

## **Can Ethiopian Courts Make/Shape Environmental Policies? An Essay**

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### **1. Introduction**

We are now in time when there are mounting environmental problems. These problems may be solved by measures that can be taken by individuals and the private sector. However, although individuals and the private sector may contribute to the protection of the environment or to overcoming environmental problems, the measures they take often remain inadequate unless they are assisted by public policies such as law supported by government authority. Thus, government involvement in the protection of the environment is necessary. On the other hand, government involvement in environmental regulation is justified partly on the inherent limitations of the market system and the nature of human behaviour. As there is no or little incentive to protect the environment, environmental protection cannot be left to market regulation alone. Moreover, the scope and urgency of environmental problems exceed the capacity of private market and individuals' efforts to deal with. That is, the scope of the environmental problems is beyond what the market can handle. Likewise, some environmental problems need urgent actions whereas market response to such problems may not be swift enough. Further, the fact that there is high level of conflicts on environmental protection should be noted. That is, there are arguments on whether or not and to what extent the environment needs protection. All these factors

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coming together make a strong case for the involvement of a government in environmental protection. The question then is to know how a government can protect the environment, whereas one way is formulating and enforcing public policy. Public policy here refers to an action that is taken in response to social problems. Since environmental problems are part of social problems, a government can respond to environmental problems by making environmental policy. In a federal arrangement, such policy can be formulated by both tiers of governments, the central and state governments. Similarly, within a government itself, environmental policy can be formulated by all the three branches of the government, the legislative, the executive and the judiciary.<sup>1</sup>

Therefore, as one branch of a government, environmental policy formulation (policy making/shaping) can also be undertaken by the judiciary. This has been true in various countries such as the USA.<sup>2</sup> In this essay, I will explore how the courts in Ethiopia can make/shape environmental policy assuming that there is judicial activism in favour of environmental protection. The discussion will use as parameters the roles courts in the US play in relation to environmental policy making/shaping.

## 2. Judicial policymaking/shaping

It is said that courts perform three interrelated but distinguishable functions, that is, they determine facts, they interpret authoritative legal texts, and they make new public policy. While the first two functions are

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<sup>1</sup> For more on what is raised and discussed in this paragraph, see Michael E. Kraft and Norman J. Vig, *Environmental Policy in Four Decades: Achievements and New Directions* included in Norman J. Vig and Michael E. Kraft (editors), *Environmental Policy: New Directions for the Twenty-First century*, 7<sup>th</sup> ed., CQ press, Washington D.C., 2010, p. 1-4

<sup>2</sup> See Lawrence S. Rothenberg, *Environmental Choices: Policy Responses to Green Demands*, CQ Press, Washington DC, 2002, p 60-62, Rosemary O'Leary, *Environmental Policy in Courts*, included in Norman J. Vig and Michael E. Kraft (editors), *Environmental Policy: New Directions for the Twenty-First century*, 7<sup>th</sup> ed., CQ press, Washington D.C., 2010, p. 129-143, and Malcolm M. Feeley and Edward L. Rubin, *Judicial Decision Making and the Modern State: How the American Courts Reformed America's Prisons*, Cambridge University Press, 2000, p 5.

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familiar, the third one is freighted with blasphemy as, traditionally, courts are not supposed to act as policymakers. In fact, the assertion that courts generally make policy is treated as either harsh realism or a predicate to condemnation. The reality, however, is that courts make policy when they are of the opinion that their actions will produce socially desirable results. However, they disguise their action of judicial policymaking as judicial interpretation of an unseen document.<sup>3</sup>

It should be noted that when a court makes/shapes a policy, judges invoke legal text to establish that they have control over the subject-matter and then rely on non-authoritative sources, and their own judgment, to generate a decision that is guided by a perceived desirability of its results.<sup>4</sup> For instance, in common law system, judicial power is not limited to applying the existing laws; instead, it extends to judicial policy making in which case the judiciary goes beyond its role of dispute

