

## The right to sustainable development in article 43(3) of the Ethiopian Constitution

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**Summary:** *Article 43(3) of the Constitution of the Federal Democratic Republic of Ethiopia provides that all international agreements concluded by the country shall respect Ethiopia's right to sustainable development. The concept of the 'right to sustainable development' contained in this provision is somewhat unclear. Issues such as the right holders and duty bearers, justiciability and binding nature of this right require clarification in order to effectively enforce it. This article argues that both the state and its people, but not individuals, are the right holders of this right. Under the Constitution the state is the duty bearer of fundamental human rights and freedoms, which include the right to sustainable development. It is the duty of the government to ensure that all international agreements adopted by Ethiopia respect the country's right to sustainable development. Although this right is contained in the Constitution as a goal and group right which does not impose a binding obligation to be enforced by courts, the state should take steps to progressively realise the right by adopting international agreements that incorporate the economic, social and environmental objectives of sustainable development in a balanced manner. In general, the government has a 'soft constitutional obligation' to respect and enforce the right to sustainable development stipulated in article 43(3)*

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*in order to protect development-related national interests, ensure legal certainty and consistency, and avoid indirect foreign interference which may occur under the disguise of international agreements and cooperation.*

**Key words:** *Federal Republic of Ethiopian Constitution; group rights; justiciability; right holders and duty bearers; right to sustainable development*

## 1 Introduction

The main objective of this article is to examine the concept of ‘the right to sustainable development’ contained in article 43(3) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution) as the term requires some clarification for effective implementation, and the issue of sustainability is becoming increasingly important for Ethiopia and today’s world at large.

The FDRE Constitution has addressed the issue of sustainable development in many respects and requires the government to formulate policies that enable the country to take into account economic, social and environmental concerns when embarking upon any developmental projects. Article 43(1) of the Constitution stipulates that ‘the People of Ethiopia as a whole ... have the right to improved living standards and to sustainable development’. It further stipulates in article 43(3), which is the focus of this work, that all international agreements concluded by the country shall respect and ensure Ethiopia’s right to sustainable development. Elias argues that one can question the constitutionality of a given international agreement if it does not protect and ensure Ethiopia’s right to sustainable development.<sup>1</sup>

The right to sustainable development is contained in the Constitution as a sub-set or one element of the right to development. Like the right to development, the right to sustainable development is guaranteed in the Constitution as a fundamental right, particularly as a democratic right. One can understand this by looking at the content and categorisation of human rights provisions of the Constitution, which places the right to sustainable development under chapter three. This right is a group right and like the right

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<sup>1</sup> E Nour ‘The investment promotion and environment protection balance in Ethiopia’s floriculture: The legal regime and global value chain’ PhD thesis, University of Warwick, 2012 101.

to development and economic, social and cultural rights, the state is required to progressively realise the right, taking into account its resource capacity or level of development since it is not fully integrated into current international law.

One may wonder what the similarities and differences are between the right to development and the right to sustainable development. Their differences may be articulated in two major areas. First, the scope of the right to development is limited to actual individuals and peoples, while the right to sustainable development includes both current and future generations. Second, the right to development mainly comprises economic, social, cultural and political aspects of development, whereas the right to sustainable development concerns on the integration of environmental concern into development.<sup>2</sup>

Unlike the wealth of literature dealing with the right to development and the general concept of sustainable development, published works focusing on the right to sustainable development are scant. This work attempts to add an original voice by critically discussing and analysing the concept of the right to sustainable development.

Overall, this article examines whether the right to sustainable development is a binding and justiciable right, and an individual or group right. It is also worth examining whether the concept of sustainable development contained in the Ethiopian Constitution is similar to the international: Does it reflect the economic, social and environmental pillars in a balanced way?

The article comprises three main parts. Part 1 discusses the conceptual and legal frameworks of the right to development, which is an important term that gives a background concept for the right to sustainable development. Part 2 discusses the concept and components of sustainable development contained in the FDRE Constitution. The third part critically analysis the conception of the right to sustainable development focusing on issues such as the nature and type, duty bearers and right holders, and justiciability of this right. Finally, the article ends with concluding remarks.

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2 J Gupta & K Arts 'Achieving the 1.5°C objective: Just implementation through a right to (sustainable) development approach' (2018) 18 *International Environmental Agreements: Politics, Law and Economics* 19.

## 2 Conceptual and legal frameworks of the right to development

It is imperative to start the discussion of the article with the right to development as it gives some background points on the right to sustainable development.

Internationally there is disagreement on the definition, content and legal status of the right to development, especially after the adoption of the United Nations (UN) Declaration on the Right to Development (DRD) in 1986. However, this does not mean that its concept was first introduced during this time or in the DRD. M'baye, a Senegalese jurist, was the first person to introduce the right to development in 1972.<sup>3</sup> He asserts that '[t]o comprehend true development, the idea of a real improvement in living standards must be taken into account; it is not a longer life for every person that matters but a better life'.<sup>4</sup> He also attempts to illustrate that the right to development is a universal right.<sup>5</sup>

There are different definitions of the 'right to development' given by different commentators and scholars. Nonetheless, the definition provided in DRD is the well-known and commonly cited one. The Declaration provides in article 1 that '[t]he right to development is an inalienable human right by virtue of which every human person and all people are entitled to participate in and contribute to and enjoy economic and political development in which all human rights and fundamental freedoms can be fully materialised'.<sup>6</sup>

Three main principles may be derived from this definition as articulated by Sengupta, the former UN Independent Expert on the Right to Development. These are that (i) the right to development is a fundamental human right; (ii) there is a specific process of economic, social, cultural and political development that is favourable to the recognition of human rights; and (iii) everyone is entitled to participate, contribute and enjoy the specific process of development.<sup>7</sup>

3 J Donnelly 'In search of the unicorn: The jurisprudence and politics of the right to development' (1985) 15 *California Western International Law Journal* 474.

4 M Belachew 'The politics underpinning the non-realisation of the right to development' (2011) 5 *Mizan Law Review* 252.

