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CRYSTALLIZING THE RIGHT TO DEVELOPMENT DISCOURSE INTO THE ETHIOPIAN HUMAN RIGHTS SYSTEM: TOWARDS A FULL-BELLY FREE PERSON

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Abstract

The FDRE Constitution recognizes the right to development. In so doing, it integrates "development" and "human rights". Employing doctrinal legal research method and guided by an interpretivist paradigm, the article appraises the status of the discourse on the right to development in the Ethiopian Human Rights System from the perspective of the United Nations Declaration on the Right to Development (DRD), Vienna Declaration and Program of Action (VDPA) and the Banjul Charter. It relies on primary sources such as the FDRE Constitution, the DRD, the VDPA and the Banjul Charter. It also uses relevant literatures as secondary sources. The finding indicates that even though the Constitution recognizes the right to development and some policy steps were undertaken for its realization, the discourse on this right is not adequately crystallized into the country's human rights system as compared to the degree of the depth and breadth it gained under the DRD and in the African Human Rights System. As such, this right has not been conceptualized and put into practice in a way that enable individuals both to fill their belly and to be free to live with dignity. Rather, the human rights system of the country has been predominantly in a "full-belly thesis" or "Lee thesis" condition. It is recommended that re-conceptualizing this right in a composite manner that embraces civil, political, economic, social, cultural and environmental rights altogether and respecting, protecting and fulfilling it in practice is essential to enable the Ethiopian People to live a life of dignity.

Keywords: Right to Development, Ethiopian Human Rights System, Full-Belly Thesis, Well-Fed Free Person, Life of Dignity

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I. INTRODUCTION

To begin with, the right to development is not explicitly recognized as a human right in its own sake in the 1948 Universal Declaration of Human Rights (UDHR) and in the twin international human rights covenants – International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). Later on, it is recognized as a human right at the international level in the 1986 UN Declaration on the Right to Development (DRD) and it was re-affirmed in the 1993 Vienna Declaration and Program of Action (VDPA). The gist of the DRD and the re-affirmation of this right by the VDPA is to put an end to the previous binary debate of pursuing development at the expense of freedom ("full-belly thesis" or "Lee thesis") on the one hand, and the insistence on the cause of freedom (civil and political rights) in disregard of the socio-cultural and economic inequalities, on the other.1 Since the right to development, as defined in the DRD and as re-affirmed by the VDPA, embraces all human rights in their entirety, it is applauded by some as "a precondition of liberty, progress, justice and creativity, the alpha and omega of human rights and as the means and the goal of human rights.2 Consequently, the DRD become one of the most reiterated declarations within the United Nations system, second only to the UDHR".3 This right is recognized in the African Charter on Human and Peoples' Rights of 1981 and it is upheld by the decisions of the African Commission on Human and People's Rights (the Commission) as well.4 It is also recognized under article 43 of the Constitution of the Federal Democratic Republic of Ethiopia.

Employing doctrinal legal research method and guided by an interpretivist paradigm, the article undertakes a critical appraisal of the status of the right to development in Ethiopia from the perspective of the DRD and the Banjul Charter. The article is divided into four sections. The first section is devoted to introductory points. The second section elaborates on the genesis of the right to development in the context of international and regional human rights systems. The third section critically appraises the status of this right in the Ethiopian Human Rights System from the perspective of the DRD, the Banjul Charter and the jurisprudence of the African Commission on Human and Peoples' Rights. The fourth section finalizes the article by a way of conclusion and brief recommendations.

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1 The term Lee thesis is named after Lee Kuan Yew, the former Prime Minister of Singapore, who is said to have advocated for the curtailment of civil and political rights or democratic governance as a trade-off for the attainment of economic development. See Carl Henrik Knutsen, Investigating the Lee Thesis: *How Bad is Democracy for Asian Economies?* EUROPEAN POLITICAL SCIENCE REVIEW 1 (2010). Howard also notes that full-belly thesis/Lee thesis, is the position that civil/political liberties can be left in abeyance until basic economic rights are secured is based on a view of human nature which assumes that the individual whose belly is not full has no interest in dignity, self-respect, or personal freedoms. See Rohda E. Howard Hassmann, The Full-Belly *Thesis: Should Economic Rights take Priority over Civil and Political rights? Evidence from Sub-Saharan Africa*, 17 POLITICAL SCIENCE FACULTY PUBLICATIONS, 467, 469 (1983)

2 Jaakko Kuosmanen, Repackaging Human Rights: *On the Justification and Function of the Right to Development,11* JOURNAL OF GLOBAL ETHICS 303, 304(2015)

3 Upendra Baxi, Normative Content of a Treaty as Opposed to the Declaration on the Right to Development. SEE ALSO STEPHEN P. MARKS ED., FRIEDRICH-EBERT-STIFTUNG, MARGINAL OBSERVATIONS, IN IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW, 47 - 48 (2008)

4 African Commission on Human and Peoples' Rights is a treaty body to the Banjul Charter that is mandated with the power of supervising the implementation of the rights recognized therein.

II. THE GENESIS OF THE RIGHT TO DEVELOPMENT AND ITS STATUS UNDER THE INTERNATIONAL AND REGIONAL HUMAN RIGHTS SYSTEM

A. The Right to Development Under the International Human Rights System

The international legal discussions on the right to development emerged from the post Second World War North–South political dialogue on the link between human rights and economic development.[5] Particularly, the genesis of this right has to do with the movement for the establishment of the New International Economic Order (NIEO) that began in the early 1970s and culminated in the adoption of the Declaration on the NIEO by the UN General Assembly in 1975. The NIEO movement was the quest by developing countries for the reconsideration of the existing international economic order in order to be fair enough to consider their development needs as opposed to the existing one which they believed was a manifestation of Neo-Colonialism that exploited them while profoundly benefitting the global North.[6] As Dekker observes, the struggle for the establishment of the NIEO itself finds its ground in the wording of the UDHR, particularly, article 28 which reads "everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized". The idea is that the substantive rights recognized in the UDHR could not be universally realized in an unjust international economic system and this necessitated the NIEO.

The right to development is considered a specifically African Contribution to the international human rights discourse.[7] Keba M'Baye, a Senegalese jurist, is credited with having first propounded this right in 1972 in his lectures at the International Institute of Human Rights in Strasbourg and later getting it formally recognized in Resolution 4 (XXXIII) of February 1977 of the UN Commission on Human Rights (now replaced by the UN Human Rights Council) when he presided over its 33rd session.[8] The adoption of this resolution was a vital initial step in the journey towards the recognition of the right to development as a human right within the international human rights system. The resolution also asked the UN Secretary General to study conditions required for the enjoyment of this right by all peoples and individuals.[9] Following this, various deliberations were made and different reports were presented within the support structures of the UN Human Rights Commission and the UN General Assembly regarding this right. These efforts have yielded a fruit. That is, nine years after the resolution of the Commission, the DRD was adopted by the UN General Assembly on 4 December 1986.[10] The

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[5] Jaakko Kuosmanen, supra note 2, at 304

[6] Arjun Sengupta, *On the Theory and Practice of the Right to Development*, 24 HUMAN RIGHTS QUARTERLY 837, 839 (2002). It has to be noted that as Sengupta was the first person to be appointed by the United Nations as an independent expert on the right to development, his explanations on this right are considered as standard interpretation and they frequently cited and he is generally taken as an authoritative figure in this regard. It is because of this reason that the present article also made a relatively frequent reference to his work.

