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About the Law School

I. Background

The Law School commenced its academic work on the 19th of December 2002 as the Faculty of Law of Jimma University. For the first year, it accepted 158 advanced diploma students who graduated three years later. Since 2003, the School has been accepting and teaching students in four first degree programs, namely, in the regular, evening, summer, and distance programs. Thus far, it has graduated thousands of students in the first three programs while the students in the distance program are yet to graduate for the first time. Moreover, the Law School has been making preparations to commence an LL.M program in Commercial and Investment Law in 2012.

In addition to its teaching jobs, the Law School has been publishing its law journal called Jimma University Journal of Law. It is a journal published at least once in a year. Besides, there are research works that the academic members of the School conduct although they are usually not published.

Finally, the Law School is making its presence in the community felt by rendering legal services to the indigent and the vulnerable parts of the society (such as children, women, persons with disabilities, persons with HIV/AIDS, and old persons) in Jimma town and Jimma Zone through its Legal Aid Centre, which has about six branch offices. Of course, the other main aim of the Centre is enabling our students to acquire practical legal skill before they graduate from the School.

II. Law School Academic Staff

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Land Use Legislation in Ethiopia: A Human Rights and Environment Based Analysis

Daniel Behailu Gebreamanuel[♣]

Abstract

As far as the history of land tenure of Ethiopia is concerned, it can be analyzed in terms of the northern Ethiopia rist system and southern Ethiopia communal land use system. Both traditional tenure systems did not encourage efficiency in land use rather the northern rist system had subjected land to fragmentation by making land hereditary use right only and the southern communal system encouraged free ride by making the land communal owned common property to all. Also, the 1975 land reform in Ethiopia seemed to have solved the problem of the poor finally compared to the massive exploitation of the tenants by landlords. However, the exploitation continued by making the government a new 'landlord' in place of the feudal landlords. Currently, by inserting the land policy in the Constitution, the current government has effectively eliminated the possibility of flexible application of policy and implementing laws. One has to wonder why this is being done.

1. Introduction

'*The challenges in rural areas are just as formidable. Deforestation and desertification are threatening ecosystems, biodiversity, and food security. Nearly 2 billion hectares of land are affected by human-*

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induced degradation of soils, putting the livelihoods of nearly 1 billion people at risk.' Kofi A. Annan[1]

The above assertion and facts made a few years ago still holds true. In light of this concern; therefore, it is appropriate to analyze land policies and issues in terms of the implication it has on environmental degradation and food security. It is often claimed, land is everything in the context of developing country in general and Ethiopia in particular. It is a source of livelihood; it is a measure of identity and a measure of personhood in some cases. It is believed in the cultural context of Ethiopian society, especially among the northerners to have no land or to be landless is to be subhuman or socially unimportant and unnoticed**.**

Hence**,** the issue of land use law and policy in Ethiopia has to be analyzed in terms of cultural values, human rights standards and environmental matters. The core issues to be tackled are subjects of land policy in place vis-à-vis the right to food, the right to shelter, the right to adequate standard of life, the right to clean & safe environment, the right to development and even the right to life ultimately. Respect for these rights and ensuring the same calls for the exposition of the land legislation and policies in place, and its connection to the environmental degradation and livelihood deprivation or food insecurity as the case may be.

The customary practice and the subsequent modern socialism oriented laws in Ethiopia have frustrated the environmental integrity and made any effort at protecting the environment an insurmountable task. The harm on the environment has eroded the potentials of the land and hence endangering many of the rights that matter most to people

[1]Nathali J. Chalifour, PatriciaKameri-Mbote and et seq., ed., *Land Use Law for Sustainable Developmen*t,(Cambridge University press, 2007), pp. preface.

including the mother of all rights, the right to life. Many have lost their life to the starvation that has ensued from the wrong land legislations & policy directions, and customary practices in Ethiopia among other factors. The *rest*[2] system, which subjects the land to continues fragmentation by making land a hereditary use right and the subsequently augmented by socialist rule of land use which subject the entire population to subsistence agriculture; immensely contributed to deforestation and the subsequent washing away of top soils by erosion and the diminution in size of fresh water.

Consequently, the customs as well as the socialist oriented modern laws in place have had taken a massive toll on the environment at least in terms of forest resource depletion, and dwindling in water & soil resources. The subsistence agriculture, which tied the majority of the rural population to farming, has caused massive poverty, and it is in turn an environmental disaster if one recalls the notion that 'poverty is the biggest polluter' of the environment. The environmental disaster in turn has resulted in aggravation of the poverty level, which has resulted in the natural consequence of imperiling the right to food and adequate standard of life, and other fundamental human rights.

