259] Nahum justifies such special emphasis in such a way that "underdeveloped as a country is generally, one legacy of feudalism has been that the regions and peoples further from the centre have been less cared for".[260]

The state has a duty to hold "land and other natural resources" on the peoples behalf and to utilize them for peoples development and common benefit.[261] Whether or not the state ownership of land advances the peoples common interest is a different query which needs intensive investigation. Nonetheless, land a "commodity of *par excellence"* is at the centre of socio-economic and political discourse in Ethiopian history.[262] Despite the issues related to land, the right to participation in any development activities including on land is stipulated as a duty to the state.[263] Ensuring the participation of the people from the inception of any development program to its implementation and monitoring is provided as the prime duty of the state.[264] Moreover, the state is obligated to support the peoples own development initiatives.[265] Such economic objective reiterates article 43 of the Ethiopian Constitution which reads "[n]ationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community".[266]

[258] Ethiopian Constitution (n 3), article 89(3).
[259] ibid, 89(4).
[260] Nahum (n 210) 187. For details of the socio-economic condition of least developed regions (for instance the Regional State of Afar, Somali, Gemabella and Benshanguel Gumus) in Ethiopia see, William Emilio Cerritelli , Akalewold Bantirgu and Raya Abagodu, 'Updated Mapping Study on Non State Actors Sector in Ethiopia' (2008) Volume II Regional Reports , Framework Contract Benef. Lot N° 7 2007/146027, Final Report, European Commission Civil Society Fund in Ethiopia, Supporting Non-State Actors, Building Partnerships, <http://eeas.europa.eu/delegations/ethiopia/documents/eu_ethiopia/ressources/regional_reports_en.pdf> accessed 04 January 2015.
[261] Ethiopian Constitution (n 3), article 89(5). See also article 40 (3) which makes land and other natural resources under the ownership of the state which is consistent with the previous governments.
[262] Nahum (n 210) 188. see also Dessalegn Rahmato, *The Peasant And The State: Studies In Agrarian Change In Ethiopia 1950s - 2000s* (CreateSpace Independent Publishing Platform 2008)
[263] Ethiopian Constitution (n 3), article 89(6).
[264] ibid.
[265] ibid.
[266] ibid, article 43(2).

These constitutional rights are vital to further human rights based approach to development.[267] As land and natural resources are under state control, the meaningful participation of the people is a *sine quo none* for the legitimacy and success of the development intervention.

In addition to specifically guaranteeing the rights of women to participate equally with men in development activities,[268] the state holds a duty to ensure overall equal participation of women in socio-economic development endeavours.[269] Moreover, the Ethiopian Constitution goes further to impose a duty on the state "to protect and promote the health, welfare and living standards of the working population of the country".[270] This duty is similar to the rights expressed under article 41 of the Constitution which deals with socio-economic and cultural rights. Every Ethiopian's 'right to engage' in any lawful economic activity anywhere within the country to improve once livelihood is recognized under the human rights chapter.[271] Moreover, the duty of the state to "protect the welfare, health and living standards of the population", is expressed in a rights language such as the right to work and social security, fair wages, and employment opportunities which ultimately protect the socio-economic wellbeing of the individual.[272] These rights impose a minimum obligation on the state so that individuals can live a life with dignity.[273] The Committee on ICESCR notes the nature of the right to health, for instance, "as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access

[267] A human rights based approach to development is a human development which considers human rights as a principal means and primary end of development. For details see Brigitte Hamm, 'A Human Rights Approach to Development' (2001) Human Rights Quarterly 23 1005-1031.
[268] Ethiopian Constitution (n 3) article 35(1) & (6).
[269] ibid, article 89(7).
[270] ibid, article 89(8).
[271] ibid, article 41(1).
[272] ibid, article 41 & 42.
[273] See Committee on Economic, Social and Cultural Rights (CESCR) 'General Comment No. 3' 'The Nature of States Parties' Obligation' (1990) E/1991/23; CESCR 'General Comment No. 12' 'The Right to Adequate Food' (1999) E/C.12/1999/5; CESCR 'General Comment No. 14' 'The Right to the Highest Attainable Standard of Health' (2000) E/C.12/2000/4; CESCR 'General Comment No. 18' 'The Right to Work' (2006) E/C.12/GC/18; and CESCR 'General Comment No. 19' 'The Right to Social Security' (2008) E/C.12/GC/19.

to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions".[274]

Hence, cumulative readings of article 41 on socio-economic rights, article 42 on the rights of labour and article 89 on economic objectives gives a better normative content about the right to health, welfare and good living standards. The principles of participation, equality, non-discrimination and development will be a means to further socio-economic justice to all Ethiopians so that they can be free from want. Such constitutional stipulation imposes duties on the state to maximize the untapped human and natural resources for the enforcement of socio-economic rights.[275] In addition, as a state party to the ICESCR[276], Ethiopia is obligated to implement socio-economic rights to the maximum of its resources.[277] Failure to utilize the available resources will amount a constitutional and treaty violation.[278]

3.3.5 Social Objectives

The social objectives are the rewriting of article 41 in the form of state duties with the objective to mainstream it to the country's policies. For instance, article 41 (4) put the states obligation "to allocate ever increasing resources to provide to the public health, education and

[274] CESCR General Comment No. 14 (ibid).

[275] Though Ethiopia is rich in both human and natural resources, she did not benefit much due to political instability, war and lack of technology. Now more than ever, Ethiopia can purse her overall development if there is a committed democratic and responsive leadership which is free from corruption. For details of current development activities see The African Development Bank Group Chief Economist Complex, 'Ethiopia's Economic growth Performance: Current Situation and Challenges' (2010) Economic Brief Volume1, Issue 5 <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/ECON%20Brief_Ethiopias%20Economic%20growth.pdf> accessed 05 January 2015; Mulu Gebreeyesus, 'Industrial Policy and Development in Ethiopia: Evolution and Current Performance' (2013), Presentation at the "Learning to Compete (L2C): Accelerating Industrial Development in Africa" conference organized by UNU-WIDER June 24-25, 2013, Helsinki, Finland, <http://www1.wider.unu.edu/L2Cconf/sites/default/files/Gebreeyesus.pdf> accessed 05 January 2015 ; World bank, 'Ethiopian Data', <http://data.worldbank.org/country/ethiopia> accessed 05 January 2015; International Monetary Fund, 'The Federal Democratic Republic of Ethiopia' (2014), IMF Country Report No. 14/303, <http://www.imf.org/external/pubs/ft/scr/2014/cr14303.pdf> accessed 05 January 2015.

[276] Ethiopia ratified the ICESCR on 11 June 1993; <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty> accessed 05 January 2015.

[277] See International Covenant on Economic, Social and Cultural Rights (adopted by the General Assembly on 16 December and entered into force on 3 January 1976), article 2(1).

[278] Ethiopian Constitution (n 3), article 9(4).

other social services". Similarly the social objective requires the state "to provide all Ethiopians access to public health and education, clean water, housing, food and social security" as resources permit.[279] The state obligation under article 89(8) and 90(1) is a little bit different. In the case of the former, the obligation of the state is relatively strong and immediate than the latter. Protection and Promotion of the health, living standard and general welfare of the working population is not limited expressly by resource constraint unlike the provision of public health, education, water, food, housing and social security to all the people. It seems that the Ethiopian Constitution favours the working population, though the basis of the social objective is a "welfare state that provides the minimum acceptable to all the citizenry".[280]

The Constitution recognizes the "right to equal access to public funded social services" under article 41(3). There is no list of social services in this specific provision. But the social objectives shed light on the kind of services which should be provided to the people as they list down health, education, water, food, housing and social security. These objectives give content to the open general term 'public funded social services'.