[7] ISSA G.SHIFJI, THE CONCEPT OF HUMAN RIGHTS IN AFRICA 29 (African Books Collective 2007)

[8] *Id.*

[9] Arjun Sengupta, supra *note 6, at 39-40*

[10] KOEN DE FEYTER, TOWARDS A FRAMEWORK CONVENTION ON THE RIGHT TO DEVELOPMENT, Friedrich-Ebert-Sifting (2013). The DRD was adopted by a majority vote – 146 countries voted for, only one country, the United States, voted against and eight countries abstained). Denmark, Finland, The Federal Republic of Germany,

adoption of the DRD is considered a vital further step in the march towards the solidification of the 'indivisibility' of human rights through the instrumentality of the notion of the right to development.[11] Sengupta explains the significance of the DRD as an attempt to revive the immediate post-Second World War consensus about human rights which was developed by Franklin Delano Roosevelt, former US president, based on four freedoms, including the freedom from want.[12] Sengupta also notes that in the aftermath of World War II, the US position had recognized that political and economic rights were interrelated and interdependent components of human rights and that true individual freedom cannot exist without economic security and independence. However, that consensus over the unity of these rights was broken in the 1950's with the spread of the Cold War and even if the DRD tried to get back to the original conception of integrated and indivisible human rights, it did not imply a consensus or the end of controversy on all the issues.[13]

A consensus or the end of ideological controversy over the unity of all human rights is later achieved by the 1993 VDPA which unequivocally heralded the universality, indivisibility, interrelatedness and interdependence of all human rights. Thus, at least at a normative level, the legacy of the divisive cold war politics on the civil and political rights on the one hand and economic, social and cultural rights on the other, which triggered dissenting vote and abstentions to the recognition of the right to development during the adoption of the DRD, was removed by the VDPA.[14] That is, the VDPA re-affirmed "the right to development", as established in the DRD (in its composite form), as a universal and inalienable right and as an integral part of fundamental human rights and freedoms with a consensus (unanimous) vote of all participants.[15] The recognition (the unanimous re-affirmation of the right to development by the VDPA) is construed as "the world getting back to the mainstream of the human rights movement for the indivisibility and interrelatedness of all human rights from which it was deflected for several decades by the Cold War international politics".[16]

Article 1(1) of the DRD defines the right to development as 'an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized". Article 1(2) of the Declaration extends the definition given under article 1 by providing that "the human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the

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Iceland, Israel, Japan, Sweden, and the United Kingdom abstained. Whereas, Albania, Dominica, South Africa and Vanuatu did not vote.

[11] There is, until now, no binding international treaty on this right. Regarding the controversy on the need to transform the DRD into a binding treaty, see generally Sabine von Schorlemer, 'Normative Content of a Treaty as opposed to a Declaration on the Right to Development: A Commentary', *in* IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW 33 (Stephen P. Marks ed., Friedrich-Ebert-Stiftung 2008)

[12] Arjun Sengupta, *supra note* 6, at 840

[13] *Id.*

[14] Vienna Declaration and Program of Action, adopted at the Second World Conference on Human Rights, 14-15 June 1993, Vienna, at Para. 10

[15] *Id., at* para. 10

[16] Arjun Sengupta, *supra note* 6, at 841

relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources".

Relying on the above definition, Sengupta identifies three principles of the right to development. To put them in his words:

a. there is an inalienable human right that is called the right to development;
b. there is a particular process of economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized; and
c. the right to development is a human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy that particular process of development.

Sengupta elaborates that the first principle affirms the right to development as an inalienable human right and, as such, the right cannot be taken or bargained away. The second principle defines a process of development in terms of the realization of "human rights," which are enumerated in the UDHR and other human rights instruments adopted by UN and regional bodies and the third principle defines the right to that process of development in terms of claims or entitlements of rights holders, which duty bearers must protect and promote.[17] The literature on the right to development and the DRD itself indicate that this right generally has two dimensions – the process dimension and the outcome dimension.[18] Thus, there is a human right both to the process of development and to the outcome of development. The UN High-Level Task Force on the Implementation of the Right to Development also defined this right in a manner that strengthens the definition given in the DRD.[19] Accordingly, the task force defined the right to development as "the right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centered development respectful of *all human rights*". The main point is that the definition of the task force, like that of the DRD, asserts that the right to development is a composite right, not a stand-alone right as it. To make it more clear, the fullness of the right to development rests in respecting, protecting and fulfilling all human rights rather than in the narrow sense of socio-economic well-being.

The right to development, as defined in the DRD, is more than a sum total of all human rights. To put it in Sengupta's words:

> Is there any further "value addition" to the already recognized rights, such as the economic, social, and cultural rights involved in human development, by invoking and exercising the right to development? The question would be legitimate if the right to development was

[17] *Id.*
[18] *Id.*
[19] The task force was established by the UN Human Rights Commission (now UN human Rights Council) in 2004 to give expert recommendation to the Intergovernmental Working Group on the Right to Development on the ways of implementing this right.

> defined merely as the sum total of those rights. Looking at the right to development as a process brings out the value added clearly: it is not merely the realization of those rights individually, but the realization of them together in a manner that takes into account their effects on each other, both at a particular time and over a period of time. Similarly, an improvement in the realization of the right to development implies that the realization of some rights has improved while no other right is violated or has deteriorated.[20]

The recognition of the right to development as a human right goes further than the notion of human development and it takes the principle of *indivisibility* of human rights as a guiding philosophy for the realization of all human rights, more step than the "human development" approach. Here, I employed the notion of 'indivisibility' with a far-reaching implications in the sense it is explained by Roland Burke, who holds the view that *interdependence* implies the enjoyment of economic and social rights relies on the civil and political, and the civil and political are contingent on the enjoyment of the economic and social.[21] It is a model of symmetrical reliance – the absence of one curtails the other while *indivisibility* suggests a stronger species of interdependence, where no right can be decoupled from the others without the catastrophic diminution of all.[22] Thus, the right to development is an integrated development process of all human rights.[23] This sense of understanding overcomes the debate over the prioritization of human rights.

As mentioned earlier, the right to development is said to have a value addition to the already known and relatively well-established notion of human development discourse. To put it in the words of Uvin (as cited in Evans), the human rights and development movement constitutes two communities of principled social change and its 'human rights domain' focused 95% on civil and political rights, while its 'development domain' focused 95% on social, economic and cultural rights."[24] The right to development approach puts an end to such differential attention to human rights and development as it brought them from polar opposites at worst and from interrelatedness at best to an integrated wholeness. Moreover, it is argued, the search for *accountability* leading up to culpability is a genuine value addition of the human rights approach to the fulfilment of human development.[25] This is to mean that unlike the human development approach in which development is not explicitly crafted as a *claim* or an *entitlement* that right holders can assert against certain duty bearer in case the latter fails to discharge its duties, the right to development approach makes this claim normatively possible.

At this juncture, it is worth mentioning how the notion of "development" is understood in the context of the right to development. Among others, Amartya Sen has gone a long way in approaching development from human rights dimension. He defines development from the point

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[20] Arjun Sengupta, *supra note* 6 at 876

[21] Roland Burke, *Confronting Indivisibility in the History of Economic and Social Rights: From Parity to Priority and Back Again,* 12 HUMAN RIGHTS AND HUMAN WELFARE 53, 55 (2012)

[22] *Id.*

[23] Arjun Sengupta, *supra note* 6 at 874

[24] Derek D. Evans, *Human Rights and State Fragility: Conceptual Foundations and Strategic Directions for State Building*,1 1 JOURNAL OF HUMAN RIGHTS PRACTICE 181, 186 (2009)

[25] Arjun Sengupta, supra *note* 4, at 873

of view of what he calls the "capability" approach. In this sense, he defines development as functionings–as things that one can freely be or do.[26] By capability he meant the ability to achieve those functionings. To Sen, a real development is one that enhances the freedom of an individual to live a kind of life that he or she has reason to value. In short, development is not only about bread and other material needs, but about enjoyment of freedom as well.

The second paragraph of the preamble of the DRD defines development as "a comprehensive *economic*, *social*, *cultural* and *political* process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".