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<sup>3</sup> For more on the functions of courts, see Malcolm M. Feeley and Edward L. Rubin, supra note 2, p. 1-10, and Stephen R. Chapman, *Environmental Law and Policy*, Prentice Hall, New Jersey, 1998, p. 28. It is argued that, with regard to judicial policy making, questions of legitimacy are largely irrelevant when it comes to specialized courts; specialist judges are better suited than generalist judges to address substantive questions of policy because they have expertise. See Isaac Unah, *The courts of international trade: judicial specialization, expertise, and bureaucratic policy-making*, University of Michigan Press, 1998, p 84. Another point worth noting at this juncture is the fact that judicial decision-making does not necessarily make the judiciary stronger than the other organs. Moreover, such decision-making may also have its own drawbacks. For instance, Christopher E. Smith catches the essence of these problems as follows. *Much of the literature on the judiciary's impact on the government system treat judges as powerful judicial decision makers although they are less powerful than they appear to be. For example, although judges can issue orders about what ought to be, they cannot implement their orders unless they are endorsed by lower courts and other executive officials. There is also detrimental consequence that judicial policymaking entails such as the unanticipated consequence of using an individual case concerning to specific litigants as the vehicle for making far-reaching policy decision that affects many people whose circumstances may be different than those of the litigants.* Christopher E. Smith, *Judicial self-interest: federal judges and court administration*, Greenwood Publishing Group, 1995, p 2.

<sup>4</sup> Malcolm M. Feeley and Edward L. Rubin, supra note 2, p. 5

resolution and assumes the responsibility of problem solver.<sup>5</sup> In other words, in addition to giving resolution to the problems at hand by applying the existing policies such as environmental policies courts may come up with new rules, if need be, to solve the problem at hand. This shows that public policy making/shaping is not an exclusive domain of the other branches of the government. If that is the case, then, environmental policy making/shaping like any other public policy can be the responsibility of all the three branches of a government. Hence, courts can engage in environmental policy making/shaping when they deem such action will produce socially desirable consequences. For instance, a court may extend the scope of an existing environmental law to include a new phenomenon if such extension is believed to produce beneficial results.

### **Judicial policymaking/shaping in the US and Ethiopia**

At the beginning, it is important to make few points about the evolution and development of environmental policy in the US and Ethiopia. In the US, it is said that environmental policy emerged and developed in the form of responses to the demands of its citizens for better environmental quality.<sup>6</sup> In other words, environmental policy in the US emerged and developed in the form of governmental responses to the demands of its citizens for environmental protection. Here, the term *government* refers to all branches of the government, the legislature, the executive and the judiciary.<sup>7</sup> Thus, in the US, the judiciary like the other branches of government can be credited for contributing at least to the development of US environmental policy. For instance, the contribution of the US courts to the effective application and development of National Environmental Policy Act (NEPA) in relation to issues such as NEPA procedural strengths, alternative course of actions that NEPA requires to be

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<sup>5</sup> Jos C. N. Raadschelders, *Government: A Public Administration Perspective*, M.E. Sharpe, 2003, p 127

<sup>6</sup> For more on this point, see Lawrence S. Rothenberg, *supra* note 2, p. 60-61.

<sup>7</sup> Crafting environmental policy is not the power and responsibility of the legislature and the executive branch of the government alone. Some argue that the judiciary can also craft environmental policy. *Id.* P. 62

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considered, the kind of mitigation measures that are necessary and the state at which they need to be considered, and when and how to consider cumulative impacts of an action on the environment can be cited as examples of courts' environmental policy making/shaping in the US.<sup>8</sup>