The social objectives also require the provision of education free from any political, cultural or religious prejudices or influences.[281] Education has been incorporated to the countries policies since 1940s' with a view to speed up modernization and economic development.[282] Nonetheless, as Negash notes "the subjection of education to political sectarian concerns" is the problem which existed even today.[283] Hassen and Ahmed have noted that education and economic development has a positive correlation in their recent study in Sub Saharan Africa

[279] ibid, article 90(1).
[280] Nahum (n 210), 189.
[281] Ethiopian Constitution (n 3), article 90(2).
[282] see Tekesete Negash, 'Education and Development in Ethiopia: The History of Dubious Correlation'(2010) Ethiopian E-Journal for Research and Innovation Foresight, Vol. 2, No. 2, 6-55, <http://www.nesglobal.org/eejrif4/index.php?journal=admin&page=article&op=view&path%5B%5D=26> accessed 05 January 2014.
[283] ibid.

when it is free from any bias.[284] Hence, the constitutional stipulation of education to be free is crucial in building a free and open society. Unlike the other social objectives, the provision of education free from any bias is not limited by resources.

3.3.6 Cultural Objectives

The Ethiopian cultural communities, as Eshete notes, "feel that they have suffered disparagement of their language, religion and other manifestations of their cultural life".[285] To rectify such unjust cultural domination, the Ethiopian Constitution imposes a duty on the state to enrich the cultures and traditions of these communities on equal basis.[286] The cultural objectives are driven to establish a human rights culture as it promotes and protects those cultures and traditional practices which are "compatible with fundamental rights, human dignity, democratic norms and ideals, and the provisions of the Constitution".[287] Those cultures which are incompatibles with such ideals will not be given any protection. Instead, cultural practices such as female circumcision and causing bodily harm to pregnant women are criminalized.[288]

Protecting the "country's endowment, historical sites and objects" is the responsibility of all Ethiopians and the government under the cultural objectives.[289] The government also is

[284] See Seid Hassan and Hanane Ahmed, 'Educational Progress in Sub-Saharan Africa: A Comparative Historical Compendium of Theory and Evidence' (2010) Ethiopian E-Journal for Research and Innovation Foresight, Vol.2, No.1, 6-26, <http://www.nesglobal.org/eejrif4/index.php?journal=admin&page=article&op=viewPDFInterstitial&path%5B%5D=33&path%5B%5D=100> accessed 05 January 2015.
[285] Andreas Eshete, 'Implementing Human Rights and a Democratic Constitution in Ethiopia' (1993) A Journal of Opinion Vol. 21, No. ½, 8-13, <http://www.jstor.org/stable/1166280> accessed 21 December 2014, 9.
[286] Ethiopian Constitution (n 3), article 91(1).
[287] ibid.
[288] For a full list of criminalized bad cultural practices see The Criminal Code of The Federal Democratic Republic of Ethiopia, Proclamation No.414/2004, articles 561-570.
[289] Ethiopian Constitution (n 3), article 91(2).

obligated to support the development of science, arts and technology as resource permits.[290] It is only this cultural objective which is limited by resource availability.

3.3.7 Environmental Objectives

Like the socio-economic objectives, the environmental objectives simply reiterate the right to environment[291] in the form of state duty. They require the state to ensure "a clean and healthy environment for all Ethiopians."[292] As a natural consequence of this environmental objective development programs should not destroy or damage the environment.[293]

The right to clean and heathy environment is closely related to every human right as environment is the basis for the enjoyment of socio-economic and civil and political rights. Environment is akin to life. Hence, pursuing an environment-friendly development program opens a door for the enforcement of other human rights. The constitutional undertaking and other legislative frameworks for the right to environment in Ethiopia is admirable though the practice has to be tested in the times to come.[294]

3.4 Duty Bearers of Directive Principles of State Policy

This section explores the duty bearers of DPSP and the nature of their obligation. As DPSP are mainly lists of socio-economic rights, this section examines the nature and content of obligations under DPSP within the socio-economic rights jurisprudence. By doing so, the aim is to ascertain the obligations of the duty bearers.

[290] ibid, article 91(3).
[291] ibid, article 44.
[292] ibid, article 92(1).
[293] ibid, article 92(2).
[294] for details of normative protection of environmental rights see Girmachew Alemu, 'The Policy and Legislative Framework of Environmental Rights in Ethiopia' (2012) Ethiopian Human Rights Law Series, Volume IV; Abadir Ibrahim, 'A Human Rights Approach To Environmental Protection: The Case of Ethiopia' (2009) Contemporary Legal Institutions vol. 1, issue 1, 62-74, <http://econpapers.repec.org/article/rauclieui/v_3a1_3ay_3a2009_3ai_3a1_3ap_3a62-74.htm> accessed 01 January 2015.

The nature of state obligations under DPSP and ICESCR are somehow similar.[295] The main tenets of the obligations are the progressive duty of the state as immediate application may not be achieved due to resource constraint. This progressive duty for the implementation of socio-economic rights is commendable as it offers a feasible and flexible approach.[296] This does not mean, however, that all socio-economic rights under the ICESCR and the DPSP are subject only to progressive realization. There are core minimum obligations which should be satisfied immediately as the Committee on ICESCR notes in its general comment.[297] For instance, the Committee notes that "basic foodstuffs, health care, shelter and housing, and basic education" need to be fulfilled immediately and failure to do so will amount violation of the convention.[298] Likewise a similar minimum core can be drawn from the DPSP as discussed in the previous section.

Even Countries which are not state party to the ICESCR, for instance South Africa, have developed a threshold for the judicial enforcement of socio-economic rights.[299] The South African constitutional court developed a 'reasonableness test' for the enforcement of socio-economic rights.[300] In the *Grootboom case* the court applied a reasonable test to judge whether there is a violation of socio- economic rights [the right to housing].[301] In order to judge the positive obligation of the state, the court evaluates the states performance in allocating tasks and responsibilities at all levels with necessary resources to implement the right to housing [legislation], the availability of flexible policies and programs to implement the legislation, and the relatedness of socio-economic and historical background and context

[295] See the ICECSR (n 277), article 2 and Ethiopian constitution (n 5), chapter 10.
[296] CESCR General Comment No. 3 (n 273), para, 9.
[297] CESCR General Comment No. 3 (n 271), para, 10.
[298] ibid.
[299] For details of socio-economic litigation see Christopher Mbazira, *Litigating Socio-Economic Rights in South Africa: A Choice between Corrective and Distributive Justice* (Pretoria University Law Press 2009).
[300] See Fons Coomans, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness Test as Developed by the South African Constitutional Court' (2005) 65 ZaöRV, 167-196, <http://www.zaoerv.de> accessed 20 December 2014.
[301] See Grootboom v Oostenberg Municipality and Others 2000 (3) BCLR 277 (C), <http://www.saflii.org/za/cases/ZACC/2000/19.pdf> accessed 05 January 2015.

to the aims of the policy.[302] Such reasonable test lays in balancing the constitutional rights and value of human dignity and the democratic principle of separation of power.[303] The point here is, the progressive nature of socio-economic rights could not exclude immediate judicial enforcement in such circumstances when the political organs failed to perform their duty.

The lesson which can be drawn from the Committee on the ICESCR and the South African constitutional court is, socio-economic rights are justiciable whether it is based on a minimum core or reasonableness tests. As the thorough analysis of the contents of the DPSP above shows, a minimum core can be drawn from social to economic to political to cultural and environmental objectives even it can be drawn from principles of external relations and national defence. These minimum cores are beyond the reach of political compromises and whenever there is such compromise the judiciary should react as an independent state organ. Moreover, the judiciary may go further to apply the reasonableness test if the minimum core approach looks unfair or unjust in the circumstances of the case. The reasonableness approach is more consistent with the progressive duty of the state to fulfil socio-economic rights than the minimum core as the latter primarily deals with the immediate obligation of the state towards socio-economic rights.[304]

The human rights jurisprudence reveals that human rights impose the triple obligation of respect, protect and fulfil.[305] As all human rights are indivisible and interdependent[306], such obligation applies equally to socio-economic rights like civil and political rights. The

[302] Coomans, 'Reviewing Implementation of Social and Economic Rights: An Assessment of the "Reasonableness Test as Developed by the South African Constitutional Court' (n 300) 173-4.
[303] ibid.
[304] See Shivani Verma, 'Justiciability of Economic Social and Cultural Rights Relevant Case Law' (2005) The International Council on Human Rights Policy, <http://www.ichrp.org/files/papers/96/108_-_Justiciability_of_Economic_Social_and_Cultural_Rights__Relevant_Case_Law_Verma__Shivani__2005__background.pdf> accessed 05 December 2014.
[305] Magdalena Seplveda, Theo Van Banning, Gudrn Gudmundsdttir, Christine Chamoun and Willem Van Genugten, *Human Rights Reference Handbook* (University for Peace 2004), 16-7.
[306] Vienna Declaration and Program of Action (adopted by the World Conference on Human Rights held in Vienna on 25 June 1993), Para 5.

obligation of respect is a negative obligation of the state not to interfere in the enjoyment of socio-economic rights while the obligation to protect requires the state to guard individuals from third parties while the obligation to fulfil requires the state to take positive action on behalf the individuals so that they can enjoy their socio-economic rights. Such triple state obligations are also applicable to DPSP. Especially, the state assumes at the very least a duty not to interfere in the enjoyment of socio-economic rights like not to engage in activities which denies citizens means of livelihood, or evict from their homes, farm and/or grazing lands.