The point is that holistic development is the one that enhances all categories of human rights together – civil and political and economic, social and cultural rights by taking their interdependence and indivisibility into account both in its process and outcome. Article 6 (3) of the DRD further strengthens this holistic conceptualization of development by indicating that the failure on the part of the states to observe civil and political rights, as well as economic, social and cultural rights constitutes an obstacle to development. Thus, a state which successfully ensures the economic prosperity, social progress and cultural development of its society cannot be said to have achieved the full development of its people and individuals within the meaning of the DRD if it lags behind in upholding civil rights such as the right to life and the right to liberty and in political rights such as the right to elect and the right to be elected.[27] Sengupta has smartly illuminated on this point while he writes:

> It is possible for individuals to realize several of the rights separately, such as the right to food, the right to education or the right to housing. It is also possible that those rights are realized separately following fully the human rights standards, with transparency and

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[26] Amartya Sen, *Human Rights and Capabilities*, 6 JOURNAL OF HUMAN DEVELOPMENT 151, 157 (2005)

[27] It is important to delineate whether the right to development is one and the same with the right to sustainable development or whether there is substantive difference between them and which one of the two could encompass the other. Indeed, the DRD has no provision speaking of the 'right to sustainable development'. It simply says the "right to development". Literatures indicate that the right to sustainable development has three pillars – economic, social and environmental (ecological) objectives. However, its main focus appears to be on the environmental pillar as its aim is to ensure the development need of the present generation without jeopardizing the need of the future generation to meet their needs – it emphasizes intergenerational equity, as clearly understood from principle 4 of the 1992 Rio Declaration on Environment and Development. In this sense, the right to sustainable development is more focused on the environmental sustainability (wise use of natural resources). Whereas, the "right to development" enhances all dimensions of human rights – civil, political, economic, social and cultural rights to be uphold both in the process and outcome of development in composite manner. Because of the evolution of new rights such as the right to healthy environment that is indicated in Agenda 2030 of the United Nations which sets Sustainable Development Goals (SDGs), the composite right to development under the DRD should, through "evolutive interpretation" (to imitate the "living instrument" doctrine of treaty interpretation developed by the European Court of Human Rights), embrace this evolving right as well. As such, the right to sustainable development could be subsumed under the right to development. Thus, I argue, any explanation that equates the right to development with the right to sustainable development is essentially reductionist. It hides the all-encompassing character of the right to development. On this point, see generally Xigen Wang, 'Implementation of the Right to Sustainable Development: Foundation in Legal Philosophy and Legislative Proposals', in IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT: THE ROLE OF INTERNATIONAL LAW 39-46 (Stephen P. Marks ed., Friedrich-Ebert-Stiftung 2008)

> accountability, in a participatory and non-discriminatory manner, and even with equity and justice. But even then, the right to development may not be realized as a *process* of development if the interrelationships between the different rights are not fully taken into account.[28]

As provided in article 1(1), the DRD vests the right to development both in the individual and groups (peoples). Regarding duty bearers, article 3(1) of the same provides that states have the primary responsibility for the creation of national and international conditions favorable to the realization of the right to development. Article 6(3) of the same re-enforces the responsibility of state in stating that states should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights, as well as economic, social and cultural rights.

Another issue worth noting is the nature of duties that a given duty bearer (primarily the states) have in relation to the right to development. There are three typologies of human rights duties of states.[29] These are the duty to respect, the duty to protect, and the duty to fulfill.[30] Fons Coomans notes that the three level human rights duties of states mentioned above were mainly developed in academic sphere than in human rights instruments, but they are also gaining an increasing popularity and acceptance by states and in the practice of human rights treaty bodies.[31] The idea of distinguishing between various types of obligations rather than between rights (civil and political *versus* economic, social and cultural) has been suggested by Henry Shue.[32]According to Shue, there are three correlative duties of states for every human right. These are the obligation to avoid depriving, the obligation to protect from deprivation, and the obligation to aid the deprived.[33] This concept of typology of human rights duties (as developed by Henry Shue) has been developed further within the framework of a study on the normative content of the right to adequate food by the former United Nations Special Rapporteur on the right to food, Mr. Asbjorn Eide who propounded the duty to respect, the duty to protect and the duty to fulfill.[34] As such, the typology of human rights duties expounded by Eide corresponds to the typology of duties developed by Shue except for the use of words. That is, what Shue identified as the obligation to avoid depriving, the obligation to protect from deprivation and the obligation to aid the deprived corresponds to what Eide identified as the duty to respect, the duty to protect and the duty to fulfil. Fons Coomans indicates that the obligation to promote is not part of the typology of obligations developed by Eide, but it has been suggested by other academic writers.[35] He adds that the United Nations Committee on Economic, Social and Cultural Rights (CESCR) has also used the three typologies of obligations in its General Comments on the right

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[28] Arjun Sengupta, *supra note* 46, at 868

[29] Inter-Parliamentary Union and United Nations Office of the High Commissioner for Human Rights (eds), Human Rights (Inter-parliamentary Union 2016) at .31

[30] *Id.*

[31] Fons Coomans, *The Ogoni Case before the African Commission on Human and Peoples' Rights*, 52 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 749, 752 (2003)

[32] *Id.*

[33] HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY 17-18, Princeton University Press (1980)

[34] Fons Coomans, *supra note* 3, at 52

[35] Fons Coomans, supra note 31, at.753

to food, the right to education and the right to health, and they are also included under section 7(2) of the 1996 Constitution of South Africa which also adds the duty to promote.[36] Indeed, the obligation to promote is recognized in the Banjul Charter as well, even though it does not directly mention the obligation to respect, protect and fulfil.[37] In order to effectively discharge the three typologies of human rights obligations indicated earlier, states are expected to take legislative, administrative, and judicial measures.[38] The point worth making at this juncture is that the obligations of states in relation to the right to development have to be appreciated from the perspective of these typologies of duties even though the DRD does not articulately mention them.

Finally, as there have been evolving human rights since the adoption of the DRD, it is worthwhile to broadly construe the composite nature of the right to development recognized in this Declaration in a way that embraces these evolving rights.[39]

B. The Right to Development Under the Regional Human Rights System: The Case of the African Human Rights System

As previously mentioned, the right to development is considered a specifically African contribution to the international human rights discourse and Keba M'Baye is regarded as the father of this right.[40] The African Charter on Human and Peoples' Rights (ACHPR), also called the Banjul Charter, is the first binding human rights instrument of its kind to explicitly recognize the right to development.[41] The first relevant part of the Charter is paragraph 8 of its preamble which provides:

> Convinced that it is henceforth essential to pay a particular attention to the right to development, and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.[42]

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[36] *Id.*

[37] African Charter on Human and Peoples' Rights, adopted on 27 June 1981 at Nairobi, Kenya and entered into force on 21 October 1986, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 ILM 58 (1982), Art. 25

[38] International Covenant on Economic, Social and Cultural Rights, 1996, article 2

[39] One of such evolving human rights is the right to healthy environment as indicated in the Agenda 2030 which sets out the Sustainable Development Goals.

[40] Issa Shifji, *supra note* 7, at.*29.* It has to be noted that M' Baye played a role not only for the recognition of this right (the right to development) at the international level, but also for its inclusion into the Banjul Charter while he was serving as the Chairperson of the drafting committee of the Charter.

[41] After the Banjul charter, the right to development was recognized in article 37 of the Arab Charter on Human Rights which was adopted in 2004 and entered into force in 2008 under the auspice of the League of Arab States, making it the second treaty document of regional character that explicitly recognized this right in its operative provisions. Indeed, the sixth paragraph of the preamble of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the San Salvador Protocol, has made a passing mention to the right to development. However, the protocol has not explicitly provided this right in its operative provisions unlike in the case of the Banjul Charter and the Arab Charter on Human Rights.

[42] African Charter on Human and Peoples' Rights, *supra note* 37, Preamble, para. 8

Regarding the substantive part of the Charter, article 22(1) provides that "all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind" while sub-article 2 of the same provides that "states shall have the duty, individually or collectively, to ensure the exercise of the right to development".