In case of Ethiopia's situation, 83% of the population live in rural Ethiopia and are either peasant or pastoral society. The population according to recent census is well over 95 million.[3] The ever-increasing population number in the absence or scanty available alternative economy is taking a toll on natural resources and the majority is forced to live on farming or farming related activities. As a

[2]*Rist is an Amharic word and* can be defined as hereditary land use right derived from an ancestral right who has occupied a plot of land perhaps centuries ago and hence this right continues to devolve to his descendants. Hence, as generations expand that same plot is subdivided among eligible heirs.

[3] Federal Democratic Republic of Ethiopia Population Census Commission, Addis Ababa, 2007 and subsequent forecast.

result, each available piece of land has to be put in use in a fragmented way and user operating small scale agriculture is the mainstay of livelihood to everyone since the land can be accessed for free.[4] The land fragmentation is beyond the imaginable scale and the national average size of an individual land holding is getting less than one hectare.[5] Hence, land in rural Ethiopia is made into subsistence (lifeline) than other means of production. The reason behind the land fragmentation and consequential environmental disaster is attributed to the customs that have been operating in the nation for centuries and the socialist ethos pursued after the 1974 revolution, which toppled the then feudal regime.

Both northern Ethiopia *rist* system and southern Ethiopia communal land use system, the traditional tenure systems, did not encourage efficiency in land use. Moreover, the northern *rist* system had subjected land to fragmentation by making land hereditary use right only and the southern communal system encouraged free ride by making the land communal owned common property to all thereby proving the theory of 'tragedy of commons'.

The subsequent socialist land policy which purported to abolish the customs in place has also by ensuring access to rural land to all for free have subjected the land to further fragmentation. Given the population boom and subsequent frequent redistribution of land holdings; the land policy proved disaster for both environmental protection efforts and reduction of poverty. Hence, in some places the

[4] Article 40(4) of the Federal Democratic Republic of Ethiopia Constitution, 1995 provides, Ethiopian peasants have right to obtain land without payment and the protection against eviction from their possession. The implementation of this provision shall be specified by law. (Since everyone is entitled to the land free of charge; the land meant for agriculture is subdivided to all as the need arises.)

[5] Ethiopian Land Tenure and Agricultural Productivity, Research Report by Ethiopian Economist professional Association, (Addis Ababa, 2002) p. 58, (Amharic Version)

fragmentation level has resulted in the non-exploitability of the land in a meaningful and economically feasible level and scale acquiring the infamous nickname 'starvation plots'.[6]Why this happened? What are the underlying factors? What is the position of the law both past and present? How is the environment affected in the process? Moreover, what is the implication for the human rights ethos enshrined in the constitution of Ethiopia itself?

In an effort to answer these questions, first the paper shall give an overview of the Ethiopian land tenure system from the historical point of view. As such, the different land tenure systems that were there for centuries and have had impact on the present system shall be examined. What were the land tenure systems and how the present land tenure system evolved? How did the custom and policies in place impact the environment? These questions and related ones shall be answered in here. Second, issues surrounding the current land policies and the tenure system attendant to it shall be discussed. Accordingly, land ownership rights pertaining to the rural and urban land in the nation will be sufficiently encompassed under the title, current land legislation and policies in Ethiopia. Third, the effect of the land system in place on environment and development shall be highlighted in terms of human right ethos. Finally, conclusion will be drawn and subsequent recommendations shall be suggested as improvement and in some cases even change of the laws and policies in operation.

[6]DesalegnRmato, researcher at Forum for Social Studies, Addis Ababa, have coined the name for the plots of land currently visible in all over the nation except in the lowlands of Ethiopia where pastoral society live.

1.1. Overview of Ethiopia's Land Tenure System: Historical Perspective

The land tenure system in Ethiopia dates back to the time immemorial and can aptly be studied in terms of the South/North dichotomy where the north has lived through the *rist* system and the south has lived under the communal system till the beginning of the 20th century. The Southern communal tenure has been disturbed immensely when the northerner started expanding their empire to the south and had won and included almost half of the present day Ethiopia. It is to be noted that before the time of Menelik II[7] the present-day southern Ethiopia was largely under the tribal communal land system where each tribal leaders controlled and ruled over the land and the people. On the other hand, the northern part of Ethiopia lived under the age-old *rist* land tenure. Hence, the question, what is tenure in land to begin with?

Land tenure can be defined as "as the relationship among people, as individuals and groups, with respect to land and other natural resources'.[8] This being the oversimplified definition of land tenure, the completeness of the definition can be achieved by adding the dimension of regulation i.e. land tenure more probably is that aspect of law which governs the relationship of people to the land they either own or hold. Accordingly, if one ventures to the question of land tenure system in Ethiopia, she/he has to see it with respect to two eras: the era before the modern legislation and the era after the modern legislations i.e. pre 1960 and post 1960. The defining moment with this respect was 1960 where all customary laws have been abolished to the extent that they are inconsistent to matters provided within the

[7]Menelik II ruled the new Ethiopia he forged out by conquering different kings and rulers of tribal kingdoms from 1881-1913.