All state organs such as the legislative, executive and judiciary assume these triple obligations towards DPSP. Specifically, the Ethiopian Constitution imposes duties on all organs of government at all levels to "be guided by" the DPSP "in the implementation of the constitution, other laws and public policies".[307] Such constitutional stipulation mainstreams DPSP in the overall government actions and conducts. This obligation is simply an addition to the enforcement of socio-economic rights and other national objectives. It shows the 'centrality of DPSP' in the governance of the country as it guides the implementation of the constitution, which is the supreme law of the land, the expression of the sovereignty of Nations, Nationalities and Peoples, let alone other laws and policies.[308]

Thus, DPSP impose obligations on the legislative, the executive and the judicial organs both at the federal and regional levels. Although it imposes a progressive obligation on these state organs, there are immediate obligations which should be fulfilled without any consideration. As the focus of this thesis is on the judicial enforcement of socio-economic rights through DPSP, separate section is given to the role and duty of the judiciary.

[307] Ethiopian Constitution (n 3), article 85.
[308] ibid, article 9.

3.5 The Role of the Judiciary for the Enforcement of Human Rights

As said in the previous section, this section examines the role of the judiciary for the enforcement of human rights under the Ethiopian Constitution. In order to appreciate the potential of DPSP for the judicial enforcement of socio-economic rights in Ethiopia, it is a prerequisite to establish whether the judiciary has the power and/or responsibility to enforce human rights in the constitutional framework. The objective of this section is to establish the power/responsibility of the judiciary to enforce human rights including DPSP by examining the constitutional framework and by substantiating with the available scholarship.

The supremacy clause of the Constitution imposes duties on all state organs including the judiciary to ensure the observance of the Constitution. Article 9(2) 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." Although it imposes duties on everyone to obey and observe the Constitution, the role of the judiciary is high given its unique mandate of interpretation and adjudication of laws. In addition, the Constitution imposes duties on the judiciary for the enforcement of human rights. Article 13(1) of the Constitution specifically states that "[a]ll Federal and State legislative, executive and *judicial organs* at all levels shall have the *responsibility* and *duty* to respect and enforce the provisions of this Chapter." [Emphasis added]. This is a constitutional obligation imposed on the judiciary to enforce human rights. As the task of the judiciary is interpretation and adjudication of laws in resolving disputes, it should enforce human rights in this endeavor.

The judiciary assumes the same duty towards DPSP. Article 85(1) provides that "[a]ny organ of Government shall, in the implementation of the Constitution, other laws and public

policies, be guided by the principles and objectives specified under this Chapter." The judiciary as one organ of the government should be guided by DPSP in the judicial process.

Although the Constitution expressly imposes duty on the judiciary to observe the Constitution, to enforce human rights and to be guided by DPSP, it expressly denies the power of judicial review. The power of constitutional review is given to the House of Federation (HoF) which is a political organ with the assistance of Council of Constitutional Inquiry (CCI).[309] Article 62(1) reads "[t]he House [HoF] has the power to interpret the Constitution." As the Constitution gives the power of constitutional interpretation to the HoF, there has been confusion among academics and the judiciary itself about the exact role of the judiciary in the Constitution.[310]

There have been two opposing views on the judiciary's role in constitutional interpretation. The first view is that although the judiciary did not have a power to review the constitutionality of laws made by the legislature, as it is exclusively given to the HoF, it can review the constitutionality of regulations, directives and orders made by the executive.[311] The basis of this argument is article 84 (2) of the Amharic [official] version of the Constitution which is slightly different from the English version.[312] The Amharic version says when 'laws made by either the federal or state legislature' while the English version says 'federal or state laws', is contested the HoF can make a final decision. It is further argued that even for the review of legislative statutes, the judiciary is not precluded from making constitutional interpretation as the HoF is the final not the single arbiter of the

[309] ibid, article 62 and 84.
[310] See Assefa Fiseha, 'Some Reflections on the Role of the Judiciary in Ethiopia' (2011), Recht in Afrika, 1-32.
[311] ibid; Ibrahim Indris, 'Constitutional Adjudication under the 1994 constitution' (2002), Ethiopian Law Review Vol. 1 No. 1; Sisay Alemahu, 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008), AHRLJ Vol. 8 No. 2; Assefa Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation (HoF)' (2007), Mizan Law Review, Vol. 1 No. 1;
[312] In case of contradiction the Amharic version prevails over the English version. See article 106 of the Ethiopian Constitution.

Constitution.[313] Even some others goes to say that the judiciary should make constitutional interpretation whenever there is a clear case of constitutional contradiction as it is inherent in judicial power.[314] The judiciary assumes a duty to deny application if the law under consideration is unconstitutional. Thus, according to these arguments the judiciary shares the power of constitutional interpretation with the HoF although the final decision rests on the HoF.

The second view, on the other hand, is that there is no room left for the judiciary to make constitutional interpretation as it is exclusively given to the HoF. Neither the text of the Constitution nor the framers intent shows that the judiciary shares this power with the HoF.[315]Thus, according to this view, whenever the judiciary faces issues of constitutionality, it should refer the matter to the CCI for a disposition by the HoF.

Within this controversy, the parliament enacted two proclamations, one to consolidate the HoF and to define its powers and responsibilities and the other on CCI.[316] In both proclamations, the sort of laws which are a subject of constitutional review is not only limited to legislative statues but extends to executive regulations, directives and international agreements in contravention with the Amharic version of the Constitution.[317] Due to these enactments the proponents of constitutional interpretation by the judiciary argue that it is in violation of the Constitution and incompatible with the parliamentary system of

[313] See Leonard Besselink, 'The Protection of Human rights in Federal Systems: The Case of Ethiopia' in Proceedings of the 14th International Conference of Ethiopian Studies (Addis Ababa 2000).
[314] See Tsegaye Regassa, 'Courts and the Human Rights Norms in Ethiopia ' in Proceedings of the Symposium on the Role of Courts in the Enforcement of the constitution (Addis Ababa 2000); Regassa (n 212); Takele Soboka, 'Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory' (2011), African Journal of International and Comparative Law Vol. 19 No .1
[315] See Getachew Assefa, 'All About Words: Discovering the Intention of the Makers of the Ethiopian Constitution on the Scope and Meaning of Constitutional Interpretation' (2010) 24 J. Eth. L; Yonatan Tesfaye, 'Whose Power Is It Anyway: The Courts and Constitutional Interpretation in Ethiopia' (2008), 22 J. Eth. L. No. 1; Adem Kassie, 'The Potential Role of Constitutional review in the Realization of Human rights in Ethiopia' (LLD thesis University of Pretoria 2012).
[316] See Proclamation No. 251/2001 Consolidation of the House of the Federation and the Definition of its Powers and Responsibilities Proclamation, Federal Negarit Gazeta, 2001; Proclamation No. 250/2001 Council of Constitutional Inquiry Proclamation, Federal Negarit Gazeta, 2001.
[317] See article 2(2) of HoF and 2(5) of CCI Proclamations respectively.

government.[318] Fiseha especially argues that in a parliamentary system of government like Ethiopia, there is legislative supremacy but there is no executive supremacy.[319] By making the actions of the executive out of the reach of the judiciary, the proclamations smashed the system of checks and balances which are essential in defending democracy and liberty.[320] On the contrary, for the other line of argument, it is consistent with both the letter of the Constitution and the framers intent.[321]