In Ethiopia, the emergence and development of environmental policy is characterized by an opposite factor. That is, while there were no demands from the public for environmental protection (hence, no public environmentalism), the government started formulating environmental policy (hence, government environmentalism) to respond to some environmental problems such as deforestation and land degradation.<sup>9</sup> Thus, unlike in the US, environmental policy in Ethiopia can hardly be taken as a supply to public demands. Moreover, although our judiciary could contribute to the development of environmental policy, the major source of environmental policy in Ethiopia thus far has been the legislature.<sup>10</sup> This is so because judicial contribution to the development of environmental policy is dependent on public demand which is virtually non-existent in Ethiopia due to low economic situation of most of its citizens.<sup>11</sup> Moreover, environmental awareness plays a great role in making the public approach courts demanding environmental protection thereby creating opportunities for the judiciary to create/shape

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<sup>8</sup> For more on the contribution of courts to NEPA's application and development, see W.M. Cohen and M.D. Miller, *Highlights of NEPA in the Courts* included in Ray Clark and Larry Canter (editors), *Environmental Policy and NEPA: Past, Present, and Future*, St. Luice Press, Florida, USA, 1997, p 181-192

<sup>9</sup> For more on the emergence of environmental policy in Ethiopia, see Dessalegn Rahmato, *Environmental Change and State Policy in Ethiopia*, FSS Monograph Series 2, Forum for Social Studies, Addis Ababa, Ethiopia, 2001, p 38-61

<sup>10</sup> This is so because while we have a number of laws dealing with the environmental in one way or another, judicial decisions involving the environment are virtually absent.

<sup>11</sup> It is said that, in economic context, environmental quality, by and large, appears to be a normal good, a good for which demand increases with economic resources, like many other government supplied goods such as education. Thus, environmental "consumption", or at least demand for a high quality environment, appears to increase with prosperity. For more on this point, see Lawrence S. Rothenberg, *Environmental Choices: Policy Responses to Green Demands*, CQ Press, Washington DC, 2002, p. 5-6

environmental policy while such awareness in Ethiopian context is very low.

Anyway, how can the judiciary craft environmental policy? In the US, Rosemary O'Leary states that courts can make/shape environmental policy by deciding on issue of standing, deciding on question of ripeness, choice of review standard, interpreting environmental laws, choice of remedies, and setting precedents.<sup>12</sup> In this section, we will see how environmental policy making/shaping result from these actions. We will also consider whether or not Ethiopian courts can do the same in relation to environmental policy.<sup>13</sup>

First, courts can make/shape environmental policy by determining who does and does not have standing or the right to sue.<sup>14</sup> Although

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<sup>12</sup> Rosemary O'Leary, *supra* note 2, p. 129-143

<sup>13</sup> At this juncture, it is important to note that there is an argument claiming that environmental policy is different from other public policies in that the former deals with how to sustain life whereas the latter deals with how to improve the quality of life. Of course, there are arguments against this argument, too. For instance, it is said that not only environmental policy but also other public policies can deal with how to sustain life such as policies dealing with drug prescription and automobile safety. For more on this controversy, see Lawrence S. Rothenberg, *supra* note 2, p. 2-3

<sup>14</sup> The question of *standing* is the question of who can seek remedy when there are certain environmental wrongs. Thus, depending on legal systems, those who can seek remedies for EWDs can be either anyone or those who are immediately concerned like the direct victims of a given action or inaction. However, as a rule, in order to select suitable plaintiff and allocate scarce resources to it,<sup>14</sup> only a person whose right or interest is affected by a given behaviour can seek relief from whosoever is responsible therefor.<sup>14</sup> See Han Somsen, *Protecting the European Environment: Enforcing EC Environmental Law*, Blackstone Printing Ltd, UK, 1996, p 151 and C.M. Abraham, *Environmental Jurisprudence in India*, Kluwer Law International, The Hague, London, and Boston, 1999, p 29. Nonetheless, the limitation of standing in environmental cases only to a person whose right or interest is (to be) affected by a given action or inaction may be an impediment to effective protection of the environment. Indeed, some have argued that recognizing the standing of all to sue for EWDs amounts to removing one of the major obstacles to enforcement of environmental law.<sup>14</sup> Moreover, it is argued that in environmental cases, standing should be extended to many because all citizens or at least all citizens in a region are individually affected by the administrative action or inaction relating to the environment.<sup>14</sup> There are also scholars who argue that standing in environmental litigation should be extended to all citizens as it allows the use of private