5 Donnelly (n 3).

6 Art 1 UN Declaration on the Right to Development (DRD).

7 A Sengupta 'On the theory and practice of the right to development' (2002) 24 *Human Rights Quarterly* 846.

Since the adoption of the DRD, the right to development has been arousing legal and political controversies. Generally, it is criticised for being vague, contradictory, ideological and over-ambitious.<sup>8</sup> Bedjaoui argues that the right to development is 'the alpha and omega of human rights, the first and the last human right, the beginning and the end, the means and the goal of human rights; in short, it is the core right from which all the others stem'.<sup>9</sup> Marks, on the other hand, argues that the right to development contained in the DRD is not based on the well-known theories of justice, but is rather framed through political negotiation.<sup>10</sup>

Despite its controversial status, the right to development has been incorporated in different multilateral and regional instruments, especially since the adoption of the Vienna Declaration and Programme of Action, which describes the right to development as an essential component of fundamental human rights.<sup>11</sup> The first agreement was reached between states on the concept of the right to development at the Vienna World Conference on Human Rights in 1993 which led to the adoption of the Vienna Declaration and Programme of Action.<sup>12</sup>

Even if it is contained in several multilateral and regional instruments, the right to development is binding only according to the African Charter on Human and Peoples' Rights (African Charter)<sup>13</sup> and the Arab Charter on Human Rights.<sup>14</sup> Its legal status is either controversial or clearly provided as a non-binding right in the other multilateral and regional agreements. The African Charter in article 22(2) imposes a duty on state parties to ensure the enjoyment of the right to development individually or collectively.<sup>15</sup> Here, a question arises as to how the right to development is enforced or violated. The African Charter contains no specific provision in this regard but, in general, state parties have the duty to realise the rights provided for in the Charter.<sup>16</sup> As far as the right to development is concerned, the African Commission on Human and Peoples' Rights (African Commission) has specified how the right may be violated. The

8 J Kuosmanen 'Repackaging human rights: On the justification and the function of the right to development' (2015) 11 *Journal of Global Ethics* 303.

9 M Bedjaoui 'The right to development' in M Bedjaoui (ed) *International law: Achievements and prospects* (1991) 1177.

10 S Marks 'Obligations to implement the right to development' in B Andreassen & S Marks (eds) *Development as human right* (2006) 62.

11 Vienna Declaration and Programme of Action (1993) (VDPA) para 10.

12 As above.

13 A Kwame 'The justiciability of the right to development in Ghana: Mirage or possibility' (2016) 1 *Strathmore Law Review* 86.

14 Art 37 Arab Charter on Human Rights.

15 Art 22(2) African Charter.

16 Art 1 African Charter.

African Commission in the *Endorois* case expressed the view that the 'right to development is violated when the development in question decreases the well-being of the community'.<sup>17</sup> This mainly concerns developmental projects that may affect the local community.

Moreover, the right to development is also explicitly or implicitly contained in the Rio Declaration, the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Monterrey Consensus, the World Summit Outcome Document, the Declaration on the Rights of Indigenous Peoples, and the Arab Charter on Human Rights.<sup>18</sup> For example, the Rio Declaration provides that the right to development should be achieved in order to fairly meet the interests of current and future generations.<sup>19</sup>

Different international initiatives also adopted a rights-based approach to development. For example, the 2030 Agenda for Sustainable Development reaffirms the DRD and states that '[t]he new Agenda recognises the need to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development)'.<sup>20</sup> The incorporation of the right to development in the 2030 Agenda has re-activated the discussion on the right and its importance with regard to the new Sustainable Development Goals (SDGs).<sup>21</sup>

At the national level there is a provision dealing with the right to development in the FDRE Constitution, but the right is defined in neither the Constitution nor in any other domestic laws. It is guaranteed in the Constitution as a fundamental democratic right similar to the right of thought, opinion and expression, freedom of movement, the right to property, the right to labour, freedom of association and economic, social and cultural rights.

Under the heading 'The Right to Development' article 43 of the FDRE Constitution provides:<sup>22</sup>

17 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 294 (*Endorois* case).

18 UN Human Rights Office of the High Commission 'The right to development at a glance', [http://www.un.org/en/events/righttodevelopment/pdf/rtd\\_at\\_a\\_glance.pdf](http://www.un.org/en/events/righttodevelopment/pdf/rtd_at_a_glance.pdf) (accessed 5 October 2018).

19 Rio Declaration on Environment and Development (Rio Declaration) Principle 3.  
20 UN General Assembly 'Transforming our world: The 2030 Agenda for Sustainable Development' (2015) para 35.

21 Kuosmanen (n 8).

22 The Constitution of Federal Democratic Republic of Ethiopia, 1995 (as set out in art 43 of *Federal Negarit Gazeta*, Extraordinary issue, Proc 1, 1st year, No 1 9 (FDRE Constitution)).

- (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 ensure respect for 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.

Four main elements may be derived from this provision to precisely articulate the concept of the right to development under the Constitution. These are (i) the right to improved living standards; (ii) the right to sustainable development; (iii) the right to participate in the national development decision making; and (iv) that development should boost the capacity of citizens and meet their basic needs. As will be discussed in detail in the next parts, the central issue of this work is derived from the second element or sub-article (3) of the above provision.

The scope of the right to development in the Constitution seems to be broad. It covers different issues that may be difficult to implement altogether to ultimately realise the right in its full sense.<sup>23</sup> To solve this potential difficulty, especially in order to determine whether or not the right has been violated, it is suggested that its scope should be construed narrowly during implementation by interpreting it in light of the African Commission's decision in *Endorois*. This kind of reference to international instruments has a constitutional base as stated in article 13(2) of the FDRE Constitution. This provision stipulates that the fundamental rights and freedoms mentioned in chapter three, which includes article 43, shall be interpreted in a way that conforms to the principles of the international human rights and other instruments adopted by Ethiopia.<sup>24</sup> Arriving at the issue at hand, the African Commission expressed the view that the right to development is violated 'when the development in question decreases the well-being of the community'.<sup>25</sup> The Commission further stated that the failure to ensure a reasonable share from development projects also constitutes a violation of the right to

23 Z Woldemichael 'The right to development under the Constitution of the Federal Democratic Republic of Ethiopia: Some reflections' (2015) 4 *PROLAW Student Journal of Rule of Law for Development* 9.