Despite the controversies on the power of the judiciary in interpreting the Constitution, almost all agree that the judiciary can enforce human rights through adjudication. Although there is no significant case law on human rights, there are some cases which show that the judiciary is capable of enforcing them. For instance in the case of *Dr Negaso Gidada v the House of Peoples Representatives and the House of Federation*,[322] the applicant former Ethiopian president challenges proclamation 255/2001 as unconstitutional on the ground that it violates his right to vote and be elected.[323] The proclamation confers benefits for former presidents while imposing conditions. It specifically states that "[t]he president shall be obligated to keep himself aloof from any partisan political movement during or after his presidency."[324] Due to the applicant's participation in the national election and winning a seat as an individual candidate, his benefits under the proclamation were taken away by the two Houses. The Federal First Instance court ruled that his participation in the election as an individual candidate makes him partisan and he no longer claims the benefits.[325] However, the Federal High Court reversed the decision by arguing that the applicant has the right to

[318] See Fiseha, 'Some Reflections on the Role of the Judiciary in Ethiopia' (n 310)
[319] Ibid.
[320] ibid.
[321] Ibid.
[322] Dr Negaso Gidada v the House of Peoples' Representatives and the House of Federation, Federal First Instance Court, File 54654, Addis Ababa, 2005.
[323] Alemahu, 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (n 311), 282
[324] Proclamation No 255/2001, Administration of the President of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 2001, article 3(7).
[325] Alemahu, 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (n 311), 283.

vote and to be elected and the fact that he has a seat in the parliament could not make him partisan as long as he does not affiliate himself with any political party.[326] Nonetheless, the Federal Supreme Court reversed this decision on the ground that the applicant secures a seat in the parliament through political participation and by so doing he is a partisan and waived his benefits under the proclamation.[327] Regardless of the outcomes of the decision, the judiciary has applied the constitutional rights to solve disputes between individuals and the state.

In addition, in the case of *Miss Tsedale Demissie v Mr Kifle Demissie*, the Federal Supreme Court went beyond the Constitution and applies the United Nations Convention on the Rights of the Child (CRC) to solve a child guardianship dispute.[328] Although the Ethiopian Constitution recognizes children rights, the court brought the principle of the best interest of the child from the CRC to pass its decision which is consistent with the human rights interpretation adopted by the Constitution.[329] Furthermore, in the case of *Addis Ababa Taxi Drivers Union v. Addis Ababa City Administration and Biyadiglign Meles et al. v. Amhara National Regional State*, the CCI confirms that deciding on the violation of human rights by the executive and the "conformity of regulations with the legislation" did not amount "review of constitutionality of laws and parties have to seek remedy from the courts."[330] These cases clearly show that the judiciary has been adjudicating and should adjudicate cases of human rights.

Thus, from the constitutional framework, academic discourse and judicial practice, it is safe to conclude that the judiciary not only have the power to adjudicate on human rights but also

[326] ibid
[327] ibid.
[328] Miss Tsedale Demissie v Mr Kifle Demissie, Federal Supreme Court Cassation Division, File 23632, Addis Ababba, 2007.
[329] Ethiopian constitution (n 3) article 13(2).
[330] Fisha, 'Some Reflections on the Role of the Judiciary in Ethiopia' (n 310), 7.

assumes the duty/responsibility for the enforcement of human rights. Hence, the judiciary can enforce socio-economic rights in light of the DPSP.

3.6 Why Socio-Economic Rights through Directive Principles of State Policy?

A cursory look at the Ethiopian Constitution reveals to one that it recognized liberty rights (civil and political rights), equality rights (socio-economic and cultural rights) and solidarity rights (the right to development and clean environment) without any distinction. While it is true that all sorts of rights are given constitutional recognition, the framings of socio-economic and cultural rights are different from the other category of rights.[331] For one thing, they are put together in a single provision though the right to labour and property are given one provision each.[332] For another, they are dispersed through the DPSP. This section explains why DPSP are important for the judicial enforcement of socio-economic rights.

Out of the nine sub-provisions, only four mention the word rights under the 'economic, social and cultural rights' article of the Ethiopian Constitution.[333] The first two sub-provisions recognized the right to engage in any economic activity and choose once "means of livelihood, occupation and profession."[334] In instead of putting other socio-economic and cultural rights, the Ethiopian Constitution opts to put the state duty to enforce the right to engage in any economic activity and the right to choose once means of livelihood, profession or occupation. Article 41 (6) & (7) reiterated the rights expressed in article 41(1) & (2) in the form of state duty. As they impose a duty on the state to propose policies which aims to advance job opportunities for the poor and unemployed, on the one hand, and gainful

[331] Adem Kassie, 'Human Rights under the Ethiopian Constitution: A Descriptive Overview' (2011) Mizan Law Review Vol. 5 No.1, 54-5.
[332] See Ethiopian Constitution (n 3) article 40 (right to property), article 41 (social, economic and cultural rights) and article 42 (the right to labour).
[333] ibid, article 41 (1), (2), (3) & (8).
[334] ibid, article 41(1) & (2).

employment for citizens, on the other hand. In this regard Girma notes that the Ethiopian Constitution allocates article 41(1), (2), (6) & (7) to the right to work and the governments duty to enforce the same.[335] Hence, the right to work holds almost half of the constitutional space of 'economic, social and cultural rights'.

The third sub-provision which is stated in a rights language is article 41(3) which deals with "the right to equal access to publicly funded social services". To begin with, this provision neither gives the right to public funded social services nor elaborates the contents of social services. It simply is a non-discrimination clause in the provision of various social services. Although non-discrimination is the basic right in the enforcement of socio-economic and cultural rights,[336] the mere declaration of it without providing the substantive rights is a huge flaw for constitutional socio-economic and cultural rights. The equality clause of the Constitution would have been sufficient for the equal provision of public funded social services.[337] Hence, based on this right one could not claim a right to social services even if the state failed to provide these services. The claim would rather arise, for instance, if the state discriminates based on ethnicity, religion or any other unjustified ground access to health care, education or social security. Article 41(4) tries to illustrate the kind of public funded social services the government may provide. Nonetheless, these services such as "public health, education and other social services" are expressed not as rights but duties to the state based on available resources akin to the socio-economic objectives of the DPSP. Related to this, the state undertakes a duty to rehabilitate and assist the "disabled, the aged

[335] Dejene Girma, 'Economic, Social and Cultural Rights and Their Enforcement under the FDRE Constitution' (2008) Jimma University Law Journal Vol.1, No. 2.
[336] ICESCR (n 277), article 2(2).
[337] Ethiopian Constitution (n 3), article 25.

and children without parents or guardian" with available resources.[338] By the same token, it is not a right *per se* which is claimed for failure on the part of the state.

The fourth sub-provision stated in a rights terminology is article 41(8) which deals with the right of pastoralists and farmers "to receive fair prices for their products" so as to enable them to improve their livelihood. Girma opines that this right though limited to farmers and pastoralists seems an extension of the right to property.[339] The right to receive fair prices also seems mechanisms of equitable resource distribution as it reads "…. to enable them to obtain an equitable share of the national wealth commensurate with their contribution".[340]

Although the title of the article says economic, social and cultural rights, it did not provide any cultural right. It only imposed responsibility like the DPSP to preserve and protect cultural and historical legacies and promote sports and the arts.[341] Due to the absence of a single cultural right, some scholars say the use of the phrase, cultural rights, under the heading of the article is a misnomer.[342]

The right to property[343] and labour[344] are recognized under the Ethiopian Constitution. Especially the right to labour contains a bundle of rights such as "the right to form trade union, the right to equal pay for equal work, the right to express grievances including the right to strike, the right to reasonable limitation of working hours, to rest, to leisure, to periodic leaves with pay, to remuneration for public holidays as well as healthy and safe work environment".[345] However, some of these rights are limited to "factory and service workers,

[338] ibid, article 41(5).
[339] Girma (n 335).
[340] Ethiopian Constitution (n 3), article 41(8).
[341] ibid, article 41(9).
[342] Girma (n 335)
[343] Ethiopian Constitution (n 3), article 40.
[344] Ethiopian Constitution (n 3), article 42.
[345] ibid.

farmers, farm labourers, other rural workers and government employees".[346] The implication is that other category of persons may be excluded from enjoying these rights.