[8] FAO, Access to Rural Land and Administration after Violent Conflict, (2005) Land Tenure Studies, 8, 19; as cited in the Ethiopian Business Law series, Vol. III, page 2.

new Civil Code, which was enacted at the same year.[9] One of the central matters addressed by the Civil Code was, of course, land and land tenure issues. However, issues pertaining to land have been administered as per the customary laws and the modern legislation had limited applications. The modern legislation was not operating in full force by the time it was again clouded and in some cases repealed by legislations following regime change in 1974. It was in fact short-lived. The 1974 popular revolution with the famous slogan 'land to the tiller' had changed the land ownership system from feudal to public land ownership.

Coming back to the imperial regimes'[10] land holding system, there were three kinds of rights over the land until it was abolished in 1975 via Proclamation. *Rist*, *Gult* and private land ownership. *Rist* was the right to claim a share of the chief father's land based on descent from him. *Gult* was the right, normally non-hereditary, to all or part of the tribute ordinarily due from the occupant of land to the ruler. The assignee of this tribute has not only the right to revenue, goods or services, but also the responsibility to perform certain judicial and administrative functions. He is known as "the governor of the *gult,".*[11] *Rist* and *Gult* largely operated in the northern part of Ethiopia and the occupants (rulers from the north) were also possessing private land in

[9] In 1960, the Emperor promulgated a new Civil Code for Ethiopia. This enactment ostensibly marked the end of the application of customary law throughout the empire, Article 3347 (1) of the code states: unless otherwise provided , all rules whether written customary or previous in force concerning matters provided for in this code shall be replaced by this code and are hereby repealed.

[10] The Modern Ethiopia took its present territorial shape with the administration of king Menelik II (1889-1908) and was subsequently ruled by Emperors, Haile Sellassie I being the last and he ruled from 1930-1974. During these periods, the land holding system was largely governed by customary rules defining the nature of the feudal landlords' rights especially in the newly occupied southern part of Ethiopia.

[11] Read Richard Pankhurst, *State and Land in Ethiopian History*, (Oxford University press, 1966)

the southern and south western part of the country where people were subjected to extreme form of exploitation by the landlords.[12] Before 1975, particularly in the southern part of Ethiopia, land was concentrated in the hands of often-absentee feudal landlords, tenure was highly insecure, and arbitrary evictions were a serious threat.[13] Hence, Private land tenure system operated in the southern part of Ethiopia. This fact and ensuing exploitation created popular resentments which erupted in the form of revolution and ended up not only with the demise of the imperial regime but also with new advent: land proclamations[14] making land the property of the government which came to power by then. The socialist regime prohibited alienation of land in any manner be it by sale, mortgage, antichrists, and so on. Hiring labor to work on a farm was also made illegal. Priority is given to the government to buy farming produces at a price fixed by the government itself.

The promise of the slogan (land to the tiller) did not come out nice with the progress of time for the actors of the military junta and even the people. The revolution, of course, succeeded in toppling the exploitative feudal regime yet it did not cure the economic cancer of the society, which was and is poverty. The extreme poverty was in turn largely attributable to the land policy. According to Destin and Eyob[15] the failure in the agricultural policy of the military regime came from:

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[12] The owners of the land were royalties, nobilities, retired soldiers, governors, and the Orthodox Church.

[13] *See generally*, Hussein Jimma, *The Politics of Land Tenure Ethiopian History: Experience from South*, (Center for Environment and Agriculture studies, Trondheim, Norway, 2004.)

[14] Public ownership of Rural Land Act Proclamation, No. 31, (Ethiopia. 1975) and Government Ownership of Urban Lands and Extra Houses Proclamation No. 47 (Ethiopia, 1975.

[15] Dustin and Eyob, 'Land to the Tiller Redux: Unlocking Ethiopia's Land Potential, (2008) Drake Journal of Agricultural Law, 13

> "… Numerous restrictive regulations imposed including price fixing, forced creation of cooperatives, and preferential treatment to cooperatives and state farms at the expense of small holders."

Such was the end of the military regime's land policy, which brought into picture extreme form of land fragmentation, small productivity and overall economic disaster to the nation. The land fragmentation and the attendant meager productivity was the consequence of the policy, which put in place public ownership of land and the prohibition thereof to sell, mortgage or transfer rights overland in any manner. Accordingly, many scholars, business men, even politicians hoped that the current government[16] would change the land policy of the nation; however, to the surprise of many it has continued (with slightest modification) the public ownership of land policy of the government it did succeed.

1.2. Current Land Policies in Ethiopia

1.2.1. Ownership Issues

As mentioned herein above, land was/is a public property in Ethiopia. The government has administered it since the 1975 radical land reform. The same is true with regard to the EPRDF[17] government, which took power in 1991. Against popular odds and expectations, the present government continued the relic of much detested government of *Derg*[18] as far as land policy and land ownership rights are concerned.