24 Art 13(2) FDRE Constitution.

25 *Endorois* case (n 17) para 294.

development.<sup>26</sup> For example, the living standard or well-being of the local community may be diminished after they have been displaced for the purpose of investment projects without or with insufficient compensation. In this example, based on the African Commission's interpretation, the Ethiopian government has violated its duty to respect or protect the right to development because of its action or inaction in the investment project concerned. Elias asserts that '[t]he right to development enshrined in the Ethiopian Constitution thus envisages not only "*Bills of Rights*" but also "*Bills of Responsibilities*" of individuals, investment projects, neighbourhoods, communities and the state'.<sup>27</sup>

Despite its potential difficulty for implementation due to its broadness, the incorporation of the right to development at a constitutional level has a significant value for Ethiopian people as development is a significant issue that needs to be guaranteed by law in a manner that obliges the government to respect, protect and fulfil it. The Constitution should be appreciated and may be considered an advanced document with respect to this specific issue. One reason for the domestication of the right to development might be to ease the enforcement of such a right provided for in the African Charter, which is a binding treaty that requires states to enforce the provisions of the Charter through all available means including legislative measures.<sup>28</sup>

### 3 General concept of sustainable development under the FDRE Constitution

At the international level, sustainable development is defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.<sup>29</sup> The concept of sustainable development should contain and balance the economic, social, and environmental objectives – known as the three pillars of sustainable development.<sup>30</sup> In general, the integration and interdependence of those three pillars are considered a standard of sustainable development. This means that sustainable development cannot exist if one of these pillars is

26 *Endorois case* (n 17) para 224.

27 *Nour* (n 1) 99.

28 Art 1 African Charter.

29 UN 'Report of the World Commission on Environment and Development: Our Common Future' (UN Doc A/42/427 1987).

30 Johannesburg Declaration on Sustainable Development 'Report of the World Summit on Sustainable Development' Johannesburg, South Africa, 2002; N Schrijver *The evolution of sustainable development in international law: Inception, meaning, and status* (2008) 120-131.



missing.<sup>31</sup> From recent international instruments, the 2030 Agenda for Sustainable Development ‘has a rhetorical commitment to “sustainable development” (mentioning it 85 times)’.<sup>32</sup> The SDGs are agreed upon by all governments and cover the three pillars of sustainable development in a balanced manner.<sup>33</sup>

As one element of the right to development, the concept of sustainable development is explicitly enshrined in the FDRE Constitution in two places. The first is in article 43(1) which provides that ‘[t]he People 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’.<sup>34</sup> The second is in article 43(3) which provides that all international agreements adopted by the country shall respect and ensure Ethiopia’s right to sustainable development.

There are different arguments relating to the concept of sustainable development in the Constitution and its importance for Ethiopia. Belay supports the incorporation of the concept of sustainable development in the Constitution asserting that ‘sustainable development is valid to keep our development pass to the next generation. It seems imperative for Ethiopia’s development in general.’<sup>35</sup> Minasse, on the other hand, argues that the incorporation of sustainable development in the Constitution does not comply with Ethiopia’s demand for economic development.<sup>36</sup>

With regard to the components of sustainable development, Abdi argues that the concept of sustainable development contained in the Constitution comprises environmental protection, economic and social development pillars, mentioning these in separate provisions.<sup>37</sup> Tsegai, on the other hand, argues that sustainable development incorporated in the Constitution primarily focuses on equitable economic development.<sup>38</sup>

31 H Cabezas et al ‘Sustainable systems theory: Ecological and other aspects’ (2005) 13 *Journal of Cleaner Production* 456; R Emas ‘The concept of sustainable development: Definition and defining principles’ Global Sustainable Development Report 2015.

32 J Gupta & C Vegelin ‘Sustainable development goals and inclusive development’ (2016) 16 *International Environmental Agreements* 440.

33 Transforming our World (n 20) 1.

34 Art 43(1) FDRE Constitution.

35 G Belay ‘Critical analysis of the applicability of the right to development in the Ethiopian context’ LLM dissertation, Addis Ababa University, 2009 38.

36 M Haile ‘The new Ethiopian Constitution: Its impact upon unity human rights and development’ (1996) 20 *Suffolk Traditional Law Review* 70.

37 J Abdi ‘The right to development in Ethiopia’, [https://www.academia.edu/9359320/The\\_Right\\_to\\_Development\\_in\\_Ethiopia](https://www.academia.edu/9359320/The_Right_to_Development_in_Ethiopia) (accessed 22 July 2018).

38 B Tsegai ‘Interrogating the economy-first paradigm in “sustainable development”: Towards integrating development with the ecosystem in Ethiopia’ (2017) 11

The incorporation of the concept of sustainable development in the Constitution is a significant contribution towards ensuring inclusive development in Ethiopia. Ensuring sustainable development is one of Ethiopia's national interests and is a matter of survival as the country is frequently affected by drought and famine due to climate change. Therefore, any developmental project needs to be environmentally sustainable. Moreover, the incorporation is important to invoke a constitutional duty of ensuring sustainable development when negotiating international agreements that may affect Ethiopia's interests related to sustainable development. It is also part of the country's international obligations as it has adopted multilateral and regional agreements that require states to ensure sustainable development by integrating it into their national development policies.

As far as the components of sustainable development are concerned I support the argument of Abdi. I argue that the Constitution implicitly recognises the need for balancing the three pillars of sustainable development by mentioning them separately in deferent provisions. I shall demonstrate how the Constitution implemented this.

### 3.1 Economic development

A close reading of article 43 reveals that economic growth should comply with sustainable development: The main aim of developmental projects must be to boost the development capacity of citizens and to satisfy their basic needs.<sup>39</sup> Besides, article 89(2) of the Constitution requires the government 'to ensure that all Ethiopians get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth among them'.<sup>40</sup> Similarly, the Constitution under article 89(4) requires the government to accord special assistance to the most disadvantaged section of society in economic development.<sup>41</sup> Those provisions indicate the need for creating economically sustainable development by adopting different mechanisms that enable the country to realise equitable economic development. One way of realising this goal is by designing and implementing developmental projects that do not create income inequality between different parts of the country or different sections of society.

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*Mizan Law Review* 79.

39 Art 43(4) FDRE Constitution.

40 Art 89(2) FDRE Constitution.

41 Art 89(4) FDRE Constitution.

### 3.2 Social development

The Constitution stipulates the obligation of the state to apportion the necessary resources to access social services.<sup>42</sup> Articles 42 and 89(8) of the Constitution stipulate the duty to implement and respect labour rights and standards and create a healthy and safe environment.<sup>43</sup> Internationally-recognised human rights are enshrined under chapter three of the Constitution, and the government is obliged to respect and enforce those rights.<sup>44</sup> Besides, article 89(7) requires the government to ensure the equal participation of women with men in all social development activities.<sup>45</sup> These provisions address some essential elements of social development (human rights, labour, health and safety standards and gender equality). These provisions are crucial to create socially-sustainable developmental projects. This is so because the introducers of developmental projects have a constitutional obligation to comply with the relevant standards, such as human rights, labour, health and safety, in their operations. Therefore, I argue that the Constitution has also stressed the need for ensuring socially-sustainable development.