Hence, despite an eye catching article heading of 'economic, social and cultural rights' the right to work [labour] and the right of farmers and pastoralists to receive fair prices are the only socio-economic rights that are recognized.[347] Alemahu notes that article 41 not only failed to provide all the socio-economic rights as its heading implies but also "crude that it is difficult to identify the rights guaranteed" and their level of protection.[348] He further notes that though one may adopt a liberal approach of interpretation, ascertaining "the scope of the rights that might be said to have been guaranteed" will remain a problem.[349]

Due to such inadequacy of specificity and lack of content of economic, social and cultural rights, a number of scholars posit different approaches for the enforcement of these rights. All the approaches are based on the content and spirit of the Constitution. The first approach to get the specific content of economic, social and cultural rights is by referring into international human rights instruments which Ethiopia ratified.[350] The basis for this is the supremacy clause of the Ethiopian Constitution which makes international treaties ratified by Ethiopia part and parcel of the law of the land.[351] Such constitutional stipulation makes for instance the ICESCR and the African Charter on Human and Peoples Rights (African Charter)[352] part of Ethiopian laws. Hence, the 'classical' socio-economic rights such as the right to an adequate standard of living (food, clothing and housing), the right to health,

[346] ibid.
[347] See Girma (n 335).
[348] Sisay Alemahu, 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia' (2008) Journal of Ethiopian Law vol. 22 No. 2, 139.
[349] ibid.
[350] ibid, 146-151; Amare Tesfaye, 'Justiciability of Socio-Economic Rights in The Federal Democratic Republic of Ethiopia' (LL.M Thesis, Addis Ababa University 2010).
[351] Ethiopian Constitution (n 3) article 9(4).
[352] Ethiopia ratifies the African charter on 15/06/1998, see Ratification Table, 'African Charter on Human and Peoples' Rights', <http://www.achpr.org/instruments/achpr/ratification/>; she ratified the ICESCR on 11/05/1993, see the Ratification Table, 'International Covenant on Economic, Social and Cultural Rights', <https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty> accessed 04 December 2014.

education and social security are additional legal guarantees in addition to article 41.[353] In addition to being additional legal guarantees, they can be also a tool of interpretation of article 41 as the Ethiopian Constitution referred the interpretation of the human rights chapter to conform international human rights instruments adopted by Ethiopia.[354] The open-ended clauses and ambiguities in article 41 can be read in line with these instruments and thereby their content can be ascertained.

The second approach emanates from the recognition of human and democratic rights as fundamental principles of the Ethiopian Constitution.[355] Regassa notes that the principle of 'inviolability and inalienability' which make human rights one of the fundamental principles of the Constitution "establishes the idea of inherence, universality, indivisibility, and interrelatedness of human rights."[356] Due to such indivisibility and interdependence of human rights under the Ethiopian Constitution, Messele proposes "an integrated approach for the protection of socio-economic rights through civil and political rights".[357] She notes that the right to life and non-discrimination or equal protection of law will be crucial to protect the right to food, shelter, housing and adequate living standard as failure to respect, protect and fulfil these socio-economic rights will ultimately violate the right to life and other civil and political rights.[358] Similarly Girma and others have argued for the 'doctrine of implied rights'

[353] It should be noted here that the direct applicability of international human rights instruments based on article 9(4) is a subject of academic debate. Some scholars argue that ratification is not enough to make them part of Ethiopian laws. Publication in the legal Gazeta, Negarit Gazeta, is mandatory as courts are obligated to take judicial notice only those published in the Negarit Gazeta. However, other relay on the constitution and argue that ratification is sufficient to apply these instruments. For details see Ibrahim Indris, 'The Place of International Human Rights Conventions in the 1994 Federal Democratic Republic of Ethiopia (FDRE) Constitution' (2000) J. Eth. L, Vol. xx, 113-160; and Takele Soboka, 'The Monist-Dualist Divide and the Supremacy Clause: Revisiting the Status of Human Rights Treaties in Ethiopia' (2009) J. Eth. L, Vol. XXIII No. 1, 132-160.
[354] Ethiopian Constitution (n 3), article 13(2).
[355] ibid, article 10.
[356] Regassa, 'Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia' (n 212) 301.
[357] Rakeb Messele, 'Enforcement of Human Rights in Ethiopia' (2002) Action Professional's for the People (APAP), <http://world.moleg.go.kr/fl/download/20194/5DXDFBK1LOMDJGVFUKBZ> accessed 01 January 2015, 33.
[358] ibid, 33-36.

for strong protection of socio-economic rights under the Ethiopia Constitution.[359] They brought the jurisprudence of the African Commission on Human and Peoples Rights in the *SERAC case* to draw a comparable lesson for the Ethiopian courts.[360] Moreover, like the right to life, the right to human dignity, reputation and honour[361] can be a basis for socio-economic rights.[362] In this regard, Girma notes that "it is not possible to say that the right to dignity, reputation and honour of those who are living in slums, 'left in the cold', exposed to the sun, rains, flood, and other hazards can be enforced without adequately housing them".[363]

The final approach for the enforcement of socio-economic rights is to look into the DPSP. A number of scholars have argued that although DPSP are non-justiciable[364], they are helpful in giving guide to the judiciary in interpreting the socio-economic rights under the constitution.[365] Hence, the role of the DPSP is limited to give only guide to courts in their interpretation endeavour of socio-economic rights. This author argues that in addition to being an interpretive tool to constitutional socio-economic rights, DPSP contains minimum socio-economic rights which the state needs to respect, protect and fulfil in the governance of the country as discussed above. Hence, DPSP are additional guarantees of the Constitution which stands by its own even without article 41 of the Constitution. Moreover, DPSP given their central role in the conduct of the business of the state will be helpful in enforcing socio-economic rights through civil and political rights which judicial application is not usually contested.[366] For instance, the socio-economic objectives of DPSP can be enforced through

[359] Girma (n 335), Tesfaye (n 350), Amsalu Darge, 'Derivation of Rights: Affording Protection to Latent Socio-Economic Rights in the FDRE Constitution' (2013) Oromia Law Journal Vol. 2, No.2.
[360] ibid, see also Social and Economic Rights Action Centre (SERAC) and Another v. Nigeria (2001) AHRLR 60 (ACHPR 2001).
[361] Ethiopian Constitution (n 3), article 24.
[362] Girma (n 335) and Darge (n 359) 46.
[363] Girma (n 335), 13.
[364] Even if the Ethiopian Constitution is silent about the justciability of DPSP, some scholars opted to call DPSP as non-justiciable claims.
[365] See Alemahu, 'The Constitutional Protection of Economic and Social Rights in the Federal Democratic Republic of Ethiopia' (n 348) 141-42; Darge (n 359) 50-54; and Messele (n 357) 29.
[366] The justiciability of socio-economic rights is contested than civil and political rights in the human rights jurisprudence and the Ethiopian case could not be special.

the constitutional right to life and human dignity, honour and reputation as the case in India. Of all the three approaches, the third one which utilizes DPSP for the judicial enforcement of socio-economic rights is more important given its overall repercussions for the constitutional democracy Ethiopia has adopted and as discussed in chapter one.

3.7 Conclusion

In sum, although the Ethiopian Constitution incorporates socio-economic rights in the Bill of Rights, the lists of rights are limited to the right to equally 'access' public funded social service, employment, labour and property. Moreover, these rights lack clarity and content which is necessary for judicial application. However, on the other hand, DPSP are informative in reading the Bill of Rights in general and socio-economic rights in particular. For one, they contain minimum obligations which should be implemented by the government without attributing to lack of resources. For another, due to their fundamental nature in the constitutional framework, they will be guiding principles in the interpretation of the Constitution and other laws in general and in the application of socio-economic rights in particular. As most of the principles are lists of socio-economic rights in the form of duties, the judiciary can avail DPSP in the enforcement of socio-economic rights. In order to do this, the judiciary assumes a constitutional duty and responsibility to enforce the Bill of rights and be guided by the DPSP. Thus, the constitutional framework supports the argument that DPSP can be useful tools for the judicial enforcement of socio-economic rights.