Immediately after the downfall of the *Derg*, no one was certain what course the new government would take regarding land tenure. The

[16] The *Derg* military government was toppled via force in 1991.

[17] Ethiopia's people Revolutionary Democratic Front, which is a ruling party in Ethiopia since its grab of power via force in 1991.

[18] *Derg* is an Amharic word for either committee or System which was a self-assumed name of the socialist military regime which ruled Ethiopia from 1974-1991

Transitional Government[19] of Ethiopia had declared that the issue of land tenure (then defined as a choice between private and public ownership) would be settled in the process of developing the new federal constitution.[20] When the new constitution of the Federal Democratic Republic of Ethiopia was adopted in 1995 (herein after the FDRE Constitution), the issue was settled in favor of public ownership of land and this policy was made available in one of the articles of the Constitution.[21]In so doing, the government effectively eliminated land policy as a variable instrument that could be used to address the changing circumstances that affect the rural economy and the policy is contradictory to the free market policy of the government itself. In other words, the room for trial of another workable land policy was legally and completely clogged.

Thus, by inserting the land policy in the Constitution, the current government has effectively eliminated the possibility of flexible application of policy and implementing law. One has to wonder why this is being done; despite the fact that the public ownership policy of the ex-regime from which the present government took power by force ended in fiasco. Some of the reasons forwarded by the government justifying this policy can be collected from the minutes of the

[19] The transitional government stayed in power from 1991 to the time of the ratification of the FDRE constitution.

[20]Nega and Adnew, et seq., *Current Land Policy Issues In Ethiopia*, 2002 (Ethiopian Economic Policy Research Institute, Addis Ababa, Ethiopia), accessed from www.fao.org, on 12.01.2011

[21] Article 40 (3) of the 1995 Constitution (which concerns property rights) provides that the right to ownership of rural and urban land, as well as of all natural resources, is exclusively vested in the state and in the people of Ethiopia. "Land is a common property of the Nations, Nationalities and peoples of Ethiopia and shall not be subject to sale or other means of exchange“. Sub Article 4 also states, "Ethiopian peasants have the right to obtain land without payment and the protection against eviction from their possession."

constitutional debate [22] pending its ratification: the present government's position appeared dominant and won a place in the constitutional arrangement.

The arguments forwarded for the public ownership of land goes as follows in contrast to the free hold system: the first argument comes from fear of rural- urban migration: the idea is if we allow peasants to sell their lands, the next thing they do is to sell the plots of land they hold and move to the cities. This really creates a problem where readily available industries are not there to take up the massive work force migrating to cities. The migrants could not only be unemployed but also be dangerous for the security of the nation or more appropriately to the security of the urban population. Secondly, they argue that if land is to be made private property; those "relics of feudal' will buy all the rural lands and subject the mass to the same old cycle of exploitation or at least they would make the mass landless. The 'relics' are said to be beneficiary of the feudal system toppled by *derg* regime or their descendants believed to be with the capital power or urban dwellers in general who might hold capital power. Thus, those people who argue for private ownership of lands are to use their capital to re-establish the dominance, which has been removed through 'popular struggle'. Third, and most importantly public ownership of land is the underlying factor for equality in Ethiopian context. Accordingly, making land the domain of public ownership and ensuring equitable distribution thereof is the trademark of Ethiopian notion of equality. Simply put, public ownership of land gives free access to land to the majority of people, especially to the rural people on egalitarian bases.

[22] Minutes of the Ethiopian Constituent Assembly, (November, 1995) Volume 4, Pages 23-51
(the assembly and other related assemblies ratified and approved the present Constitution of the Federal Democratic Republic of Ethiopia, 1995)

However, on the other hand, those who were/are arguing against public ownership of land come from the angle of development or efficiency, environmental protection and human rights in general. If we see the argument that comes from the development angle, one cannot be in difficulty to figure out its merits. If we make land privately owned property so much so that we accord the right to the peasants to sell, mortgage or lease their land, as they like; this would automatically deal with the problem of land fragmentation and fragmented unstainable small-scale farming. Since no one is in a position to deny that land fragmentation [23] with ever-increasing population number is exacerbating the poverty level of Ethiopian, the only way out, it seems is to resort to the new policy as against a policy that proved unable to break the poverty cycle in Ethiopia. Second, once a person thinks that the land is to stay with him or her as a private property its sustainable use would be a private agenda as well. In other words, private ownership of land gives incentive for the owner to continually invest on it, keeping its fertility and so on in a way serving the environmental cause as well and above all expediting efficiency.