The manner the Charter recognizes the substantive content of the right to development differs from the manner in which this right is recognized in the DRD in two senses. For one thing, unlike in the case of the DRD which recognizes the right to development as an integrated right that enhances the prevalence of all human rights altogether, the Charter, under article 22 cited above, appears to emphasize economic, social and cultural rights dimension as components of the right to development even if it adds a less strict and overly vague expression that says "due regard be given to the freedom" of the peoples. To put it in the words of Abdi, the Charter seems to recognize the right to development as a stand-alone right rather than as a composite right.[43] For the other, the Charter recognizes the right to development as the right of peoples, that is, as a group right, and it does not make the individual a holder of this right unlike in the case of the DRD and the VDPA which recognize this right both as individual and group right.[44]

The right to development recognized under the Banjul Charter did not remain a dead word. It has been practically upheld by the jurisprudence of the Commission. *In the Center for Minority Rights Development and others v. Kenya* (also known as the *Endorois* case) which it entertained in 2009, the Commission found that the Kenyan government has violated the right to development of a subnational group (people) of the country known as Endorois.[45] Shortly mentioned, the facts of the case and the findings of the Commission are as follows:

> The *Endorois* community – an indigenous pastoral community living around Lake Bogoria were displaced by the government from their ancestral land on which they graze their livestock and performs religious ceremonies. The displacement was for development purpose (wildlife reserve). According to the grievance, the people concerned were not consulted in the development process (formulation of the game reserve project) and they were not paid compensation promised to them and prevented from practicing their religion at their ritual site. Due to the lack of access to the Lake, the salt licks and their usual pasture, the cattle of the Endorois died in large numbers. Consequently, they were not able to pay their taxes and, as a result, the Kenyan Authorities took away more cattle. The

[43] Abdi Jibril, '*The Right to Development in Ethiopia*', *in* 3 *Human Rights And Development: Legal Perspectives From And For Ethiopia* 60-97, EVA BREMS, CHRISTOPHE VAN DER BREKEN, SOLOMON ABAY YEMAR EDS., BRILL NIJHOFF (2015)

[44] However, the Commission, in the *Open Society Justice Initiative v. Cote d'Ivoire* (the *Dioula* Case), in which the group of people called *Dioula* alleged the violations of their rights as a group and as individuals for they were denied of Ivorian nationality, ruled that the right to development in article 22 of the Banjul Charter should be interpreted to include not only peoples' rights, but also individual rights. The commission reasoned that the right to development is essential for individuals to make a "life plan" and for their "self-fulfilment". On this case, see RACHEL MURRAY, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS: A COMMENTARY 523 (Oxford University Press 2019)

[45] Koen De Feyter, *supra note* 10, at 2

> commission found, among others, the violation of article 22 (right to development) of the Banjul Charter.[46]

As Vandenbogaerde notes, the *Endorois* case is viewed as a landmark decision as it was the first time the violation of the right to development was found in a human rights case.[47] Feyter goes further and appreciates the role played by the Commission in the *Endorois* case in interpreting the term "people" that is stipulated in the Charter in a way that renders an expansive meaning to the group right dimension of the right to development. He writes:

> The Commission established a violation of the right to development of a sub-national group. The decision goes beyond the DRD, by placing neither the individual nor the population as a whole, but the survival of an (African) indigenous group at the center of development; it also deals with a dimension of the right to development that is not at the forefront of concerns at the Geneva based intergovernmental debates. The Commission recognizes the need to protect marginalized and vulnerable groups in Africa suffering from particular problems. Groups within this category qualify as peoples in the context of the African Charter, and enjoy collective rights, including the right to development.[48]

Another case in which the right to development of peoples, especially the economic, social and cultural dimension of this right was entertained by the Commission was the *Sudan Human Rights Organization v. Sudan, and the Center for House Rights and Evictions V. Sudan* (the two cases together known as the *Darfur* case).[49] Even though the two cases were communicated to the Commission separately, the Commission joined them and decided upon them as one case because of the similarity of their content.[50] The history of the case is generally as follows. The case arose from the alleged marginalization and underdevelopment of the ''Black African tribes'' (mainly the Fur, Marsalit, and Zaghawa tribes) of Sudan's Western Darfur region by the Sudanese government since Omar Al-Bashir seized power through a *coup d'etat* in 1989. As a result, two armed groups, the Sudanese Liberation Army and the Justice Equality Movement, consisting mainly of Black African tribesmen were formed to resist the oppression. In order to suppress the rebellion, the Sudanese government armed and supported the Janjaweed and Murhaleen militias, made up of members of the nomadic tribes of Arabic origin. Using these militias, the government undertook repressive measures which resulted in gross violation of

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[46] Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya, Communication. No. 276/2003, Decision of Nov. 25/2009 para. 83-84, 125-135. See also, Zelalem Sheferaw, The Right to Development Under the Constitution of the Federal Democratic Republic of Ethiopia: Some Reflections PROLAW Student Journal of Rule of Law for Development 1

[47] Arne Vandenbogaerde, T*he Right to Development in International Human Rights Law: A Call for its Dissolution 32,* NETHERLANDS QUARTERLY OF HUMAN RIGHTS 187, 199 (2013)

[48] Koen De Feyter, supra note 10, at 2

[49] Sudan Human Rights Organization, the Center for House Rights and Evictions V. Sudan Communication No. 279/03, 296/05, decision of May 27 2009. para. 1-8 and para. 10-15. See also, Frans Viljoen, Introductory Note to African Commission on Human and Peoples' Rights: Sudan Human Rights Organization v. Sudan; Centre for House Rights and Evictions V. Sudan 49 International Legal Materials, 1569 (2010)

[50] *Id*.

human rights such as torture, extrajudicial killings and forced evictions. Consequently, thousands have been killed, and more than a million inhabitants of the region have been displaced. The Commission found that the Sudanese government violated many provisions of the Banjul Charter, among which, article 22 which stipulates the right to development of peoples is one.[51]

The *Endorois* and the *Darfur* cases established the justiciability of the right to development in the African Human Rights System. These two jurisprudences have to inform the domestic application of this right in the member states of the Banjul Charter, including Ethiopia.

III. CRYSTALLIZING THE RIGHT TO DEVELOPMENT DISCOURSE INTO THE ETHIOPIAN HUMAN RIGHTS SYSTEM: TOWARDS A FULL-BELLY FREE PERSON

To start with, the right to development is a subject worth studying about in the Ethiopian context. Because, the issue of reconciling the conflicting trends between development endeavors and human rights standards has been a concern for the Third World Countries and Ethiopia is not an exception to this dilemma. Research plays a critical role in reconciling this conflict by informing laws, policies and practices.

According to Rohda Howard, there are two competing paradigms of how civil and political rights on the one hand and economic development on the other interact in the Third World.[52] One is the assertion that development requires significant economic growth and social stability that such growth and stability often require limiting civil and political rights and therefore, development often requires the limitation of civil liberties and political participation to succeed.[53] The second is the view that development requires active participation of people and the fulfilment of basic economic and social needs to be effective and that deprivation of civil and political rights and human needs destroys that possibility, and therefore, failure to provide for human rights and basic needs makes development impossible.[54] In a similar vein, Patnaik observes that there is a problem of reconciling human rights, development and democratization in the Third World Countries; in these countries, the march towards development is accompanied by the greatest casualty in human rights.[55] As it has been made clear in our earlier discussion, the right to development is thought of as a cure to settle the conflict between development endeavour and human rights. That is, the right to development, technically speaking, inseparably combines development and human rights together.

The right to development is recognized under the FDRE Constitution.[56] However, two main issues have to be evaluated at length. The first one is the breadth and the depth of the normative content of this right as recognized in the Constitution. The second one is the extent to which the constitutional stipulations are further elaborated and re-enforced by subsidiary laws (legislative

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[51] *Id*.
[52] Rohda E. Howard Hassmann, *supra* note 2, at 470
[53] *Id*.
[54] *Id*
[55] J. K. Patnaik, Human Rights: The Concept and Perspectives: A Third World View 65 Indiana Journal of Political science 499, 508 (2004)
[56] CONSTITUTION, Proclamation No. 1/1995, FED. NEGARIT GAZETA, 1st Year No.1, 1995 (here after FDRE CONSTITUTION), Art. 43.

measure test), by fundamental development policy and human rights policy guidelines of the country (policy measure test), by judicial decisions (judicial measure test) and by research works of the academic community (being a research subject test). These two main tests, taken together, help to appraise the status of this right in Ethiopia in the light of the DRD, the VDPA and the clarification given on this right by the former UN independent expert on this very right, Dr. Arjun Sengupta, and in the light of the Banjul Charter and the jurisprudence of the African Commission on Human and People's Rights.

To begin from the constitutional test, it is worthwhile to reproduce article 43 of the FDRE Constitution that recognizes the right to development as follows:

1. The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.
2. Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.
3. All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.
4. The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.