4. Making DPSP Work for Socio-Economic Rights in Ethiopia: A Synthesis of the Comparative Experience

4.1 Introduction

In the previous chapters, DPSP as a constitutional principle and their place in the Indian and Ethiopian context have been discussed. This chapter synthesise the previous discussions with the objective of exploring how we can make DPSP work for the judicial enforcement of socio-economic rights in Ethiopia. With this objective in mind, this chapter addresses a few questions for the synthesis. The first section asks whether or not constitutional stipulation of DPSP matter by taking the Indian and Ethiopian experiences? The second section goes to explore what role the judiciary should play in a constitutional democracy where both India and Ethiopia subscribe, whereas the third section examines ways of socio-economic rights enforcement and proposes a holistic constitutional approach.

4.2 Does Constitutional Stipulation of DPSP Matter?

The Constitutional stipulation of rights makes differences in the practical application of constitutional rights.[367] For instance, the framing or the writing of rights in a constitution is crucial not only to know the scope of the right and its limits but also to make a judicial sense of it.[368] In the same fashion, the design of DPSP in constitutions has a significant impact in their enforcement. The objective here is to evaluate the Indian and Ethiopian design of DPSP and its impact for judicial enforcement.

[367] See Janet L. Hiebert, 'Constitutional Experimentation: Rethinking How a Bill of Rights Functions' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011); Philip A. Hamburger, 'Natural Rights, Natural law and American Constitutions' (1993), Yale Law Journal Vol. 102: 907.

[368] One can see how the framing of constitutional rights in the United States, Canada and South Africa has impacted the judicial jurisprudence of rights. See Mark S. Kende, *Constitutional Rights in Two Worlds South Africa and the United States* (Cambridge University Press 2010); Stephen L. Newman (ed), *Constitutional Politics in Canada and the United States* (State University of New York Press 2004).

The Indian Constitution not only expressly ban the judiciary from adjudicating claims based on DPSP but also make DPSP '*fundamental in the governance of the country in making laws'*. [Emphasise added]. It is important to reiterate what the Indian Constitution says in this regard;

> *The provisions contained in this Part [DPSP] shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.*[369]

From the literally reading of this provision, DPSP are fundamental principles which guide the legislature in making laws. Although DPSP are fundamental principles of the state, as law making is not the power of the judiciary in a strict sense, they are outside of the reach of the judiciary. Even if one may argue that DPSP impose duties on state organs and thereby the judiciary as one state organ assumes a duty towards DPSP, there is nothing left for the judiciary as the Constitution excludes not only the power of adjudication but also to take them as tools of interpretation.

This interpretation is confirmed by the constitutional debates in the making of the Indian Constitution as the compromise reached was to incorporate DPSP in the Constitution while excluding judicial application.[370] There were two opposing views where one considers DPSP as mere political programmes which could not fit with constitutional ideas while the other takes DPSP as fundamental principles which should be part of the Constitution. As a constitution is the outcome of compromises, the framers of the Indian Constitution have brought the best compromise possible to incorporate DPSP as a constitutional principle while excluding judicial enforcement. Thus, neither the plain interpretation of the constitutional

[369] Indian Constitution (n 53), article 37.
[370] See Constitutional Assembly Debates on the Indian Constitution vol. 11.

provision nor the framers' intent lead to the conclusion that the judiciary has even a role in the enforcement of DPSP.[371]

However, through purposive interpretation, the Indian judiciary have managed to make sense of the DPSP in its task of judicial review.[372] As discussed in chapter two, it was not easy for the judiciary to consider DPSP in its adjudication. In its first stage, the judiciary did not give any backing even as interpretive roles for DPSP. In the second stage the court had tried to give a harmonised interpretation to uphold both fundamental rights and DPSP while for the third stage it has given primacy to DPSP over fundamental rights. In giving DPSP a judicial space in India, the courts have been struggled and engaged with both socio-legal engineering. When the legislative and executive organs fail to observe and/or advance the ideals in the DPSP, the courts have understood that their previous position on DPSP could not lead for the furtherance of the aspirations of the Constitution, especially the preambular stipulation of "justice, social, economic and political." In order to advance these aspirations, the courts use judicial review as an appropriate venue to check on the other organs and have been engaged with purposive interpretation.

The social realities of the Indian citizenry dictate the court to take an activist position in the overall constitutional adjudication concerning DPSP and to avoid some of the procedural impediments through PIL. Although the Indian judiciary is praised for its innovative interpretation of the Constitution [DPSP] to protect socio-economic rights, it is also blamed for its intrusion in the works of other organs of the government.[373] This is how far the stipulation of DPSP in the Indian Constitution has taken the judiciary.

[371] For details of constitutional interpretation see Craig R. Ducat, *Constitutional Interpretation* (Wadsworth, Cengage Learning 2009).
[372] For details of purposive interpretation see Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005); Aharon Barak, 'Hermeneutics and Constitutional Interpretation' (1992/3), 14 Cardozo L. Rev. Vol. 14:767.
[373] See the discussion in chapter two.

The Ethiopian design of DPSP, on the other hand, is different from India in the sense that it neither denies nor confers judicial adjudication on DPSP. It is silent on the justiciability or otherwise of DPSP. Contrary to the Indian stipulation, the Ethiopian Constitution expressly gives the judiciary a responsibility to use DPSP in its task of adjudication. In this regard, the Ethiopian Constitution reads "[a]ny organ of Government shall, in the implementation of the Constitution, other laws and public policies, be guided by the principles and objectives specified under this Chapter [DPSP]."[374] This constitutional stipulation imposes duties on the judiciary to be guided by the DPSP in the disposition of cases concerning the Constitution and other laws. Doing so would not require an activist judiciary to the level of intrusion to the works of other organs, but a judiciary which fulfils its constitutional duty.

Unlike the Indian judiciary, the Ethiopian judiciary is given express permission to take DPSP as interpretative tools and thereby is not expected to bring an innovative interpretative theory for being guided by DPSP in its adjudication. Nonetheless, to make the DPSP justiciable claims the Ethiopian judiciary should engage in the business of interpretation as the Constitution is silent on the matter. To this end, the Ethiopian judiciary should engage in judicial activism taken in the sense of bringing social justice to the people in areas not covered by any law, as Chinnappa notes, is required to make it justiciable to enforce the minimum core DPSP as discussed in chapter three.[375] Thus, the interpretation which gives more benefit to the people in the constitutional interpretation should be given primacy. It is a plain fact that more constitutional justice will be done if the judiciary takes the minimum core DPSP as justiciable and constantly monitor's the overall enforcement of DPSP in its judicial process.

[374] Ethiopian Constitution (n 3), article 85(1).
[375] Chinnappa (n 12), 256.

In addition to the justiciability issue, the constitutional framing of DPSP in India and Ethiopia are different. The language and the way DPSP are framed in the Indian Constitution are programmatic, and an immediate state obligation could not be drawn.[376] However, a minimum core immediate obligation can be drawn from the Ethiopian Constitution not only because the DPSP requires the state to fulfil some socio-economic guarantees immediately without resource or any other consideration being a condition but also due to the fact that some of the DPSP provisions are verbatim copy of the justiciable socio-economic and cultural rights under the Bill of Rights chapter.[377] Thus, the constitutional framing of DPSP helps the Ethiopian judiciary in its bid to make DPSP justiciable unlike the Indian judiciary.

Thus, although the DPSP formulation in Ethiopia is suitable for judicial enforcement unlike India, the latter has enforced socio-economic rights through DPSP along with the right to life, while the former did not take such action to date. What follows from the comparative experience is that the Ethiopian judiciary should enforce socio-economic rights through DPSP better or at least with equal footing with the Indian judiciary for stronger reason given its better constitutional protection. Although the absence of judicial review in Ethiopia unlike India is a significant factor which hinders the court from human rights adjudication, the constitutional framework suffice for the judicial enforcement of human rights including DPSP.