### 3.3 Environmental protection

Article 44(1) of the Constitution guarantees the right to a clean and healthy environment for all people.<sup>46</sup> The Constitution further provides in article 92(2) that the design and implementation of development programmes and projects in the country should not damage or destroy the environment. As Damtie and Bayou assert, this provision of the Constitution is enshrined to indicate the need for conducting environmental impact assessments during the implementation of developmental projects.<sup>47</sup> Article 92(3) of the Constitution also provides that '[p]eople have the right to full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly'. It can be construed from those provisions that in addition to guaranteeing environmental rights, the Constitution has stressed the need for protecting the environment and the livelihood of the community when implementing developmental projects. The 1997 environmental policy of Ethiopia states that '[e]

42 Art 41(4) FDRE Constitution.

43 Arts 42 & 89(8) FDRE Constitution.

44 Art 13(1) FDRE Constitution.

45 Art 89(7) FDRE Constitution.

46 Art 44(1) FDRE Constitution.

47 M Damtie & M Bayou 'Overview of environmental impact assessment in Ethiopia' January 2008, <https://chilot.files.wordpress.com/2011/01/overview-of-eia-book-html.pdf> (accessed 2 December 2017).

nvironmental sustainability is recognised in the Constitution and in the national economic policy and strategy as a critical prerequisite for lasting success'.<sup>48</sup> Therefore, the cumulative reading of those provisions reveals how environmentally-sustainable development is also given a place in the Constitution in the same way as the other two pillars. The above provisions require the need for taking into account environmental concerns while designing and implementing socio-economic developmental policies and projects. This commits or enables the government to integrate environmental matters into the other two pillars when making development-related decisions.

Generally, the Constitution has addressed the three pillars of sustainable development in a manner that indicates that all three pillars are equally crucial for Ethiopian people. One may ask how the provisions that deal separately with each pillar relate to the concept of sustainable development contained in article 43. I argue that the Constitution intended to ensure sustainable development in the country in two ways: first, by explicitly mentioning the term 'sustainable development' in article 43 to afford it constitutional recognition; second, by incorporating other provisions that address the relevant elements or pillars of sustainable development that give colour to article 43 and simplify its implementation. It is difficult to conclude that the constitutional concept of sustainable development is the balance of the three pillars by merely analysing article 43. The overall contents of the Constitution should be analysed to reach this conclusion. Based on this approach, I argue that the Constitution implicitly provides the need for balancing economic, social and environmental matters while designing and implementing developmental policies and projects.

#### **4 The concept of the right to sustainable development**

This part discusses the origin, nature, type and legal status of the right to sustainable development.

At the international level, different agreements, reports and commentaries provide explicit or implicit content to the notion of the right to sustainable development. The right emerged in the United Nations Framework Convention on Climate Change (UNFCCC) in 1992.<sup>49</sup> Article 3(4) of the Convention provides:<sup>50</sup>

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48 The Environmental Policy of Ethiopia (1997) para 1.4.

49 Gupta & Arts (n 2) 19.

50 United Nations Framework Convention on Climate Change (UNFCCC) art 3(4).

The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

According to this provision, the member states have the right and duty to promote sustainable development. It may be construed that the provision calls for integrating social, economic and environmental matters into the development process in such a way that balances the interests of present and future generations. Moreover, UNFCCC in its Preamble affirms that 'responses to climate change should be ... taking into full account the legitimate priority needs of developing countries for the achievement of sustained economic growth and the eradication of poverty'.<sup>51</sup>

Referring to UNFCCC, Moellendorf gives examples to show how the right to sustainable development works in the context of developing countries. He asserts that respect for the right to sustainable development entails ensuring that developing countries are permitted emission allotments adequate to attain development within a plan of global emission reductions which is two degrees Celsius as agreed in the Copenhagen Accord.<sup>52</sup> He further asserts that to respect the right to sustainable development, an international treaty should require developed nations to make substantial capital investments in clean technology in developing nations.<sup>53</sup> This example works in the context of investment agreements. To ensure respect for the right to sustainable development, a treaty provision may allow developing countries to emit allotments sufficient to attain development and require developed countries to use sound technology that enables them to reduce emission as per the global standards of sustainability. A provision may also be incorporated in investment agreements to require developed countries to transfer intellectual property rights to cleaner technology to developing countries. Thus, the right to sustainable development not only is a negative duty to allow developing countries to attain development, but also includes a positive duty to provide resources helpful to achieve the required development.<sup>54</sup>

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51 United Nations Framework Convention (n 50) Preamble.

52 D Moellendorf 'A right to sustainable development' (2011) 94 *The Monist* 437.

53 Moellendorf (n 52) 439-440.

54 As above.

The African Charter also implicitly guarantees the right to sustainable development as can be understood from the cumulative reading of articles 22(1) and 24. Article 22(1) provides that '[a]ll peoples shall have the right to their economic, social and cultural development'.<sup>55</sup> Article 24 provides that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'.<sup>56</sup> The right to sustainable development is also contained in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) which explicitly provides that all women have the right to sustainable development.<sup>57</sup> From recent international documents, the post-2015 development agenda gives implicit recognition to the right to sustainable development making a cross-reference to UNFCCC which explicitly recognises such a right.<sup>58</sup>

Overall, the right to sustainable development has been explicitly or implicitly recognised in some international agreements. The next task will be to examine its nature of obligation and whether it is an individual or a group right.

Under international law, it appears that scholars agree that the right to sustainable development is a group right, but there is no full consensus on the nature of the obligation. The notion of sustainable development as a right has evolved through time from the interpretation of the right to life with dignity and the right to an adequate standard of living.<sup>59</sup> The understanding is that those fundamental human rights include issues of livelihood and human well-being attainable in the process of development.<sup>60</sup> As in the case of other group rights, the right to sustainable development is considered a 'third generation human right'.<sup>61</sup> It can be understood from the African Charter and African Women's Protocol that the right to sustainable development is a group right as these instruments afford such a right to the people and women as a whole respectively.

The right to sustainable development in UNFCCC imposes a soft obligation as article 3(4) uses the word 'should' rather than 'shall': 'The Parties have a right to, and should, promote sustainable

55 Art 22(1) African Charter.

56 Art 24 African Charter.

57 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) art 19.