Third, in terms of the freedom of choice as well; where a person is given full ownership rights alternative economic activities can be entertained by selling or leasing the land that belonged to him or her. The human rights based argument is best illustrated in the indirect

[23] It is not uncommon to hear arguments these days that as renting rural land is allowed, the problem of land fragmentation can be dealt with since investors can take land on rent and farm on large scale. The arguments is weak in a sense that the renting is for fixed duration , which is a maximum of 25 years in some regions and this rent status can't create full confidence to the investing body i.e. insecurity is the real issue still. In fact, the government can only do rural land lease since peasants are not allowed to rent their land completely. A farmer can only rent his land in a manner that does not displace him, hence the peasant is supposed to retain minimum size holding define by the law. Given that the national average land holding is below one hectare one is not in a position to lease his land to an investor rather to fellow farmer in this case it must not be for more than three years as per the regional laws.

implication of the policy in place. The land use policy by making access to all has distributed poverty and hence poverty has become the trademark of Ethiopian rural community. Where poverty is rampant, respect for human rights stands no chance. There is no right that is not violated by poverty. To name just a few : the right to food, the right to health, the right to shelter, even in extreme case of poverty the right to life can be violated. Moreover, the government has absolute control over the life of the peasants as it is the giver and taker of land, thereby affecting their freedom. The system simply encourages despotism.

Now the question here is which position is tenable given Ethiopia's present situation. This is a very subtle question requiring subtle answer. There are obvious merits and demerits in both side of the argument. The merits with respect to the argument for public ownership of land or better said the advantage is that the government can push any genuine development plans like putting infrastructures in place (e.g. constructing road) easily without much hassle or disputes with private owners just by giving compensations as demanded by law.[24] Moreover, investors can also secure land from the government very easily and in a more centralized manner. Plus, it can easily ensure social equity with regard to access to land. On the other hand, the disadvantage is that the government is obviously restricting freedom of choice of the farmers and is using land for political ends. As it can be witnessed from the outcry of the opposition parties in the country,

[24] The Ethiopian constitution, under article 40(8), puts an obligation on the government to pay, in advance, compensations "commensurate to the value of the property" expropriated. The Ethiopian civil code on its part has the following to say , under article 1474(1) " that the amount of compensation or the value of the land shall be equal to the amount of the actual damage caused by expropriation." However, the most difficult question in here is, given the absence of market price for land and that land being the property of the government, how are we to assess the actual value? The problem is being addressed in practice by giving the person, whose land is taken away another land somewhere else. These practices have so many consequences, which needs separate treatment and study.

which has got elements of truth, the government has a way of manipulating the votes of the farmers in such a way that if a farmer is pro-government, credit facilities are extended to him or her to get fertilizers and other inputs for farming. Land is allocated more easily to pro-government farmers (discriminating those who dare to hold different positions), and new agricultural packages are accessible as well. The public ownership of land being in place has obviously resulted in a land fragmentation and that the scale of fragmentation in some regions is so immense that it resulted in a scanty productivity adding fuel to the existing problem of poverty. It is just enough or even less than enough in some cases for subsistence itself.

With respect to the advantage and disadvantage of the issue of private ownership of land, the following can be said. Of course, private ownership of land gives freedom of choice, yet what is there to be chosen from, ought to be the burning agenda. How far they have also researched that such ownership advances the causes of the environment and human rights is a point for concern? But from practical experience of other countries, private property in land advances efficiency in land use and boosts productivity. However, in our context: What if the middle position in terms of long lease can be tried which does have the merits of both state ownership and private ownership of land. Multiple ownership system (the one which combines public, communal and private as found appropriate) and versatile policy has to be tried out in Ethiopia.

The most workable policy mix as a solution to the present predicament ought to be a mix of at least three kinds of ownership or land holding systems: Public and Communal holdings, and private ownership. The private ownership can suitably operate in areas where land is so fragmented and that there is over population against the arable land available. People need to own their lands, freely engage in the land transactions and look for the alternative economic roots, as available;

for in a way the productivity return is so scanty that in some cases it cannot sustain life anymore. This policy practically helps also for the re-healing of the land and avoids fragmentations thereof. An investor or the government itself may invest to regain the fertility of the land and may give a breath for the land to re-heal acquiring the land under free market policy. Those areas where the community uses them collectively needs to be owned communally with use rights extended to everyone as the circumstances allow specially among the pastoral society of Ethiopia or in areas where indigenous communities live with their way of life still intact. As far as pure public ownership of land is concerned; it would be very suitable with regard to unused lands often available in the lowland parts of the country and of course with further research of its effect, as well. The government can lease to investors these lands for large-scale production and organized youth (or people from overcrowded highland areas) by resettling them at the lowlands with credit access, transferable and secured tenure. This kind of ownership gives big capital investors an easy chance to do so in the lowlands of the country where unused lands are available and there is a need to put up infrastructures for production.

1.3. Rural Land Legislation and Policy

There are many poor people in the world. Poverty is a persistent problem. Poor people often live in so-called less developed countries and the poorest of them live in rural areas of those countries. Mass media regularly remind us that these people live with continuous livelihood insecurity. However, for the people in these poor rural regions, livelihood insecurity is part of daily life. It seems, it is never to dawn from the eclipse of poverty especially for Ethiopian rural poor. The land policy, however, is largely to be blamed for the horror of these predominately majority section of the society in every developing nation.