The recognition of the right to development under the Constitution is, in and of itself, commendable as it marks the first normative step towards the crystallization of this right in the country's human rights system. However, three general limitations could be discerned in connection with the manner the normative content of this right is stipulated in the Constitution. The first limitation and which is applicable not only to the right to development, but also to other human rights provisions of the Constitution is the manner in which the typology of human rights obligations is provided. In order to better appreciate this limitation, it is worthwhile to keep in mind the typology of human rights duties of states which were discussed earlier with sufficient detail – the duty to respect, the duty to protect and the duty to fulfil. This in turn gives clarity for the right holders to claim their rights against duty bearer – the state without confusion. Coming back to the specific point at hand, the FDRE Constitution stipulates the duties of the state in an inconsistent and inadequate manner. On the one hand, article 43(3) of the Constitution provides the duty to *protect* and *ensure.* This sub-article confines these duties (the duty to protect and ensure) only to the right to sustainable development sub-component among the list of the normative content of the right to development recognized under article 43. In other words, the nature of the duties of the state in relation to the rights recognized under article 43(1), that is, the right to improved living standard and for the right recognized under article 43(2), that is, the right to participate in national development issues, are not provided. On top of that, article 43(3) does not embrace the complete picture of the three typologies of human rights duties of states – the duty to *respect*, *protect* and *fulfil* since the duty to respect and fulfil are not indicated therein.

On the other hand, article 13(1) of the Constitution stipulates that the state has the obligation to *respect* and *enforce* human rights and freedoms. Thus, the obligation to *respect* is directly recognized in this article. It could also be said that the obligation to *enforce* mentioned in article 13(1) could be interpreted in a way that embraces the obligation to *protect* and *fulfil.* By the same logic of interpretation, the duty to *ensure* that is provided in article 43(3) could be interpreted in a way that comprise the duty to *respect* and *fulfil* in addition to the duty to protect which it directly mentions. In this sense, the constitutional limitation in stating the nature of the human rights duty of the state appears merely a matter of expression or usage of words than a loophole. However, I argue, the Constitutional limitation on the nature of the duties of state depicted above is not only semantic. Because, human rights law, like any other discipline, has its own painstakingly established doctrine in many respects. One of such doctrines is related to the typology of human rights duties. Thus, in such instance of well-established catchphrases that have greater implication on the way the state understands its obligations regarding what the right holders expect from it, the Constitution should have matched with the state-of-the-art of stipulating human rights duties by stipulating the duty to respect, protect and fulfil. Given that its contemporaries such as the 1994 Constitution of South Africa explicitly recognize this typology of human rights duties, it is not naïve to question the lack of this stipulation under the FDRE Constitution as it is among the modern Constitutions with elaborate provisions on human rights and freedoms.[57]

The second constitutional limitation is that, unlike in the case of the DRD, the manner in which the normative content of the right to development is stipulated does not embrace the composite nature of this right. The Constitution stipulates the substantive components of the right to development in terms of the right to improved living standards (article 43(1), the right to sustainable development (article 43(1), and the right to participate in development-related activities (article 43(2). As the Constitution does not provide any further clue as to the contents of these rights, we need to interpret it in line with international human rights instruments adopted by Ethiopia since such interpretation is authorized under article 13(2) of the very Constitution.[58] According to Abdi, the right to improved living standard recognized in article 43(1) of the Constitution corresponds to the right to adequate standard of living, such as the right to adequate food, clothing, and housing that is recognized in article 11 of the ICESCR and it also embraces the right to water as further elaborated upon in General Comment no. 25 of the Committee on Economic, Social and Cultural Rights.[59] By similar logic, the right to sustainable development stipulated in article 43(1) of the Constitution has to be interpreted in line with relevant international instruments. According to article 22 of the Banjul Charter (even though it generally refers to the right to development without saying the right to sustainable development), the right

[57] See the Constitution of the Republic of South Africa (1996), article 7(2). It states that the state must respect, protect, promote and fulfill the rights recognized in its Bill of Rights chapter (i.e., in chapter two of the very Constitution).

[58]. FDRE Constitution, *supra note 56,* Article 13(2). It provides that fundamental rights and freedoms specified in this chapter (chapter three of the very constitution) shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia.

[59] Abdi Jibril, *supra note* 43, at 79.

to development involves economic, social and cultural development. So, through article 13(2) of the Constitution and article 22 of the Banjul Charter, the right to sustainable development enshrined in article 43(1) of the same Constitution could be interpreted to embrace the right to economic, social, and cultural development. The problem is that, this interpretation does not embrace the issues of civil and political rights.

The other point is how to interpret the participatory right enshrined in article 43(2) of the Constitution. Taking an insight from the decision of the Inter-American Court of Human Rights in *Saramaka People v. Suriname* case, the Commission found in the *Endorois* case that consultations in the development process have to be undertaken in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.[60] This interpretation of participatory right is a better way to construe the right to participation that is enshrined in article 43(2) of the Constitution. The government is expected to consult the people not for symbolic purpose or as a mere procedural requirement, but to hear their views and to reach at a genuine decision (better outcome) on a case-by-case basis. I argue that the most comprehensive way to interpret the normative content of the right to development stipulated in article 43 of the Constitution is to interpret it in line with article 1(1) and article 1(2) of the DRD that is extensively discussed earlier. This gives the right to development a composite nature so that development endeavour in the country should be undertaken in a way that is respectful of all human rights.

The problem is, even though it is legitimate to claim to fill the gap through interpretation as mentioned above, it could be argued that the constitutional stipulation, as it now stands, does not accommodate the right to development to the degree of the breadth with which it is recognized in the DRD (as re-affirmed in the VDPA) and as elaborated upon by the former United Nations Independent Expert on this right, Arjun Sengupta. That is, the Constitution does not have sufficient guidance as to how all categories of human rights – civil and political and economic, social and cultural rights could be upheld together in an integrated manner in a way that gives pre-eminence to the interdependence and indivisibility of all human rights and in a way the prevalence of one right does not cause deterioration of the other. Given that the Constitution was adopted after the adoption of the DRD and the VDPA that recognize the broader version of the right to development and further given that the Constitution is a post-Cold War Constitution adopted at a time when the ideological antagonism on different categories of rights is relaxed, it is fair to say that it has not gone the distance it should or could have gone in relation to the manner of stipulating the contents of the right to development.

One may argue that the Constitution is a general law so that it is not expected provide such detail on the manner of upholding human rights in an integrated manner. However, this kind of argument is simply refutable for the following reasons. For one thing, providing the issue of indivisibility, interdependence and interrelatedness of human rights is by its very nature not a

[60] *Saramaka People v. Suriname, Inter-American Court of Human Rights* Judgment of November 28, 2007, para. 133. See also *Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community v. Kenya*, Communication. No. 276/2003 para. 289. For comments, see Abdi Jibril, *supra note* 43 at 79

matter of detail, but a matter of general principles. These concepts are general principles that characterize the very essence of human rights. As such, questioning the Constitution for lack of clear indication in this respect is neither a quest for unnecessary detail nor illogical. For the other, upholding all human rights in their entirety is the very defining feature of the right to development as defined in the DRD and as explicated in the authoritative interpretation of the special rapporteur, as discussed earlier. This is what it is meant when the right to development is said to be a composite right. From this point of understanding, any Constitution or other legal document or policy prescription which simply mentions the right to development without indicating its composite nature does not fit into the spirit of the DRD, the VDPA and the standard interpretation given by the special rapporteur.