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environmental statutes give citizens, broadly defined, the right to sue polluters or regulators, procedural hurdles must still be cleared in order to gain access to the court.<sup>15</sup> This means, the stipulations in environmental regulations granting *locus standi* to citizens may still need interpretation. By interpreting these stipulations, courts decide how they should be understood and applied. On the other hand, such activity of courts has the tendency to shape the environmental policy under consideration. For instance, if a given environmental legislation contains a provision that allows citizens to bring court action for any environmental wrongdoing, question as to what the term *citizen* refers to may arise, that is, whether it means only nationals or it includes residents as well. The judiciary entertaining a case in which such issue arises may decide that the citizen suit provision covers not only nationals but also residents or the vice versa thereby making/shaping the existing environmental policy.

The above method of shaping environmental policy can be used in Ethiopia, too. For instance, while article 11(1) of our Environmental Pollution Control Proclamation grants every person, without the need to show any vested interest, the right to lodge complaint, against any persons allegedly causing actual or potential harm. Moreover, Council of Ministers Regulation on Prevention of Industrial Pollution, Regulation No. 159/2009, allows everyone to lodge complaint, without proving vested interest, to environmental protection organs if there is industrial pollution. From these two laws, it is not clear if regulators can be sued for failing to discharge their duties. However, in one case,<sup>16</sup> the Federal First

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resources to enforce environmental laws. See Duard Barnard, *ENVIRONMENTAL LAW FOR ALL: A PRACTICAL GUIDE FOR THE BUSINESS COMMUNITY, THE PLANNING PROFESSIONS, ENVIRONMENTALISTS AND LAWYERS*, Impact Books Inc, Pretoria, 1999, p 51, Han Somsen, Id., p 152 and Steven Ferrey, *Environmental Law: Examples and Explanations*, 3<sup>rd</sup> Edition, ASPEN Publishers, New York, 2004, p 228. Interestingly, the experiences of some countries such as the US, RSA, and Kenya also show that environmental standing is recognized in its broader sense.

<sup>15</sup> Rosemary O'Leary, *supra* note 2, p. 129

<sup>16</sup> *Action Professionals' Association for the People vs. Environmental Protection Authority*, reported by Wondwossen Sintayehu, (Federal EPA) as part of Public Interest

Instance Court explained this issue in relation to the article 11(1) of our Environmental Pollution Control Proclamation. First, it stated that the expression *without the need to show any vested interest* shows that the plaintiff should not demonstrate injury, actual or potential, to himself. Second, and impliedly, the court accepted that legal persons can bring court actions for alleged environmental wrongs because the plaintiff in the case was a legal person. Third, the Court decided that the article does not grant any person the right to sue regulators thereby limiting the scope of the right to standing individuals can have to bring environmental cases to courts. Therefore, by explaining the content of article 11(1) of the Proclamation, the Court shaped how the message of the article on standing should be understood and applied. However, there is one issue that has not been settled by this case. That is, although the article grants every person the right to sue those who do wrong to the environment, it is not clear whether this right extends to foreigners. For instance, whether or not persons on the other side of the border can bring court action before Ethiopian courts because they are feeling the negative impacts of an activity taking place on Ethiopian soil is not clear. Our court can however clarify this point when there is a chance thereby further shaping the environmental policy we have on *locus standi*. Further, if constitutional interpretation were given to courts, they might explain the provision of our Constitution which imposes on every citizen the duty to ensure observance of constitutional stipulations which includes environmental protection as granting right to standing to every citizen.<sup>17</sup>

Second, the US courts can shape environmental policy by deciding which cases are ripe or ready for review, whereas a case is said to be ripe if there is controversy that is more than merely anticipated.<sup>18</sup> Thus, by deciding on readiness of a case, courts can determine when the application of a

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Litigation Report(available online): Report on the Public Interest Litigation Case instituted at the Federal First Instance Court of Ethiopia (available online).