58 Gupta & Arts (n 2) 20.

59 Universal Declaration of Human Rights (Universal Declaration); International Covenant on Civil and Political Rights (ICCPR).

60 C Ngang 'Indigenous peoples' right to sustainable development and the Green Economy Agenda' (2015) 44 *Africa Insight* 37.

61 Moellendorf (n 52) 445.

development.’ This weakens the nature of the duty.<sup>62</sup> Gupta and Arts argue that states have a legitimate right to promote the right to sustainable development and achieve it progressively, which means, not as a binding obligation since it is not fully integrated into current international law.<sup>63</sup> Windfuhr has a similar view: Like the right to development, the right to sustainable development needs to be realised progressively.<sup>64</sup> Moreover, the African Commission in *Gunme* asserted that the ‘respondent state is under obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights’.<sup>65</sup> It may be inferred from this assertion that the right to sustainable development, impliedly contained in the African Charter, is also a kind of right that can be progressively realised by states.

Moellendorf argues that the right to sustainable development is a group right and it is ‘consistent with very important individual interests and widely recognised individual human rights’.<sup>66</sup> This argument is supported by Wang: The right to sustainable development includes all parts of development and human rights.<sup>67</sup>

The right to sustainable development is similar to the right to development in some cases such as in the context of a sustainable global energy policy.<sup>68</sup> Generally, the two rights ‘are not quite so different in the post-2015 world’.<sup>69</sup>

Nationally, the right to sustainable development was first introduced into the current Ethiopian Constitution adopted in 1995.<sup>70</sup> The Constitution has not yet been amended; hence, no revision has been made with regard to such a right. The previous Ethiopian Constitutions/Charter adopted in 1931, 1955, 1987 and 1991 did not include the right to sustainable development.

62 Gupta & Arts (n 2) 14.

63 As above.

64 M Windfuhr ‘Economic, social and cultural rights and development cooperation’ in A Frankovits & P Earle (eds) *Working together: The human rights-based approach to development cooperation* (2000) 31.

65 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) para 206.

66 Moellendorf (n 52) 445.

67 X Wang ‘On the right to sustainable development: Foundation in legal philosophy and legislative proposals’ in P Marks (ed) *Implementing the right to development: The role of international law* (2008) 39-46.

68 Moellendorf (n 52) 437.

69 Gupta & Arts (n 2) 13.

70 Arts 43(1) & (3) FDRE Constitution.

Ethiopia ratified UNFCCC in May 1994,<sup>71</sup> but it is not clear whether it was this Convention that instigated the incorporation of the right to sustainable development in the Constitution; nothing is mentioned in the explanatory notes (preparatory work) of the Constitution regarding this issue. However, one might suspect that, as far as the incorporation of sustainable development is concerned, the drafters of the Constitution might have been inspired by the Rio Declaration and UNFCCC or incorporated it as it was regarded as part of the country's international obligation since it had ratified these agreements, which require parties to ensure and promote sustainable development, including at national level. Further, it is difficult to determine the intention of the drafters and the reasons why they incorporated the right to sustainable development as there is no recorded debate on this issue.

The right to sustainable development is guaranteed in the Constitution as a fundamental right, particularly as a democratic right. Chapter three of the Constitution incorporates the right to sustainable development under part four, which contains democratic rights such as economic, social and cultural rights (article 41); the right to labour (article 42); and environmental rights (article 44). Here, a question may be asked regarding the nature of the obligation of the right to sustainable development and whether it is considered an individual or a group right under the Constitution. With respect to the nature of the obligation, it may be said that it is more obligatory than the right contained in UNFCCC as the provision (article 43(3)) uses the word 'shall' instead of 'should'. The provision reads that all international agreements concluded by the state shall respect and ensure Ethiopia's right to sustainable development.<sup>72</sup> Tsegai argues that '[e]ven if the concept of sustainable development in the Constitution is stated as a right, it is difficult to pin it down as a specific right. Although it is fundamental in character, it cannot be characterised as a specific and mandatory right.'<sup>73</sup>

It is also argue that, even if the term 'shall' is used in the provision, the right remains a type of soft obligation placed as a policy goal. The basis of this argument is the explanatory notes to the Constitution, which equate article 43 with national principles and objectives contained in chapter ten of the Constitution, including foreign policy principles, social, economic, environmental objectives, and

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71 Ethiopian Environmental Protection Authority 'United Nations Conference on Sustainable Development' (Rio+20 National Report 2012) 22.

72 Art 43(3) FDRE Constitution.

73 Tsegai (n 38) 80-81.



so forth.<sup>74</sup> Those principles and objectives are incorporated to serve as guidelines in the implementation of the Constitution and other subsidiary laws.<sup>75</sup> Moreover, the explanatory notes explicitly state that article 43(1), which stipulates that the peoples of Ethiopia as a whole, and each nation, nationality, and people, in particular, have the right to sustainable development, should be seen as a principle or long-term goal; and further provides that article 43 as a whole does not constitute a justiciable right.<sup>76</sup>

It can also be understood that the right to sustainable development in the Constitution is a group right. It seems that it is intended to give domestic and international dimensions to the right to sustainable development in Ethiopia. As a domestic dimension, the Constitution provides in article 43(1) that the peoples of Ethiopia as a whole, and each nation, nationality, and people, in particular, have the right to sustainable development. When one examines the international dimension, which is the focus of this work, article 43(3) states that all international agreements concluded by the state shall respect and ensure Ethiopia's right to sustainable development. Here, it is clear that this right is a group right as it is given to the peoples of Ethiopia (as a domestic dimension) and to Ethiopia as a state (as an international dimension). The right is broad, comprising the economic, social and environmental rights provided in different provisions of the Constitution.<sup>77</sup> Yeneabat asserts that

the right to sustainable development recognised under the FDRE constitution includes the right to sustainable utilisation of the natural resources, the integration of environmental protection and economic development programmes, the right to development which is the right of rights, the pursuit of equitable allocation of resources.<sup>78</sup>

As far as article 43(3) is concerned, one issue may be raised, namely, whether or not it requires a specific implementing law. Yirga expresses the view that the provision should be directly implemented without the need for enacting an implementing proclamation.<sup>79</sup> The government has enacted a treaty-making and ratification proclamation which stipulates that general principles and procedures apply to all international treaty-making processes, but

74 Explanatory notes of the 1995 FDRE Constitution (HOPR-Documentation 1995) 98.

75 Art 85(1) FDRE Constitution.

76 Art 43 FDRE Constitution.

77 Tsegai (n 38) 80-81.

78 D Yeneabat 'The right to development under the RTD Declaration, African Charter on Human and People's Right and FDRE Constitution: A comparative study' (2015) 3 *International Journal of Political Science and Development* 447.