As already indicated, interpretation is a logical solution to fill the constitutional inadequacy on the content of the right to development in the country. It is also theoretically grounded as in, for instance, Dworkin's interpretative theory of law which considers law and for stronger reason, constitutional law which is too general in nature, as essentially an interpretative process.[61] However, owing to the constitutional interpretation design adopted in the constitution itself, I argue that constitutional interpretation cannot be a realistic guarantee to make the right to development provision congruent to the one recognized in the DRD and VDPA in practical sense. Constitutionally speaking, Article 62 cum Article 84 of the Constitution confer constitutional interpretation power in the political body called the House of Federation (HOF) than in ordinary courts or special constitutional court.[62]

Of course, one may argue that the courts are not deprived of the power to interpret human rights provisions of the Constitution since article 13(1) of the very Constitution provides that all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of chapter three which stipulate human and democratic rights. However, this argument appears to be loose as article 13(1) addresses the general compliance of all organs of states, including the courts, in their day-to-day activities under the normal course of events rather than empowering the courts to undertake constitutional interpretation in case constitutional dispute arise with respect to human rights provisions. In short, the Constitution has not adopted a double standard with respect to the constitutional interpretation mandate – it has not mandated the HoF for interpretation of non-human rights provisions, and the courts for its human rights provisions. As per Article 83(1) of the Constitution, the HoF is mandated to entertain all constitutional disputes; not all constitutional disputes minus human rights disputes. In this context, constitutional disputes simply refer to issues that necessitate constitutional interpretation and these include human rights issues as well. Besides, even though article 13(2) of the Constitution stipulates that the fundamental rights and freedoms specified in chapter three of the very Constitution shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and International instruments adopted by Ethiopia, this does not qualify the scheme of constitutional interpretation power adopted in the

[61] RONALD DWORKIN, A MATTER OF PRINCIPLE 119 (Harvard University Press 1985)
[62] FDRE CONSTITUTION, *supra note* 56, Article 62(1) cumulatively with Article 83 (1) and 83 (2)

Constitution. From the start, article 13(2) is about the manner of interpretation rather than about the organ that is mandated to undertake the task of interpretation. That is, as I argued above, the mandate to uphold article 13(2), which I like to call an *"interpretational conformity"*, in case Constitutional disputes arise is vested in the HoF, rather than in Courts. This is also what Constitutional practice has been indicating as the courts are known for frequently referring constitutional issues to the HoF rather than handling the issues by themselves.[63] As Assefa puts, "the HOF and the Courts that are the primary institutions for enforcing human rights, continue to suffer from lack of clarity in their respective roles".[64]

Therefore, we need to demarcate two striking points. That is, the view that courts are ideal justice institutions to be the guardians of human rights by better interpreting the Constitution is one thing while the view that courts have the power to interpret the constitution is another. At this juncture, it is sufficient to note that the constitutional interpretation design adopted in the Constitution is not conducive enough to uphold an interpretation that dwells on the centrality of human rights. In short, in a country where judicial activism for human rights is nearly invisible and constitutional interpretation is mandated to a political organ, the HoF, a resort to constitutional interpretation remains mainly an academic argument than pragmatic consideration.

The third constitutional limitation is that, perhaps as opposed to the DRD and the VDPA that recognize the right to development as an *inalienable* human right, the placement of the right to development in the section that is given a "democratic rights" brand (articles 29-44) unnecessarily implicates that this right is of a secondary importance unlike the rights incorporated in the "human rights" section of the very Constitution (articles 14-28). Indeed, the categorization of human rights into human and democratic rights in the Constitution has been a subject of criticism by different scholars with the fear that those rights enshrined under the democratic rights category might be given less emphasis.[65]

Apart from the substantive content of the right to development in article 43 of the Constitution, how the right holders are stipulated in this very article has a limitation. Unlike the DRD and the VDPA which generally vest the right to development both in the individual and in a group (people), the Constitution has addressed this issue in an inadequate manner. For instance, article 43(1) bestows the right to improved living standards and the right to sustainable development in the Ethiopian People as a whole and in the Nations, Nationalities and Peoples. As such, it does not guarantee this right for the individual. Whereas, article 43(2) of the Constitution, unlike article 43(1) of the same, vests the right to participate and the right to be consulted in the process of development policies and projects only in individuals without guaranteeing this right for the Ethiopian People as a whole and for the Nations, Nationalities and Peoples of the country. As such, there are inconsistencies and confusions as to the right holders

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[63] See generally Takele Soboka, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory* 19 AFRICAN JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 99-123 (2011)

[64] Assefa Fisseha, 'Development with or without freedom?', *in* REFLECTIONS ON DEVELOPMENT IN ETHIOPIA: NEW TRENDS, SUSTAINABILITY AND CHALLENGES 67, 68 (Dessalegn Rahmato, Meheret Ayenew, Asnake Kefale and Birgit Habermann, eds. FORUM FOR SOCIAL STUDIES 2014)

[65] See Adem Kassie Abebe, *Human Rights under the Ethiopian Constitution: A Descriptive Overview* 5, MIZAN LAW REVIEW 41, 56-57(2011)

of the right to development in the country. The interpretation could be mentioned again as a solution to the inconsistencies and confusions, but owing to the problem of interpretative solution explicated above, it cannot take us a long way in this context as well.

Regarding the second set of test – the extent to which the composite nature of the right to development is nurtured into the Ethiopian development discourse through subsidiary laws (legislative measure test) and through major development plans and the National Human Rights Action Plans of the country (policy measure test) and the extent to which administrative and judicial measures have augmented this right, the article emphasizes macro issues (methodological holism) without going to the micros. To begin with, there is no special law that elaborates on the substantive content and the manner of enforcement of the right to development in its own sake under the Ethiopian human rights system. This is not to implicate that the country needs to enact a separate subsidiary law for every one of the human rights recognized in the Constitution. Rather, it is to mean that as the right to development, as argued earlier, is a composite right that deals with the issue of all human rights or as it is considered the *alpha* and *omega* of human rights (to use Bedjaouis's expression), enacting a separate law for its clarification and implementation is not undeserved. Talking about the right to development as a composite right is talking about every human right.

The other sub-set of the second test, the policy measure test, that is worth mentioning is the Growth and Transformation Plans of the country that were adopted on two phases (under the leadership of the former Ethiopian Peoples' Revolutionary Democratic Front) and their successor, the Ten Years Perspective Plan known as the Pathways to Prosperity (adopted under the leadership of the incumbent Prosperity Party). These are selected for analysis because they are the major development plans from which all other sector policies are deemed to be cascaded. Besides, the National Human Rights Action Plans of the country are also taken as a unit of analysis of the status of the discourse on the right to development in the country as part of a policy measure test. It has to be noted that Ethiopia prepared the National Human Rights Action Plans as part of a compliance with part II paragraph 71 of the VDPA which provides that "the World Conference on Human Rights recommends that each state consider the desirability of drawing up a national action plan identifying steps whereby that state would improve the promotion and protection of human rights".[66] Thus, the article considers the National Human Rights Action Plans of the country as the human rights policy counterpart of the Growth and Transformation Plans and the Ten Years Perspective Plan, which are essentially economic growth plans. However, it has to be understood from the start that the GTPs and the National Human Rights Action Plans were not mutually exclusive. Indeed, the National Human Rights Action Plans themselves made cross references to the GTPs.

The first Growth and Transformation Plan (GTP I) was adopted in 2010 and it was in force until 2014/2015.[67] The second Growth and Transformation Plan (GTP II) was adopted in 2015

[66] The first National Human Rights Action Plan in the history of Ethiopia was adopted in June 2013. The document itself speaks that it is adopted in pursuance of the VDPA.

[67] The first Growth and Transformation Plan of the Federal Democratic Republic of Ethiopia (GTP I – 2010/11-2014/15)

and it was supposed to remain in force until 2019/2020.[68] It is essential to state key parts of the policies for better understanding. As stated in the document itself, the objective of GTPI was to maintain at least an average real GDP growth rate of 11% and attain the Millennium Development Goals (MDGs), to expand and ensure the qualities of education and health services and achieve MDGs in the social sector, to establish suitable conditions for sustainable nation building through the creation of a stable democratic and developmental state and to ensure the sustainability of growth by realizing all the above objectives within a stable macroeconomic framework.[69] To put it in a short and clear manner, the emphasis of the GTPI was economic growth and democratic and developmental state building. Realization of civil and political rights were lacking from the objectives. Even though democracy was mentioned in the objective section, it was not as such promising as it was essentially attached together with the notion of developmental state which is believed by many observers as an antithesis to democracy as the practice of the East Asian Tigers (the stronghold of developmental state ideology) indicates. In this sense, the "democratic developmental state" ideology that has been propounded by Ethiopia was an oxymoron. That is, "democracy" and "developmental state" building can hardly go together. The objective of GTP II was also similar with that of the GTPI. As stated on page 80 of the GTP II document, its objective is an extension of the objective of GTPI. Accordingly, the document states that "the overarching objective of GTP II is to sustain the accelerated growth and establish a springboard for economic structural transformation and thereby realizing the national vision of becoming a lower middle-income country by 2025".