[376] See the Indian Constitution (n 53), Chapter on DPSP.
[377] See the discussions on chapter three.

4.3 The Role of the Judiciary in a Constitutional Democracy

In order to compare the judicial practice of the Indian and Ethiopian experiences, it is crucial to locate the role of the judiciary in a constitutional democracy as both systems subscribe. The objective is to shed light on how constitutional democracy requires the judiciary's active engagement with the constitution to maintain the constitutional balance by drawing lessons from the Indian experience. This section argues that although the absence of judicial review is a crack to constitutional democracy, the role given to the Ethiopian judiciary by the Constitution vis-à-vis the constitutional democratic feature it adopts requires the judiciary to be more active as a constitutional organ.

In the dictionary meaning, a constitutional democracy[378] is "a system of government based on popular sovereignty in which the structures, powers, and limits of government are set forth in a constitution".[379] Thus, the rules of democracy are provided in the constitution and state institutions should operate accordingly. In other words, constitutional democracy is a system which regulates democracy by a written constitution. The *trias politica* –legislative, judicial and executive organs function within their own powers and limits. Concerning their relationship neither is a junior nor a senior organ of the other as the rules are clearly specified in the constitution.[380]

In such a system of constitutional democracy what exactly is the role of the judiciary? Aharon Barak, who was the chief justice of the Supreme Court of Israel for more than 26 years and a well-known legal theorist, argues that the judiciary has the dual role of "bridging the gap between law and society," on the one hand, and "protecting the constitution and

[378] For details of constitutional democracy see Janos Kis, *Constitutional Democracy* (CEU Press 2003) and Dennis C. Muller, *Constitutional Democracy* (Oxford university Press 1996).
[379] <http://dictionary.reference.com/browse/constitutional+democracy>.
[380] Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002/3), 116 Harv. L. Rev. 19, 46.

democracy," on the other hand.[381] Barak further argues that "courts neither cure every ill of society nor are a primary agent for social change."[382] At the same time, he does not claim courts are "the most effective branch for the resolution of disputes".[383] What Barak claims and I subscribes is that the "court has an important role in bridging the gap between law and society and in protecting the fundamental values of democracy with human rights at the centre."[384]

Given these established roles of the judiciary in any constitutional democracy,[385] what lesson should the Ethiopian judiciary learn to fill the gap between the law and the society and to defend the Constitution and democracy while making human rights at the centre? The judiciary could not be indifferent as it has been and if it chooses to be indifferent, it means that these roles will be missed. This is neither the aspiration of the Constitution nor the will of the Ethiopian people as mere observation suffices. This is due to the fact that the Constitution imposes duties on the judiciary and the people need an independent and impartial third state organ which adjudicates disputes in a way which advances the values, rights and principles of the Constitution.

When one asks whether the Ethiopian constitutional design enables the judiciary to perform its duty to its fullest extent as expected in a constitutional democracy, the answer will be in the negative as the judiciary's hand is half tied due to the absence of judicial review. However, as discussed in chapter three, the judiciary is not precluded from enforcing

[381] ibid, 47; see also Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006); Aharon Barak, 'The Role of the Supreme Court in a Democracy' (1998), Israel Studies, Vol. 3, No. 2, 6-29; Sylvia R. Lazos Vargas, 'Democracy and Inclusion: Reconceptualising the Role of the Judge in a Pluralist Polity' (1999), 58 Md. L. Rev. 150.
[382] Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (n 380), 47.
[383] ibid.
[384] ibid.
[385] For details of the role of the judiciary in a constitutional democracy see Kenneth D. Ward and Cecilia R. Castillo (eds), *The Judiciary and American Democracy: Alexander Bickel, The Counter majoritarian Difficulty, and Contemporary Constitutional Theory* (State University of New York Press 2005); Thomas Fleiner and Lidija R. Basta Fleiner, *Constitutional Democracy in a Multicultural and Globalized World* (Springer 2009).

constitutional rights including DPSP. Nonetheless, the absence of judicial review almost paralysed adjudication of cases based on the Constitution in general and DPSP in particular.[386]

On the other hand, the Indian experience can be a manifestation of the power and value of judicial review in a constitutional democracy. Its DPSP jurisprudence has been not only a bridge between the law and the society but also a litmus test of defending the Constitution and democracy while advancing human rights.[387] This is because there has been a gap between the law [Constitution] and the society [social reality]. Although the Constitution provides for fundamental rights and DPSP, the Indian masses could not enjoy it due to the illiteracy, poverty and marginalization. In bridging the gap, the Indian judiciary has used judicial review and has not only taken activist position for the interest of 'justice, social, economic, political' as aspired by the Constitution but also has liberalized the standing rules and procedural requirements to access the courts. Through the proper understanding of their role in the constitutional democracy and the power the Constitution confers them, the Indian judiciary has brought DPSP to the service of the Indian masses.

Although there may be other factors which contribute to the variations in judicial practice between Indian and Ethiopian courts, the absence of judicial review is one of the main factors which hinder the latter in fulfilling its responsibility as expected in a constitutional democracy. Nonetheless, there is a minimum task which the judiciary assumes for the proper functioning of a constitutional democracy.[388] Thus, the role the Ethiopian judiciary assumes

[386] See the discussion in chapter three on the role of the judiciary.
[387] The Indian Supreme Court defends the amendment of the constitution by developing a basic structure doctrine which precludes the amendment of the basic feature of the constitution.
[388] See Barak, 'The Judge in a Democracy' (n 381).

vis-à-vis the nature of constitutional democracy which the constitution pursues gives it not only the power but also the responsibility to apply DPSP to further socio-economic rights.

However, it should be noted that judicial review is the best approach to keep the balance of the constitutional democracy as a counter majoritarian check to maintain the will of *We* the people and *I* the individual in a democratic polity. Had the Ethiopian Constitution adopted judicial review, it would have been simple for the court to adjudicate cases based on the Constitution as is evident from the Indian experience.

Thus, from the Indian experience of judicial review, on the one hand, and the role of the judiciary in the Constitution vis-à-vis the features of constitutional democracy two arguments can be posited. One, if human rights and DPSP need to be enforced more meaningfully as the case in India, the Ethiopian judiciary needs to have the power of judicial review. The HoF, political organ and final arbiter of the constitution, are ill fitted to play the role of the judiciary and are unable to bring the necessary balance in a constitutional democracy.[389] Two, even in its current role, the judiciary can and should enforce human rights and DPSP as it is given a constitutional responsibility and an active engagement with the Constitution is consistent with the constitutional democracy the Ethiopian Constitution adopts.

4.4 Enforcing Socio-Economic Rights: Taking a Holistic Constitutional Approach

Enforcing constitutional socio-economic rights has been a challenge due to constitutional design and judicial approach in many jurisdictions.[390] The different constitutional language for socio-economic rights unlike civil and political rights, on the one hand, and the deep

[389] Abebe, 'The Potential Role of Constitutional Review in the Realization of Human Rights in Ethiopia' (n 315).

[390] See Terence Daintith, 'The Constitutional Protection of Economic Rights' (2004), 2 Int'l J. Const. L.; Deval Desai, 'Courting Legitimacy: Democratic Agency and the Justiciability of Economic and Social Rights' (2009/10), 4 Interdisc. J. Hum. Rts. L.; Shadrak B. Gutto, 'Beyond Justiciability: Challenges of Implementing/Enforcing Socio-economic Rights in South Africa' (1998), 4 Buff. Hum. Rts. L. Rev.

rooted perception of non-justciability, on the other hand, has been a challenge for their judicial enforcement. The situation is not different in Ethiopia. As a result, this section argues that the enforcement of socio-economic rights in Ethiopia should take a holistic constitutional approach primary through the instruments of DPSP as has been the case in India. By holistic constitutional approach, this author refers to a comprehensive way of enforcing socio-economic rights by availing the various constitutional options available.

It is a conventional wisdom that a constitution is the supreme law of a country. It is also true that each chapter, section and provision in a constitution is fundamental and thereby forms the body organism of a constitution. For the constitution to function, its body organisms should function and perform their own peculiar tasks. It is only when the various organisms operate that the constitution moves forward to achieve its aspirations. Mere operation does not suffice; it should be consistent and holistic so that the coherent whole can stand. However, the non-operation of one part of the body organism may destabilize the whole body and impair its overall functioning.