79 B Yirga, director of legal drafting, Ethiopian General Prosecutor, Addis Ababa, Ethiopia, 9 July 2018.

it does not contain sustainable development-related principles and guidelines.<sup>80</sup>

#### 4.1 Legal meaning of 'respect' in article 43(3) of the FDRE Constitution

Clarifying the meaning of the word 'respect' used in article 43(3) is essential to understand the concept and objective of the provision. However, before clarifying the legal meaning of 'respect', it is necessary to discuss from where and how it is derived in the context of this work. The English version of the FDRE Constitution in article 43(3) states that '[a]ll international agreements and relations concluded, established or conducted by the state shall protect and ensure Ethiopia's right to sustainable development'.<sup>81</sup> This provision uses the expression 'protect and ensure' to demonstrate the type of obligation required in international agreements *vis-à-vis* the right to sustainable development. However, this expression is not the correct translation of the Amharic version of the provision, which is the final legal authority as provided in the Constitution itself.<sup>82</sup>

The Amharic version uses the word የሚያስከብሩ (*yemiyaskebru*) which means 'respect' in its correct translation. The word *yemiyaskebru* is translated as 'respect' in another provision of the Constitution (article 86(1)) which deals with a related issue. This provision, under the heading 'Principles for External Relations', reads '[t]o promote policies of foreign relations based on the protection of national interests and respect for the sovereignty of the country'. In this provision, unlike the above article 43(3), the word 'protection' is also correctly translated from the Amharic version which is 'የሚያስጠብቅ' (*yemiyastebk*). Therefore, the English version of article 43(3) needs to be revised as '[a]ll international agreements and relations concluded, established or conducted by the state shall respect and ensure Ethiopia's right to sustainable development'.

It is incontrovertible that the correct translation should be used of the two words 'respect' and 'protect' as they impose different duties on the state. In general, the duty to protect 'requires preventive action to ensure that potential threats are halted before they result in actual violations'.<sup>83</sup> It is somewhat of a positive duty that requires

80 Ethiopian International Agreements Making and Ratification Procedure Proclamation 1024/2017, *Negarit Gazeta* 23rd Year No 55 (Addis Ababa 7 July 2017).

81 Art 43(3) FDRE Constitution.

82 Art 106 FDRE Constitution.

83 Ngang (n 60) 38.

states to protect the human rights of their citizens from violation by third parties/non-state actors.<sup>84</sup> The duty to respect will be explained below as it is the central issue of this sub-section.

The Constitution uses the word 'respect' in many instances, especially when providing the duties of the state related to human rights. For instance, article 13(1) provides that the legislative, executive and judiciary organs of the government shall have the duty to respect fundamental rights and freedoms. It is difficult to understand the legal meaning of 'respect' as neither the Constitution nor its explanatory note defines it. It is also not defined in other domestic laws although the word is used in many respects such as to express the human rights obligations of the government. Hence, as an alternative, it is crucial to assess its meaning in international instruments ratified by Ethiopia and adapt it to the word 'respect' used in the Constitution (the Constitution allows this as discussed in part 1). Based on this approach, it will be crucial to explore the meaning of 'respect' from ICESCR as the right to sustainable development mostly relates to the rights enshrined in this Covenant; and it is also adopted by Ethiopia.<sup>85</sup>

Generally, as provided in article 2(1) of ICESCR, state parties are required to respect and ensure the economic, social, and cultural rights provided in the Covenant. A detailed explanatory note on the meaning of 'respect' is provided in ICESCR's General Comments. The General Comment provides that the duty to respect commits member states to abstain from meddling with the enjoyment of the Covenant rights.<sup>86</sup> This duty is a type of negative obligation that requires states to do nothing or to do no harm.<sup>87</sup> The General Comment further explains the obligation to respect as follows: 'The obligation to respect economic, social and cultural rights is violated when state parties prioritise the interests of business entities over Covenant rights without adequate justification, or when they pursue policies that negatively affect such rights.'<sup>88</sup>

The obligation to respect covers both theoretical and practical aspects. Theoretically, states are required to ensure respect for economic, social and cultural rights, refraining from adopting laws

84 General Comment 24.

85 Wikipedia 'Treaties of Ethiopia' ratified since 21 August 1995, [https://en.wikipedia.org/wiki/Category:Treaties\\_of\\_Ethiopia](https://en.wikipedia.org/wiki/Category:Treaties_of_Ethiopia) (accessed 4 October 2018).

86 General Comment 24.

87 M Langford 'The justiciability of social rights: From practice to theory' in M Langford (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2009) 14.

88 General Comment 24.

that contradict such rights. According to this aspect, 'states parties should identify any potential conflict between their obligations under the Covenant and under the trade or investment treaties, and refrain from entering into such treaties where such conflicts are found to exist'.<sup>89</sup> The practical aspect, on the other hand, entails that states should not jeopardise the implementation of the rights. The implementation problem may occur, for example, when forced displacement is ordered for the purpose of investment projects.<sup>90</sup>

Therefore, the meaning of the word 'respect' mentioned in article 43(3) of the Constitution may be interpreted in line with the meaning given in the General Comments. However, it should be noted that this meaning has no binding effect as the ICESCR General Comments are non-binding documents.

Ngang asserts that the duty to respect the right to sustainable development requires states to refrain from interfering with the enjoyment such a right.<sup>91</sup> In the context of article 43(3) of the Constitution, the word 'respect' means that international agreements should not be used as instruments to interfere with the enjoyment of Ethiopia's right to sustainable development. The Ethiopian government has the duty to ensure that the texts of any international agreements and their implementation respect and ensure Ethiopia's right to sustainable development.

## **4.2 Right holders and duty bearers of the right to sustainable development**

The objective of this sub-section is to identify the right holders (beneficiaries) and duty bearers of the right to sustainable development. This is crucial in order to establish who can claim such a right if it is not respected; and which is the responsible body to enforce it. These and other related issues are discussed below.

### **4.2.1 Right holders**

Generally, rights holders of human rights are individuals or groups that have particular claims with respect to certain duty bearers.<sup>92</sup> Regarding the specific issue at hand, I explained in the preceding

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89 As above.