<sup>17</sup> Article 9, 44, 92 of the FDRE Constitution. The power to interpret the Constitution is given to the House of the Federation. See article 62 and 83 of the Constitution. However, there are still arguments that courts are not excluded from interpreting the Constitution.

<sup>18</sup> Rosemary O'Leary, *supra* note 2, p. 129



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given environmental policy can be set in motion/invoked in court of law. For instance, in the *Sierra Club v. Ohio Forestry Association Inc.* where certain forestry plan was challenged, the US Supreme Court decided that the case was not ripe for review because it concerned abstract disagreements on administrative policies.<sup>19</sup>

Ethiopian courts can also shape environmental policy in similar fashion. For instance, assume that the executive organ has issued regulations which authorize starting implementing one's project which is subject to preliminary EIA and for which such EIA is being done but not completed. If these regulations are challenged, our courts may decide that the regulations are unlawful, seen in light of higher laws such as the laws of the parliament, and hence, there is a case to litigate. Or, alternatively, the courts may decide that there is no case so long as no one has started implementing a project that is subject to preliminary EIA. This will, however, not be because if ripeness means presence of some harm, it may be late to prevent certain environmental problems.

Third, US courts can shape environmental policy by choice of standards of review, that is, when they have to review and reverse the decision of administrative bodies and when not to do so.<sup>20</sup> For instance, according to the US Supreme Court, reasonable interpretation of a given environmental policy made by an administrative organ must be deferred to if the policy is silent or ambiguous with respect to a given issue.<sup>21</sup> This means, so long as a given environmental policy is either silent or ambiguous in respect of an issue, then the solution given by an administrative body based on such policy must be accepted as correct provided that the solution (the interpretation of the policy) is reasonable.<sup>22</sup>

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<sup>19</sup> Id., p. 133

<sup>20</sup> Id., p. 129

<sup>21</sup> Id., p. 134

<sup>22</sup> Of course, what is reasonable could be challenged which a court has to decide.

In Ethiopia, it is not common to review administrative decisions by courts. This is so for two reasons. First, there is no clear legal framework authorizing courts to do so. In other words, courts lack clear mandate to review administrative decisions. In fact, although there were opportunities to do so, some laws unfortunately failed to recognize courts' role to review administrative actions (including inaction). This is clearly observable in relation to the Environmental Pollution Control Proclamation which fails to recognize right to standing to sue environmental protection organs thereby missing the opportunity to subject such organs' decisions to courts' review authority. Of course, the attitude of the general public that the government or its organs cannot be sued (as saying goes *the sky cannot be tilled, nor can the government be sued*) may be worth mentioning here. Even the only environmental case brought against the Federal EPA for not taking the measures it was supposed to take was dismissed on the ground that the Federal EPA could not be sued at least in light of the law that was mentioned (the Environmental Pollution Control Proclamation).<sup>23</sup> In the end, the absence of administrative procedure law in the country plays great role in the absence of judicial review of administrative actions.

The fourth way in which the US courts can shape environmental policy is by interpreting<sup>24</sup> environmental laws which are often ambiguous and vague, whereas on the other hand situations which were not anticipated by the drafters of these laws may arise. Thus, courts can interpret and make these ambiguous and vague laws apply to the new (and an unanticipated)

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<sup>23</sup>*Action Professionals' Association for the People vs. Environmental Protection Authority*, supra note 16

<sup>24</sup> Some argue that judicial policy making/shaping is different from interpretation. In the case of the latter, judges invoke applicable legal text to determine the content of their decision. In the case of policy making, judges invoke legal text to establish that they have control over the subject-matter and then rely on non-authoritative sources, and their own judgment, to generate a decision that is guided by a perceived desirability of its results. Malcolm M. Feeley and Edward L. Rubin, supra note 2, p. 5

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situations. By so doing, courts can make/shape both current and future environmental policies.<sup>25</sup>