The 1975 land reform in Ethiopia seemed to have solved the problem of the poor finally compared to the massive exploitation of the landlords against the tenants. In hindsight, one can easily see that the exploitation continued by making the government a new landlord in place of the feudal landlords. Undeniably, the reform abolished the tenant-landlord relationship. However, it was unable to solve the livelihood insecurity of 83% of the Ethiopian rural poor. Agriculture being the dominant economic activity of the nation, the sole sources of export and massive source of employment, the policies crafted to govern it needs to be developed with care and extra wisdom.

Ethiopia is considered to have one of the best agricultural lands in Africa. Yet its people are languishing under the yoke of poverty. The problem partly has to do with the land policy. The policy practically has not changed since 1975. This policy stagnation has hindered the overall development of the nation and the peasants in particular. Many praised the 1975 land reform yet to the surprise of many; it did not bring change in terms of poverty alleviation. It is the question of every sensible person in Ethiopia; why the present government is also clinging to the policy, which proved unworkable.

The present government worked hard putting agricultural development at the front point. It has declared that land is the property of the nations, nationalities and people of Ethiopia.[25]On the other hand, the present government made slight modification to the *derg* proclamation[26] with regard to rural land and administration thereof. The first federal law enacted pursuant to the constitutional direction was the federal rural land administration proclamation no. 89/1997. If one sees the proclamation at a glance, it confirmed the constitutional

[25] The Constitution of the Federal Democratic Republic of Ethiopia, article 40 (FDRE Constitution, 1995)
[26] Proclamation no.31/1975, (Ethiopia. 1975)

principle of land ownership by the nations, nationalities and people of Ethiopia .i.e. public ownership of land. It gives power to administer land to the regional governments.[27] This proclamation practically amended the existing laws on one area only; that it enabled the right to rent out[28]land in addition to bundle of property rights in land provided for under proclamation 31/1975. Under the recent proclamation, bequeathing land to family members[29] is allowed in a conflicting manner to the civil code of Ethiopia.[30]

Confirming once again the power of regional governments on land, proclamation 456/2005 provides for the rural land administration and use framework law; pursuant to this law states are allowed to enact their own laws with regard to land administration and use.[31] The framework legislation has also authorized regional states to fix duration of rural land rent out.[32] The rent right extended to the holder of land is of two categories depending on the identity of the lessee: to fellow farmer or investor the later enjoys lots of privilege. Usually rent to fellow farmers or rent to anyone who would farm in traditional method is given for short term, maximum for three years with no right to give it as a collateral. The rent is also to respect minimum holding

[27]Article 4-5 of the Federal Rural Land Administration Proclamation no. 89/1997, (Ethiopia. 1997)

[28] Id, Article 2(3); However, the renting is with limitation. Rent is allowed in a manner that does not displace the farmer. Distinction is also made on the duration of the lease period depending on the identity of the lessee and hence if the lessee is a farmer the maximum duration is 3 years while up to 25 years is allowed to an investor.

[29] A family member is defined as any one permanently living with a person having holding rights by means of sharing the livelihood of the later. Id, Article (5)

[30] Both modification were informally and customarily, there in the society, renting and inheriting land were and are common phenomenon for Ethiopians.

[31]On the morrow the big states, Regional States of Oromia, SNNPR, Amhara, Tigray, have enacted their own land use and administration proclamations as per the framework federal legislations and regulating areas left onto them.

[32]For instance, Amhara Regional state has given up to 25 years, Oromia up to 20 years, SNNPR up to 25 years, Tigray up to 20 years.

size fixed by the regional government and such renting must not be displacing the rent giver. Thus, the right is basically unavailable given in most densely populated areas the land holding is already to minimum holding size fixed by regional states. The regional laws also purport to have prohibited redistribution of rural land which has to be seen in light of the constitutional rights of the landless to get land for free and as they demand.

However, with ever-increasing population number the issue of land redistribution[33] is a business that states might venture to now and then. This phenomenon has reduced the sizes of rural land holdings per to the framers ratio in such way that the fragmentation robbed the land of its capacity to yield. Of course, the regional laws prohibited in some cases further redistribution of land,[34] yet this fact seem to have a bearing on the constitutional provision which makes access to rural land a right.[35] The FDRE constitutions clearly states that everyone is entitled to free access of rural land for farming and hence where is the land to be sourced if redistribution is to be prohibited. The prohibition endangers the constitutional right of the younger generation. It is also provided in the regional laws enacted as per the framework federal law that there will be minimum holding size[36]below which holding is prohibited as lessee or original holder of the land.

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[33] Redistribution is prohibited under some of the regional laws, however, its constitutionality is questionable since the constitution grants a right to everyone to access land for free as long as one chooses agriculture as the main livelihood.