90 As above.

91 Ngang (n 60) 38.

92 UNICEF 'Glossary: Definitions A-Z' Gender Equity UN Coherence and You 1997, <https://www.unicef.org/gender/training/content/resources/Glossary.pdf> (accessed 12 November 2018).

sub-section that the right to sustainable development is a group right. This finding provides an indication as to who the general right holders are. They should be a group of people or a state or states, but not individuals. This can be demonstrated by analysing the international and national laws that guarantee the right to sustainable development.

From international instruments, the first document to be analysed is UNFCCC as the concept of the right to sustainable development originates from this document. Referring to article 3(4) of the Convention, which states that '[t]he Parties have a right to, and should, promote sustainable development', I assert that the right holders are the member states (each state individually). This is also true for other treaty laws under the sponsorship of the UN.

Unlike UNFCCC, in the African Charter peoples are the right holders of the right to sustainable development; states or individuals are not the direct beneficiaries of such a right. This is also affirmed by the African Commission decision in *Gunme v Cameroon*. The Commission expressed that the rights mentioned in articles 19 to 24 of the African Charter 'can be exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds'.<sup>93</sup> As discussed earlier, the African Charter implicitly guarantees the right to sustainable development in articles 22(1) and 24. Thus, it is necessary to be a group of people to claim the right to sustainable development under the African Charter.<sup>94</sup> The African Women's Protocol also grants the right to sustainable development to women as a group. Article 19 of the Protocol, under the heading 'right to sustainable development', provides that '[w]omen shall have the right to fully enjoy their right to sustainable development'.<sup>95</sup>

As in the above international instruments, individuals also are not the beneficiaries of the right to sustainable development under the FDRE Constitution. As per article 43(1) of the Constitution, which reflects the domestic dimension of the right to sustainable development, the right holders are the peoples of Ethiopia in general, and each nation, nationality, and people in particular. It is clear from this provision that a group of people are the beneficiaries of the right to sustainable development. Here, it is imperative to find the meaning of nation, nationality, and people in order to identify

93 *Gunme* (n 65) para 171.

94 Arts 22(1) & 24 African Charter.

95 African Women's Protocol (n 57).

the exact beneficiaries of such a right. This can be discerned from the Constitution itself which defines these terms in article 39(5). This provision states:

A 'Nation, Nationality or People' for the purpose of this Constitution, is a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.

It seems that the scope of these terms is broad, but it can be precisely expressed as a group of people having common characteristics.

Coming to the international dimension of the right to sustainable development stipulated in article 43(3) of the Constitution – at face value – it seems that Ethiopia as a state is a right holder. However, this provision should not be considered as it excludes the peoples from being the beneficiaries of such a right. The ultimate beneficiaries of the right to sustainable development are the peoples of Ethiopia. This is already guaranteed in article 43(1) of the Constitution, as discussed above. States cannot be the active subject of human rights; human rights are inherent to human beings.<sup>96</sup> This also does not mean that states are not totally the right holders since, generally, 'the right to development was recognised due to demands of developing countries for a new international economic order'.<sup>97</sup> Hence, the balanced approach is to make both the state and its people the holders of the right to sustainable development. This assertion will be more convincing when one evaluates it in line with the African Charter, the African Women's Protocol and UNFCCC.

Ethiopian peoples and women are the holders of the right to sustainable development pursuant to the African Charter and the African Women's Protocol respectively as these instruments have become part of the country's laws through ratification. On the other hand, Ethiopia as a state is the holder of such a right under UNFCCC. This instrument has also become part of the country's laws as it has been ratified by Ethiopia.

Overall, I argue that under the Constitution, Ethiopia as a state and its peoples are the holders of the right to sustainable development, but individuals are not. This means, for example, in the context of foreign investments, that an individual cannot claim that a given

96 Abdi (n 37) 90. The Ethiopian Constitution in art 10 also stipulates that '[h]uman rights and freedoms, emanating from the nature of mankind, are inviolable and inalienable'.

97 Absi (n 37).

investment project has violated his or her right to sustainable development, but only the state and/or a group of people can have such kind of a claim. However, this does not mean that individuals have no right to make a claim. They may make a claim as an integral part of a collective right.

#### 4.2.2 *Duty bearers*

Duty bearers are those persons who have obligations to respect, protect, promote and fulfil human rights.<sup>98</sup> The term mostly refers to state actors, but non-state actors such as individuals, private companies and international organisations may also be duty bearers.<sup>99</sup>

The duty bearers of the right to sustainable development in different international instruments are almost the same. Under UNFCCC, the duty bearers are each party individually.<sup>100</sup> A state has extraterritorial obligations as its activities may affect the right of another state. In addition to the Convention, this kind of duty also emanates from the general obligation to cooperate in international development which is a long-standing custom in international law.<sup>101</sup> We also find the 'duty to cooperate' in DRD. The Declaration states that '[a]ll states should cooperate with a view to promoting, encouraging and strengthening universal respect for and observance of all human rights and fundamental freedoms for all'.<sup>102</sup> States may also owe a collective duty if the concerned issue is global since the policy or behaviour of each state may contribute to the violation of the right to sustainable development. Thus, states have national and international duties to ensure such a right.

As in the case of UNFCCC, under the African Charter states are duty bearers (individually or collectively) of the right to sustainable development. Article 1 of the African Charter requires the member states to recognise and enforce the rights and freedoms contained in the Charter by adopting legislative and other measures.<sup>103</sup> The African Women's Protocol also imposes a duty on member states to take all appropriate measures to ensure and promote women's rights to sustainable development.<sup>104</sup>

98 UNICEF (n 93) 1.

99 As above.

100 Gupta & Arts (n 2) 16.

101 Schrijver (n 30) 164-167.

102 Art 6(1) DRD (n 6).

103 Art 1 African Charter.

104 African Women's Protocol (n 57).

Under the FDRE Constitution the state is the duty bearer of fundamental rights and freedoms in general. This is clearly provided for in article 13(1): The legislative, executive and judicial bodies of the government shall have the duty to respect and enforce the provisions of chapter three of the Constitution which includes the right to sustainable development.<sup>105</sup> According to this provision, it is the duty of government ensure that all international agreements adopted by Ethiopia respect and ensure the country's right to sustainable development. As per article 43(1) of the Constitution, the government also has a duty to respect and enforce the right to sustainable development of the peoples of Ethiopia as a whole, and each nation, nationality, and people in particular.<sup>106</sup> Besides, pursuant to UNFCCC, the African Charter and African Women's Protocol, it is the duty of the government to respect, protect, promote and fulfil such a right. For example, in the context of foreign investments, it is the duty of the government to protect its citizens' rights to sustainable development from violations by foreign investors. This is due to the fact that only the government can be a claimant or defendant in disputes or concerns arising from investment agreements or foreign investment contracts.