As indicated by Meheret Ayenew, the plan was guided by developmental state approach with a singular focus on economic growth, but one that will have to delay the process of political democratization in the interest of fast-track economic transformation.[70]

In a similar vein, Assefa observes that "based on the East Asian experience with developmental state and the way it is emulated by the ruling party, the Ethiopian Peoples' Revolutionary Democratic Front (EPRDF), the key argument is that the ideological shift towards the "developmental state" gives priority to the socioeconomic sector than civil rights and political freedoms in spite of the fact that the Constitution places equal weight on all generations of rights.[71] In short, the general policy stance of the then EPRDF regime in general and the manner the GTPs were framed in particular do not embrace the composite nature of the right to development viewed from the perspective of the DRD and the VDPA and the interpretation of the UN independent expert on this right.

Indeed, as the 'reformist government' took power in April 2018, two years ahead of the expiry of the GTP II, it was even dubious whether the reformist government had strictly adhered to this national plan or whether it had given it a relegated status or discarded it ahead of its

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[68] Ministry of Finance and Economic Development, The Second Growth and Transformation Plan of the Federal Democratic Republic of Ethiopia (GTP II –2015/16-2019/20).

[69] The first Growth and Transformation Plan, *supra note* 67, at 22

[70] Meheret Ayenew, 'The Growth and Transformation Plan: Opportunities, Challenges and Lessons', *in* REFLECTIONS ON DEVELOPMENT OIN ETHIOPIA: NEW TRENDS, SUSTAINABILITY AND CHALLENGES 3- 4 (Dessalegn Rahmato, Meheret Ayenew, Asnake Kefale and Birgit Habermann, eds. FORUM FOR SOCIAL STUDIES 2014)

[71] Assefa Fisseha, *supra note* 64, at 68

expiry date. At this time, the Abiy administration has announced that it has prepared a ten years perspective development plan known as the pathways to prosperity for 2021-2030 GC with the aim of making Ethiopia a beacon of African Prosperity. This plan prioritizes areas of the economy such as the mining sector, tourism sector, innovation and technology sector and energy sector.[72] The general approach of the plan is increasing economic growth (GDP) even though it has some indications on the participatory rights of citizens, gender equality, and justice.[73] However, given the existing political turmoil and the ongoing civil war which seemed to have put the emphasis of the new government on security concerns and survival issues, one cannot, as of writing, realistically show a full-fledged picture of the stand of this reformist government on how it conceptualizes the right to development and how it intends to put it into practice in the coming one decade of the perspective development plan.

With respect to the two National Human Rights Action Plans of the country, they had separate sections dealing with the right to development in its own sake. This was commendable in the process of nurturing the discourse on the right to development in the country's human rights system.[74] The plans had made at least two conceptual progresses in relation to this right. First, they had indicated the nature of duties of the government. As such, they had clearly put that the government has the duty to respect, protect and fulfil the right to development.[75] Second, the plans had given recognition to the DRD as a normative framework on the right to development. Arguably, this implies that the government accepts the composite nature of the right to development recognized in the DRD at human rights policy level. Thus, the plans had added value in the process of clarifying and concretizing the right to development in as much as they did in other rights. However, as mentioned earlier, because of the developmental state policy orientation of the then EPRDF regime which gave primacy to economic growth in terms of an increase in GDP and owing to the then political turmoil (which also continued under the Prosperity Party Government), there was no much practical progress in upholding the right to development even though there was relative economic success. Besides, even though the second National Human Rights Action Plan expired in 2020, there is, heretofore, no official information as to the preparation of another national human rights action plan in the country.

As the administrative effort had usually been the replica of the general policy direction of the country that gave prime importance to economic growth than the holistic components of the right to development, one cannot expect an adequate administrative effort to have been undertaken to realize the right to development in its composite nature. To use John Abbink's expression, development under the EPRDF rule has been construed in its classic economic sense, that is, in terms of GDP growth and not in those of well-being, or democratic performance, or

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[72] Federal Democratic Republic of Ethiopia, Planning and Development Commission, *Ten years perspective development plan: A pathways to prosperity* (2021-2030 G.C), pages 39-49

[73] *Id.*, at 64-68

[74] See The First National Human Rights Action Plan of the Federal Democratic Republic of Ethiopia (2013-2015), pages 176-183. See also the second National Human Rights Action Plan of the Federal Democratic Republic of Ethiopia (2016-2020), prepared under the auspice of the then Office of the National Human Rights Action Plan of the Federal Attorney General, Pages 173-181

[75] *Id.*, at 176

human rights respect.[76] In simple terms, it is said that EPRDF's ideological commitment to revolutionary democracy, a doctrine of top-down governance, has undermined the country's democratic institutions and subordinated human rights to economic development.[77] Even though there have been some economic progress under the EPRDF administration, civil and political rights were severely deteriorated.

The other subset of the second test is whether Ethiopia had or had not taken an adequate judicial measure for the realization of the right to development. As Zelalem rightly observes, the existing constitutional ambiguity on the power of courts to directly apply constitutional provisions has created a setback to the possibility of human rights litigation in general and the right to development litigation in particular.[78] The truth is that there is, thus far, no direct judicial pronouncement on the right to development in the country. As such, the justiciability of this right is not practically demonstrated even though all human rights recognized under the Constitution, including the right to development, could be claimed justiciable pursuant to article 13 (1) and article 37(2)(b) of the FDRE very constitution.[79] An independent but related issue is that as the country has not yet recognized public interest litigation except in the case of environmental issues, this could be raised as one obstacle to bring the right to development to courts or to the HOF through human rights NGO's and individual human rights defenders.[80] Even though the Constitution recognizes public interest litigation pursuant to article 37(2) (b) cited above, the Civil Procedure Code of the country which regulates procedural issues of civil litigation requires the plaintiff to show vested interest.[81] Besides, the practice of *amicus curiae* is not known in the

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[76] John Abbink, *Ethnic-based Federalism and Ethnicity in Ethiopia: Re-assessing the Experiment after 20 years 5* JOURNAL OF EASTERN AFRICAN STUDIES 596, 612 (2011)

[77] Jennie Boulerice and Catherine Di Santo, *Emily Madden, Brie Richardson, and Gabriela Sala, Divide, Develop, and Rule: Human Rights Violations in Ethiopia* (Un published Student's Practicum Report, Centre for International Human rights law and Advocacy of University of Wyoming (2018), pp. 4

[78] Zelalem Sheferaw, supra note 46, at 16

[79] Article 13 (1) of the Constitution reads that all the 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 (chapter three of the very Constitution) – the bill of rights chapter that goes from article 13 through articles 44). Whereas, article 37 (1) of the Constitution reads that everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power. Even though the term "justiciable matter" is not defined in the constitution, the practice of the African Commission indicates that the right to development is justiciable. As Ethiopia is state party to the Banjul Charter, this treaty becomes part and parcel of the law of the country pursuant to article 9(1) of the same Constitution. As such, the decision of the commission has to inform Ethiopia's domestic practice on the justiciability of the right to development. However, owing to the impediments mentioned in this article, this is not practically demonstrated so far.

[80] See Environmental Pollution Control Proclamation, Proclamation No.300/2002, FED. NEGARIT GAZETA, 9th Year No. 12, Addis Ababa, 3rd December 2002, Article 11(1) and 11(2) Article 11(1) stipulates that 'any person shall have, without the need to show any vested interest, the right to lodge a complaint at the Authority or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment. Article 11(2) stipulates that when the Authority or regional environmental agency fails to give a decision within thirty days or when the person who has lodged the complaint is dissatisfied with the decision, he may institute a court case with in sixty days from the date the decision was given or the deadline for decision has elapsed.

[81] FDRE CONSTITUTION, *supra note 56*, article 37 (2) (b). It provides that any group or person who is a member of, or represents a group with similar interests to seek a decision or judgment on justiciable matter. Whereas, CIVIL PROCEDURE CODE of the Empire of Ethiopia, NEGARIT GAZETA, Extra-ordinary issue No.3 , Addis Ababa 1965 Article 33 (2) provides that no person may be a plaintiff unless he has a vested interest in the subject-matter of the

country's adjudication system even though it was publicly and formally practiced for the first time during the constitutional interpretation issue that was entertained by the Council of Constitutional Inquiry and the HOF in 2020 regarding the postponement of the sixth general election.[82] In other countries such as Kenya, *amicus curiae* play a crucial role in presenting key arguments on human rights issues in courts.[83] This practice is yet to be developed in Ethiopia.