This role of the judiciary is obvious. In our case, judicial power is given to the courts by the Constitution.<sup>26</sup> Thus, by virtue of this constitutional authorization alone, our courts can interpret environmental laws and regulate any new situation that is not expressly covered by the existing environmental laws. For instance, in relation to projects that are to be implemented around borders, our EIA Proclamation does not expressly impose duty on proponents to consult the communities living on the other side of the border. However, if any member of such community institutes an action in Ethiopian courts challenging the failure of the proponent to consult them, the court may decide that the proponent should have consulted them, too, because the EIA Proclamation was intended to cover this situation as well. By so doing, the court will be extending the scope of the existing law to a situation perhaps not intended by the drafters of the EIA Proclamation.

Finally, the major way in which US courts can shape their environmental policy is by choosing remedies for not observing environmental regulations.<sup>27</sup> For instance, the courts may choose to apply imprisonment, fine, corrective measures or other remedies in case a particular form of environmental policy non-observance occurs. Thus, the remedies the courts apply may be taken as policy shaping provided of course that courts can choose remedies.

In Ethiopia, too, courts can choose the remedies they apply for non-observance of environmental regulations. For instance, our environmental laws provide, *inter alia*, for imprisonment, fine, cleaning up environmental pollution, suspension or closure or relocation of an

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<sup>25</sup> Rosemary O'Leary, *supra* note 2, p. 130, 138-141 and Stephen R. Chapman, *supra* note 3, p. 28

<sup>26</sup> See article 79 of the FDRE Constitution

<sup>27</sup> Rosemary O'Leary, *supra* note 2, p. 130, 140-143

enterprise causing environmental problems, etc. Thus, anyone of these remedies can be chosen and applied to a given environmental case. Under such circumstance, the courts make or at least choose environmental policy for the concerned party. However, there are times when our courts cannot shape our environmental policy through choice of remedies. This happens when the law that is violated provides for only one remedy to apply. For instance, our EIA Proclamation subjects any person who, without obtaining authorization from the relevant environmental protection organ, implements a project that is subject to EIA or makes false presentations in an EIA study report, to fine of not less than fifty thousand birr and not more than one hundred thousand Birr.<sup>28</sup> Thus, a court that entertains a case involving such misbehavior can only apply fine as a remedy since the law does not provide for other alternatives.<sup>29</sup> Moreover, there are times when the law provides for cumulative remedies to apply. In this case, too, courts cannot choose remedy and hence shape environmental policy because they can only apply both remedies.

In the end, it should be noted that the US Supreme Court sets precedents for the other courts to follow. Thus, the decisions it make will be used as a law by lower courts. If the ways of environmental policy shaping discussed thus far are used by the US Supreme Court, the environmental policy so shaped will have wider application. For instance, lower courts will use the standard used by the US Supreme Court to decide issues of ripeness. When it comes to Ethiopia, the Federal Supreme Court does not ordinarily set precedent for lower courts. Consequently, lower courts can follow their own path of shaping environmental policy. After all, unlike in common law countries, in Ethiopia, Article 79(3) of Our Constitution requires judges to exercise their functions in *full independence* and to be directed *solely by the law*. Thus, judges can legitimately refuse to accept

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<sup>28</sup> See article 18(2) of the EIA Proclamation

<sup>29</sup> If there is any discretion left to the courts it is only on the amount of fine to be imposed. Otherwise, the courts cannot impose, for instance, imprisonment instead of fine for that would amount to violation of the principle of legality as recognized in our criminal law.

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the opinions of other judges, when invoked, even if they may be Supreme Court Judges and claim independence in relation to what they do. Moreover, the term *law* in the Constitution refers to statutes as opposed to judge-made law. Of course, the consequence of this constitutional stipulation is that judges can shape the same environmental policy in different ways thereby resulting in its non-uniform application.