[34]For instance, article 8 of the *Amhara* land proclamation no. 133/2006, (Ethiopia, 2006)

[35]Article 40 of the FDRE Constitution

[36]According to the *Oromia* land proclamation the minimum rural land, holding size shall not be less than 0.5 hectare for annual crops and 0.25 hectare for perennial crops. The SNNPRS Land proclamation has used different criteria to fix the minimum land holding size; if the land is to be used for, the rain feed agriculture its size shall not be less than half hectare. However, if the land is irrigable land, its size must not be more than half hectare. On the other hand, the *Amhara* land proclamation simply stated that such holding ceilings should be decided by

1.4. Urban Land Legislation and Policies

Following the land reform of 1975, all urban land and extra-houses became state property. Urban dwellers and enterprises had the right to rent the property from the government. The rental transactions were registered by the *kebele*'s [37] administration of land and houses. However, the present government has adopted lease system for urban landholding and administration since 1993. Proclamation no.80/1993 governed the lease system and it was adopted before the constitution came into picture. The FDRE constitution seemed to have accepted the lease system by not altering and even more appropriately by escaping the issue. The 1993 lease proclamation has been replaced by proclamation No.272/2002.[38]This proclamation applies to land held by the permit system[39], or by leasehold system[40], or by other means. 'The other means' includes giving land via negotiation, lots and even grant by the concerned governments administering the land. The proclamation has established principles, which fix the duration of the lease[41] and rights of the lessees to use it as collateral or use it as a capital contribution. [42] The period of lease is also subject to renewal[43]as per the requirement of the law. The lease system is the area where least complaint runs against the land policy of the nation

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regulations to follow the proclamation. The *Tigray* land proclamation is a bit subtle on the issues, it affirms that redistribution is not a likely and hence the existing holding size of the peasants are respected despite odds; however, if land is to be given in the future the minimum land holding shall not be less than 0.25 hectare.

[37] *Kebele* is the smallest administrative organ in Ethiopia even by today's standard.

[38] A Re-enactment of Urban Land Lease Holding proclamation no. 272/2002

[39] Permit system or rent system is adopted by the *derg* regime.

[40] There are three mechanisms of allocation of urban land to the recipients: by auction, negotiation, and grant by the concerned region or city government, article 3(2) of proc.272/2002

[41] Pursuant to article 6 of the Lease proc. No.2727/2002, period of lease is up to 99 for housing, 80 for industry, 50 for commerce, and 50 years for others (lands in the capital city). It also provides different period for other town and land in other towns meant for different purposes all over the nation.

[42] Article 13 of the Proc. 272/ 2002

[43] Id, Article 7

save the duration of the lease in some cases. However, in a recent controversial lease proclamation[44], transfer of lease right is further restricted.

2. Confronts to the Current Land policy

"..there was a consensus that the current system, because it does not guarantee security of tenure and undermines incentives, has detrimental effects on agricultural productivity and natural resource conservation... current land policy does not give farmers secure rights over the land they use, does not maintain equitable access to land over time, does not provide incentives for investment in improvements or conservation, and does not encourage farmers' entrepreneurial and experimental efforts to better their lot. From a policy perspective, it does not foster agricultural intensification, improved environmental management, accretion capital formation, or rural development."[45](Emphasis Added)

The above quote summed up the challenges to the present land holding system and the policy underlying it. The challenges include but not limited to: tenure insecurity, fear of land redistribution, fear of expropriation, and issues pertaining to maladministration. Let us examine each item by item and find out how these matters are challenges to the existing land policy of the nation. Are these real or perceived problems coming from fans of private ownership of land rights?

2.1. Tenure Insecurity

The major sources of tenure insecurity in the present Ethiopia is fear of land redistribution and expropriation. The FDRE Constitution (under article 40) gives, “peasants the right to free allotment of the

[44]Urban Lands Lease Holding Proclamation No. 721/2011, (Ethiopia, 2011)
[45]Nega and Adnew, as quoted in Supra note 20.

land and not to be evicted there from". The constitution guarantees the right to free access of land and at the same time security not to be evicted there from. However, given the ever-increasing number of Ethiopian population though the law may guarantee against eviction; it cannot guarantee against the re-sizing of the land as the new generations come to picture. Redistribution is inevitable at given intervals. The downsizing can be justified by the same constitutional rights of the younger generation to get land for free.[46] As the territory of the nation is not expanding, redistribution is a brute fact to confront. These facts again contribute to the existing fragmentation of arable land problem, which ultimately exposes the land to the status of non-viable source of livelihood and environmental degradation.

The eviction may come also from the angle of expropriation though expropriation is only for public purposes alone that too after adequate compensation are given in advance.[47] Nonetheless, difficulties in getting precise definition to phrases like "Public Purpose" and "Adequate Compensation" are not easy to solve given the shaky status of our judicial independence and the heavy hand of the government. Moreover, mistrust also run around, the ability and impartiality of the regional states while making redistribution of the lands as needs arises. If one pays attention to the print media often-carrying messages belittling the government, one may not escape to confront the often-talked issues of favoritism towards party members and sympathizers, massive corruptions with regard to urban land allocations and so on. With regard to land redistribution issues as well; the accusation runs with full momentum.