Not constitutionalizing socio-economic rights is one thing; but failures to enforce after constitutionalizing is quite another and the repercussions are different.[391] In a simplistic understanding, while the former is attributed to the people's choice in constitutional making, the latter is attributed to the failure to uphold a constitution and thereby undermine the legitimacy of it.[392] Thus, despite the language of socio-economic rights and issues of justiciability, the judiciary should use a holistic constitutional approach to enforce these constitutional rights as they are included for a purpose.

[391] Ilias Trispiotis, 'Socio-Economic Rights: Legally Enforceable or Just Aspirational?' (2010), Opticon1826, Issue 8; Kirsty McLean, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* (Pretoria University Law Press 2009).
[392] Osiatynski, *Human Rights and Their Limits* (n 33).

In the Indian Constitution, there is no such thing as socio-economic rights. However, as discussed elsewhere in this thesis, the DPSP contain socio-economic guarantees akin to socio-economic rights. At the same time, these DPSP are non-justiciable and there is no constitutional way by which DPSP [socio-economic rights] are litigated in courts by their own. Due to this justiciability problem, the Indian judiciary takes a holistic understanding of the constitution and observes the legal and social realities of the Indian citizenry to enforce socio-economic rights. The preamble of the Constitution aspires for 'justice, social, economic and political', Part III provides for fundamental rights, Part IV stipulates for DPSP and the various parts provides for the responsibilities of constitutional institutions to fulfil these constitutional undertakings. Within such constitutional framework what should the judiciary do as a guardian of the constitution and as a protectorate of liberty and freedom? As discussed in chapter two, the judiciary through its holistic understanding of the Constitution created a biosphere of DPSP jurisprudence within the ambits of fundamental rights. Accordingly, the right to food, the right to health, the right to shelter and the right to livelihood are part and parcel of the right to life and thereby are enforceable and consumable commodities for the citizenry.

In Ethiopia, as in India, the judiciary can enforce socio-economic rights through the instrumentality of DPSP in a number of ways. As socio-economic rights are part of the justiciable Bill of Rights, the Ethiopian judiciary will have even an advantage over the Indian counterpart although the content of these rights could not be easily ascertained as discussed in chapter three. In the holistic constitutional approach to enforce socio-economic rights, DPSP play a crucial role given their very nature, as discussed in chapter one. One, as discussed in chapter three, DPSP contain a minimum core socio-economic rights which should be enforced immediately. Two, given the ambiguity of the contents of socio-economic rights under the Bill of Rights, DPSP can be an interpretive tool and thereby give content to these

rights. Three, as DPSP guides the enforcement of the Constitution, the socio-economic rights contained in the DPSP will get life in the enforcement of the Bill of rights especially through civil and political rights. In addition, as some of the DPSPs are the verbatim copies of the socio-economic and cultural rights in the Bill of Rights, the latter can be considered in the enforcement of civil and political rights. Four, due to the interdependence and indivisibility of human rights, socio-economic rights can be enforced through civil and political rights in a harmonious manner guided by the ideals of the DPSP.

4.5 Conclusion

Both the constitutional stipulation of DPSP and socio-economic rights in Ethiopia, on the one hand, and the Indian experience, on the other hand, support the argument that DPSP can work for the judicial enforcement of socio-economic rights in Ethiopia. Although the absence of judicial review is a huge crack for the judicial enforcement of constitutional rights including DPSP in Ethiopia, the role the judiciary assumes vis-à-vis the constitutional democracy the Constitution adopts gives the judiciary an active role in maintaining the constitutional balance especially by being the defender of human rights. Due to the lack of clarity of content of socio-economic rights under the Ethiopian Constitution, the judiciary, as the Indian counterpart, should take a holistic constitutional approach to enforce these rights especially through the biosphere of DPSP. To this end, DPSP are well situated in the constitutional framework to further socio-economic rights in the enforcement of the Constitution and other laws.

Conclusion

DPSP have brought additional constitutional discourse in the protection of human rights in general and socio-economic rights in particular. Given the fundamental position in constitutions, DPSP guides the state and the people toward socio-economic and political justice. In this process DPSP places state organs not only in tune with the ideals, values and principles of constitutions but also make them responsive to their own actions. The enforcement of DPSP is constantly monitored by the public through periodic elections and the courts through judicial review, which is consistent with the ideals of constitutional democracy.

Although DPSP is a fundamental constitutional principle and an innovative alternative to constitutionalize socio-economic rights, neither the scholarship and nor the judicial practice are well developed. However, the judicial practice in India and Nepal sheds light on the potential of DPSP to further socio-economic rights while the experience of Ghana is limited to justiciability. Despite the variations in the level and intensity of judicial engagement, a close investigation of constitutions which recognize DPSP, on the one hand, and academic scholarship, on the other hand, reveal that DPSP are fundamental constitutional principles which mainly incorporate socio-economic rights and are suitable for judicial enforcement.

The Indian experience provides rich DPSP jurisprudence and thereby shows that DPSP are not only judicially suitable but are desirable and necessary to enforce fundamental rights, advance the ideals and aspirations of the Constitution to the benefit of the citizenry. Despite the non-justicibality of DPSP and absence of socio-economic rights in the Indian Constitution, the judiciary reads DPSP with Fundamental Rights by appreciating their role in furthering 'justice, social, economic, political.' The courts' innovative interpretation of the right to life has enabled the enforcement of socio-economic rights such as the right to food,

the right to shelter, the right to health and the right to livelihood. In doing so, both the role the Constitution gives to the judiciary and the judiciary's understanding of socio-economic and political realities vis-à-vis legal realities contributes much to the development of this DPSP jurisprudence. In this regard, judicial review, judicial activism and public interest litigation have been an engine for the enforcement of socio-economic rights through the instrumentality of DPSP.

Unlike the Indian Constitution, the Ethiopian Constitution constitutionalizes socio-economic rights in the Bill of Rights. Although it incorporates socio-economic rights in the Bill of Rights, the lists of rights are limited to the right to equally 'access' public funded social service, employment, labour and property. Moreover, these rights lack clarity and content, which are necessary for judicial application. In a similar vein, the Ethiopian DPSP are informative in reading the Bill of Rights in general, and socio-economic rights in particular. For one thing, they contain minimum socio-economic guarantees which should be implemented by the government without attributing to lack of resources. For another, due to their fundamental nature in the constitutional framework, they will be guiding principles in the interpretation of the constitution, for instance civil and political rights, and other laws in general, and in the application of socio-economic rights in particular.

Thus, both the constitutional stipulation of DPSP and socio-economic rights in Ethiopia, on the one hand, and the Indian experience, on the other hand, support the argument that DPSP can work for the judicial enforcement of socio-economic rights in Ethiopia. Although the absence of judicial review is a huge crack for the judicial enforcement of constitutional rights including DPSP in Ethiopia, the role the judiciary assumes vis-à-vis the constitutional democracy the Constitution adopts gives the judiciary an active role in maintaining the constitutional balance especially by being the defender of human rights.

Due to the lack of clarity of the content of socio-economic rights under the Ethiopian Constitution, the judiciary, as the Indian counterpart, should take a holistic constitutional approach to enforce these rights especially through the biosphere of DPSP. To this end, DPSP are well situated in the constitutional framework to further socio-economic rights in the enforcement of the Constitution and other laws. Thus, the potential of DPSP for the judicial enforcement of socio-economic rights is practically successful [as the case in India], constitutionally consistent and judicially feasible for Ethiopia.

What is required from the judiciary is to understand its role in the constitutional framework in light of the constitutional democratic feature vis-à-vis the socio-economic and political realities of the populace. Nonetheless, to effectively guard the Ethiopian Constitution, to foster human rights and democratic culture, the judiciary need to have the power of judicial review. To bring human rights in general, and socio-economic rights in particular to the service of the distant Ethiopian citizenry, liberalization of standing rules and rules of procedure are required. Until the judiciary finds its appropriate place in the Ethiopian constitutional system, the ideals, values and rights therein will be very far away from the people.

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