Nevertheless, as of 2005, the Cassation Bench of the Federal Supreme Court has been mandated to make decisions on interpretation of laws binding on all levels of courts at all levels (Federal and Regional) provided that applications are made to it when fundamental error of law occurs.<sup>30</sup> As a result, the Bench has been using this mandate to make various decisions on interpretation of laws when fundamental errors in their uses are claimed. On the other hand, other courts are also using the decision of the Bench to decide similar cases presented before them. For example, in one family case,<sup>31</sup> lower courts decided based on the Federal Revised Family Code that marriage dissolves only if there is death or absence of one of the spouse, invalidation of marriage by judicial order, or divorce declared by a court. Indeed, these are the only grounds the Federal Revised Family Code recognizes to dissolve marriage.<sup>32</sup> However, the Federal Supreme Court Cassation Bench decided that long disuse of marriage should be added to (read into) the grounds expressly recognized by the Code. As a result, other courts are now using disuse of marriage for long period, because they are required by Proclamation 454/2005, as additional ground to declare that marriage is dissolved.<sup>33</sup>

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<sup>30</sup> See article 2(1), Federal Courts Proclamation Re-amendment Proclamation, Proclamation No. 454/2005. Actually, upon its enactment, the Proclamation was criticized for its unconstitutionality because some people thought that it would erode the independence of judges as recognized and required by the Constitution.

<sup>31</sup> *Shewaye Tessema V Sara Lengana and Others*, Federal Cassation Bench, File No. 20938, April 19, 2007

<sup>32</sup> See article 75 of the Federal Revised Family Code, 2000

<sup>33</sup> Of course, there are arguments in favour of and against this decision of the Bench. See Filipos Aynalem, *ሳይፋቱ (ዲ ፋክቱ) ፍጥ (De facto Divorce)*, p 131-132, Mizan Law review, V 2, No. 1, 2008 (in favour) and comments by Mehari Radae, Journal of Ethiopian Law, Volume XXII, No.2, December 2008, p 37-45, and Dejene Girma Janka,

With regard to environmental policy making/shaping, two points may deserve emphasis in relation to what is raised and discussed in the preceding paragraph. First, the decision of the Bench in relation to environmental policy will be used by all other courts. This is particularly good if judicial activism in favour of environmental protection is reflected in the decision of the Bench. Second, the bench may, while interpreting a given environmental law, go beyond the text of a law and decide to include a given aspect into its scope. For instance, in one case mentioned before,<sup>34</sup> the Federal First Instance Court decided that the Environmental Pollution Control Proclamation does not allow suing environmental protection organs. If the case had been brought before the Bench claiming that fundamental error of law was committed by the court in relation to understanding the spirit of the Proclamation, the Bench might have decided that the Proclamation permits, as it did in relation to grounds of dissolving marriage, suing regulators if there are faults on their sides.<sup>35</sup> Nonetheless, applications involving fundamental error of environmental law(s) are yet to reach the Bench.

### 3. Conclusion and recommendations

To conclude, as this brief essay has tried to explain, the judiciary can play a role in the formulation of environmental policy. In the US, the avenues for judicial policy formulation (making/shaping) are many. In fact, the US courts have been using these avenues to shape their environmental policies whenever opportunities present themselves. In Ethiopia, too, the judiciary can shape environmental policy although some of the avenues available to the US courts are not available to them. However, there is no meaningful effort, except one, that has been made by our courts to shape our environmental policy. Of course, absence of judicial efforts to shape

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*Tell Me Why I Need to Go to Court: A Devastating Move by the Federal Cassation Division*, Jimma University Journal of Law, V2, N1, 2009 (against)

<sup>34</sup> *Action Professionals' Association for the People vs. Environmental Protection Authority*, supra note 16

<sup>35</sup> After all, in the absence of suits against regulators to fore them take measures they are expected to, the purposes of the Proclamation can hardly be served.

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environmental policy in Ethiopia may be attributed to either lack of demand (case) presented before the courts by the public (or other entities) for environmental protection, whatever the reasons may be, or absence of judicial activism in favour of environmental protection. It is, therefore, recommended that our courts should use any opportunity that may present itself to them to shape the existing environmental policies in favour of environmental protection.

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