The last unit of analysis adopted in this article to evaluate the status of the right to development discourse in the country is how far this right has received an attention in academic research. Even though there are few publications in this regard, there is much to be done to crystallize this right in the country's human rights system.[84] It is a relatively under-researched area. Moreover, those available studies simply describe the constitutional provision and some practical impediments than boldly asserting for a transformative paradigm that upholds the composite nature of this right in the country more than as a mere stand-alone right. This article is an attempt to fill this gap by arguing for this transformative stand.

Based on the above analysis, I argue that even though there is a positive beginning in normative and policy framework, the right to development discourse has not yet taken a stronghold in the country's human rights system to the degree of the depth and breadth with which it is recognized in the DRD and the VDPA and as elaborated upon by the UN independent expert on this right. Strictly speaking, the progress has not gone beyond the human development approach. As indicated earlier, authors differentiate between the human development and the right to development even though these two notions fundamentally overlap. According to Sengupta, the right to development builds upon the notion of human development and can be described as the right to human development, defined as a development process that expands substantive freedoms and thereby realizes all human rights, but when human development is claimed as a human right, it becomes a qualitatively different approach; it is not just achieving the objectives of development, but also the way they are achieved that becomes essential to the process.[85] The objective is fulfilling human rights and the process of achieving this is also a

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suit. As the constitution is a general law, it requires special law for its implementation. Taking the environmental proclamation as an example and enacting a new law that authorizes individuals or groups to bring human rights cases before adjudicatory organs without the need to show vested interest is vital.

[82] See generally Negese Gela, *Participation of Amicus Curiae in the Ethiopian Constitutional Interpretation Process: Constitutional-Legal Basis and Practical Ramifications,* 11 OROMIA LAW JOURNAL 1 - 42 (2022)

[83]See generally Christopher Kerkering and Christopher Mbazira (eds), Friends of the Court and the 2010 Constitution: *The Kenyan Experience and Comparative State Practice on Amicus Curiae*, KENYAN JUDICIAL TRAINING INSTITUTE (2017). See also the Constitution of Kenya, 2010, Article 22 (3) (e), available at www.kenyalaw.org, last accessed on 10th May 2022

[84] Some publicly available publications regarding the right to development in Ethiopia are: Abdi Jibril, 'THE RIGHT TO DEVELOPMENT IN ETHIOPIA', *IN* 3 HUMAN RIGHTS AND DEVELOPMENT: LEGAL PERSPECTIVES FROM AND FOR ETHIOPIA 60-97 (Eva Brems, Christophe Van Der Breken, Solomon Abay Yemar eds., Brill Nijhoff 2015), Assefa Fisseha, Assefa Fisseha, 'Development with or without freedom?', *in* REFLECTIONS ON DEVELOPMENT OIN ETHIOPIA: NEW TRENDS, SUSTAINABILITY AND CHALLENGES 67-97 (Dessalegn Rahmato, Meheret Ayenew, Asnake Kefale and Birgit Habermann , eds. Forum for Social Studies 2014) ,Zelalem Shiferaw, The Right to Development Under the Constitution of the Federal Democratic Republic of Ethiopia: Some Reflections, PRO LAW STUDENT JOURNAL OF RULE OF LAW FOR DEVELOPMENT 1-20

[85] Arjun Sengupta, *supra note* 6, at 851

human right and this signifies that the human development approach is subsumed under the notion of the right to development. [86]

Sengupta further notes that the UN Human Development Report of 2000 itself speaks that although *human development thinking* insisted on the importance of the *process* of development, it has traditionally focused on the *outcomes* in a way that is not sensitive to how those outcomes were brought about.[87] Whereas, the *"Human Rights thinking"* is essentially concerned with not only the nature of those outcomes, which are the objects of claim, but how those outcomes are brought about.[88]

From all the above analysis, what is crystal clear is that neither the old Western liberal view of human rights that considers development as a mere policy aspiration than as a claimable human right nor the so-called alternative development paradigm of East Asian nations that Howard explains as a "full-belly-thesis" could solve the conflict between development on the one hand and human rights protection on the other in the Ethiopian context. The best and sustainable option is integrating development with human rights by upholding the right to development.

IV. CONCLUSION AND RECOMMENDATIONS

Recognition of the right to development under the FDRE Constitution is commendable as the first normative step in the process of nurturing this right into the country's human rights system. The inclusion of some elements of the right to development such as economic matters, health matters and popular participation matters into the previous GTPs of the country also counts as a positive policy measure. However, the inadequacy of the manner the Constitution stipulates the nature of human rights duties of the government, the manner the substantive content of the right to development is stipulated in the very Constitution and the categorization of this right as democratic right than as a human right could be mentioned as limitations. Moreover, the justiciability of this right in the country is not yet practically demonstrated even though it seems to be constitutionally defensible. The adherence to developmental state ideology and confusing revolutionary democracy has also hampered the realization of this right during the EPRDF era. Thus, the EPRDF regime appeared to have chosen the first of the two conflicting paradigms with respect to the friction between "development" and "human rights" that characterize Third World countries, that is, it has given priority to economic development over civil and political rights. In short, it adopted the "full-belly" thesis or "Lee thesis". Even though the current reformist government of the Prosperity Party has officially denounced the developmental state ideology and pledged to uphold democratic governance and human rights, it is premature at the time of writing in order to make an objective and comprehensive assessment of the stand of this new regime with respect to the right to development as the regime is in political trouble including the ongoing civil war and the sporadic security concerns here and

[86] *Id*., at 851-852
[87] *Id*.
[88] *Id*.

there. The general truth, at the moment, is that the right to development discourse has not yet taken a stronghold in the country's human rights system.

However, as indicated in the earlier discussion, a dignified existence requires both to be well-fed and to be free – hence, the phrase "well-fed free person". Therefore, crystallizing the right to development discourse into the Ethiopian human rights system in its composite form has a far-reaching benefit over the full-belly-thesis. It reduces the conflict between development endeavours and human rights protection and enables the Ethiopian people both to fill their belly and to be free – it leads towards a full-belly free person living with dignity.

Based on the above conclusion, the article recommends that if the Constitution undergoes an amendment, article 43 should be amended in a way that articulate the right to development in a manner that matches with the stipulation of the DRD, the VDPA and the standard interpretation given on this right by the UN independent expert and by the High-Level Task force on the implementation of this right. Until such amendment comes to reality, the country should adopt a subsidiary law which offers further elaboration on the normative content and implementation scheme of this right. The prospective legislation should strongly indicate the nature of duties of the government and other entities both in the process of development and in relation to its outcome. In this case, the Constitution of South Africa gives a good lesson in the manner of stipulating the typology of human rights duties. Furthermore, the law should have a clear avenue for judicial enforcement of the right to development so that the right to development will truly be crystallized into the human rights system not as a mere policy aspiration, but as an inalienable and justiciable human right which can be directly claimable by individuals or groups against the government. In this regard, the country should take a lesson from the African Commission on Human and Peoples' Rights decisions such as the *Endorois* and the *Darfur* cases in order to practically prove the justiciability of the right to development. The country should also recognize public interest litigation (*actio popularis)* with respect to the right to development as it has already done in relation to environmental rights issues. Further, the government should recognize the participation of *amicus curiae* in litigations in which the right to development is at stake by drawing insight from the participation of *amicus curiae* in the constitutional interpretation case of the country which was entertained by the Council of Constitutional Inquiry and the House of Federation with respect to the postponement of the sixth general election in 2020. Besides, the government should explicitly incorporate the right to development in its major development policies in a way that describes the composite nature of this right as this will have a positive impact in nurturing this right in all sector policies that are cascaded from the major policy. Moreover, the government should adopt a third national human rights action plan in a way that explicitly addresses the right to development as it was the case in the two previous national human rights action plans. The new action plan should explain the right to development in a composite manner in a way that fits with the DRD and the VDPA.

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