### 4.3 Justiciability of the right to sustainable development

As explained above, there are right holders and duty bearers of the right to sustainable development. This leads us to the question of whether the right holders can bring legal action against the duty bearers concerned provided that the latter failed to respect, protect or fulfil the right to sustainable development. In other words, is the right to sustainable development justiciable? For example, there can be a complaint that the investment project of company X, which was registered in country Y, pollutes a nearby river, resulting in the loss of human and animal lives; the investment activities of the company contradict the religious and cultural values of the local community; and 97 per cent of the workers of the company are highly-skilled men, creating income inequality among the local community. These examples are derived from the environmental protection, social and economic development pillars of sustainable development in order to show how concerns can be raised over each pillar. Moreover, concerns may be raised that the bilateral investment treaties between Ethiopia and country Y do not incorporate provisions that enable the host state to regulate the sustainability of foreign investments, which may be regarded as contrary to the constitutional provision requiring

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<sup>105</sup> Art 13(1) FDRE Constitution.

<sup>106</sup> Art 43(1) FDRE Constitution.



all international agreements to respect and ensure Ethiopia's right to sustainable development. The next issue will be whether the affected community or any other stakeholders can bring the case before a court and the latter declares that the investment project of company X and the BIT of Ethiopia and country Y but do not respect and ensure Ethiopia's right to sustainable development.

According to the explanatory notes to the FDRE Constitution, the right to sustainable development mentioned in article 43(3) is not justiciable. It clearly states that people cannot request courts to enforce the rights mentioned in articles 41 to 44 of the Constitution.<sup>107</sup> The explanatory notes further provide that those rights are similar to the national policy objectives and principles stipulated in chapter ten of the Constitution.<sup>108</sup> These are principles of external relations and national defence and economic, social, cultural, and environmental objectives.<sup>109</sup> As the explanatory notes provide no further explanation concerning the justiciability issue of the right to sustainable development, it will be essential to infer some detailed lessons from the explanatory notes to chapter ten as their status or nature is equated with article 43.

As far as the national principles and objectives provided in Chapter ten are concerned, the Constitution states 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 chapter deals with national policy objectives and principles]'.<sup>110</sup> The explanatory notes provide that those national policy objectives and principles are not justiciable. During the discussions of the Constitution's drafting committee, it was asked what the relevance was of the national principles and objectives if they were not justiciable. The response was that '[u]nless such principles are explicitly stated, government organs would not know the course they should take and the public would not have standards to evaluate its representative'.<sup>111</sup> If the government fails to fulfil the national principles and objectives, the option of the citizens may be to punish the government by their vote during an election.<sup>112</sup>

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107 Explanatory notes (n 78).

108 As above.

109 Arts 86-92 FDRE Constitution.

110 Art 85 FDRE Constitution.

111 Stated in the explanatory notes of 1995 FDRE Constitution and translated by Belay Getachew; Explanatory notes (n 78) 22.

112 Belay (n 35).

Truly speaking, it is difficult to argue for the justiciability of the right to sustainable development providing a clear and binding legal authority from the Constitution. As explained earlier, there also is no other specific law enacted to implement this right. Moreover, Ethiopian courts' precedents also are not available as courts usually decline to apply the provisions of the Constitution as a basis for their decisions. The reason is a lack of clear rules concerning the extent of courts' power to interpret and apply the Constitution.<sup>113</sup>

Overall, the right to sustainable development may be regarded as a goal and non-binding right to be achieved by the state progressively taking into account the country's level of development. This can be justified based on article 2(1) of ICESCR which requires member states to progressively realise socio-economic rights 'to the maximum of its available resources'.<sup>114</sup> In principle, there is no minimum threshold requirement that judicial authority can identify and enforce socio-economic rights.<sup>115</sup>

For example, in the context of investment, stakeholders may advocate that the government should take the necessary steps to ensure the sustainability of foreign investment, including renegotiating bilateral investment agreements. However, for example, if employees incur damage, due to poor labour, health and safety standards of a given investment project, they can bring the case before court and make the concerned foreign company liable for compensation and so forth. This is not an issue of sustainability, but rather a kind of extra-contractual liability or a violation of a single human right such as the right to life, and the victim also is not claiming that his right to sustainable development has been violated.

## 5 Conclusion

From the aforementioned analysis I argue that like the national principles and objectives, the right to sustainable development is not a binding right to be enforced by courts. It is rather a goal to be achieved by the state, progressively taking into account the country's level of development and the government may be required (by a group of people as right holders) to take administrative action if such a right is violated. Here, the issue is how and when the government should start implementing the realisation of this right. As can be

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113 A Sisay 'The constitutional protection of economic and social rights in the Federal Democratic Republic of Ethiopia' (2008) 22 *Journal of Ethiopian Law* 143.

114 Art 2(1) International Covenant on Economic, and Cultural Rights (ICESCR).

115 APAP 'Justifiability of ESC rights: A paper presented in the training workshop for the federal courts judges' (2006) 11.

understood from ICESCR, states should take steps to progressively realise economic, social and cultural rights, including by taking legislative measures. The African Charter also requires states to recognise and enforce human and peoples' rights (which include the right to sustainable development), among others, through legislative measures.

Therefore, by drawing lessons from the African Charter and ICESCR and its General Comment, I argue that legislative or policy measures are the initial steps to start the realisation process of the right to sustainable development contained in article 43(3) of the Constitution. This measure refers to negotiating international agreements that incorporate the three pillars of sustainable development in a balanced manner as the right to sustainable development cannot be respected without equally treating the economic, social and environmental concerns in any developmental projects governed by such agreements. For example, in the context of foreign investments, the Ethiopian government is required to initiate the realisation of the right to sustainable development by concluding investment agreements that incorporate the economic, social and environmental and human rights objectives of sustainable development in a balanced manner. This means that the investment agreements enable the government, as a duty bearer, to enforce the constitutionally-guaranteed right to sustainable development in the foreign direct investment sector.

In general, the government has a 'soft constitutional obligation' to respect and enforce the right to sustainable development stipulated in article 43(3) in order to protect development-related national interests, ensuring legal certainty and consistency, and avoiding indirect foreign interference that may occur in the guise of international agreements and cooperation.