[46] Article 40 of the FDRE Constitution
[47] Article 40 of the FDRE Constitution

2.2. Restriction on Transfer of Land Rights

One of the major problems with regard to the present land policy of Ethiopia is that landholders are unable either to sell their lands or mortgage the land to get some credit from financial institutions thereby handicapping them not to [both] look for alternative economic means and/or continually invest on their own land and improve the quality thereof. Such restriction is also the major problem, which holds back the active farmer not to expand beyond his small plot of land.

Alienation, or the ability to transfer land, is one of the major issues in the public versus private ownership debate. Public ownership errs on the side of restricting the ability to transfer land, which was true under the *Derg regime*, where land could only be transferred privately through inheritance. (Emphasis added)[48] Such restriction entails the following consequences:

- Where land is publicly, owned alternative economic activities cannot be easily sought for initial capital (to venture on entrepreneurship) that would have been available by selling or mortgaging land is forfeited at the same time.
- Such ownership right which limits transferability creates tenure insecurity; land can be taken away under the guise of redistribution or public purpose.
- The restriction robs the land of its natural value, it makes the land to have no practical market value and hence a property worthy of no protection.
- The policy also plays major part in land fragmentation and degradation of the environment. Where land gets scarce people automatically venture to clearing nearby forests and even over using the land available to the extent that the land no more could be used for any meaningful farming activity.

[48]Dutin and Eyob, Supra Note 15, p. 13

- The restriction on transfer discourages the active farmer and the investor. The policy also discourages modern farming using up to date technologies, as such, technology usually cannot operate in small-scale farming.
- The administration aspect of this policy is never free from corruption and opens up room for abuse of the land that would have served the causes of much desired development.
- Thus, the policy by enabling farmers to farm for subsistence only, it brought about the same level of income for rural society thereby contributing to the overall national poverty.

3. Prospects to the Current Land Policy

The positive aspects of the current policy come partly from the policy it inherited and the modification it made there from. Lifting up the restrictive regulations put in place by the *derg* regime as far as price fixing and quota contributions are concerned; are welcomed by the Ethiopians in general and rural poor in particular. Dropping that socialist agenda of the ex- regime at least with respect to selling the products of the land, is one giant step to right direction. Thus, market liberalizations are a point for thumbs up to the policy of the current government. Accordingly, the following strong sides of the current policy can be talked of:

- Equality of access to rural land including protection of women right via land access; yet urban land is not based on the principle of equality of access to land.
- Market liberalization, which enabled farmers to sell their produces for better and competitive price, is another opportunity thereby relatively improving their income of the rural poor;
- The granting of the right to rent out land though for limited duration and permission to pass it over to families through inheritance. However, there are many limitations to these rights, as well;

- Lease system for urban land where least complaint is coming from suggesting the workability of the policy. Yet, the recent lease proclamation of 2011, had deleted the merits of the lease proclamation that has allowed free transfer of the rights under the lease;
- Handing out title deeds at least in some regions abating the fear of tenure insecurity temporarily until further redistribution is to take place; and,
- Agricultural extension services though for limited areas have also improved productivity.

4. Land Use, Human Rights and the Environment in Ethiopia

Land is an important factor of production in Ethiopia and so is the case everywhere else**.** The land use policy must foster sustainable development. The fact of the matter in Ethiopia is the land use pattern put in place by the law fosters environmental degradation and exacerbates the condition of poverty in the nation. The policy in place is contradictory to the notion of human rights enshrined in the constitution itself. All human rights standards are included in the FDRE Constitution: the right to health, the rights adequate standard of life, the right to life, the right to clean & safe environment and above all the right to development.[49] Ethiopia is also member to International Convention on Economic, Social and Cultural rights, herein after, ICESCR, which sanctions these rights. Moreover, under article 2 of the ICESCR, the nation is under obligation to realize these rights progressively. However, the single most important means of realizing those ideals and obligation using land potential is being contested on its policy and ownership line. The policy in place instead of favoring the realization of these rights tied the people to poverty and is subject to criticism from all angles. Land ownership laws and policies have an impact on the progressively enjoyment of economic, social and

[49] Articles 43 of the FDRE Constitution

cultural rights. Yet, the laws governing land issues in Ethiopia work the other way round. It progressively denied the right to have adequate standard of life by making the land public property and exposing it to degradation, fragmentation and ultimately rendering it unusable.

Human rights are interdependent and indivisible and the violation of one right is the violation of all. The violation of the right to food results in poor health, which in turn is the violation of the right to health. The violation of the right to health if persists results in the violation of the right to life and the destruction of human life destroys all the right meant for that person. If so, how is the life of rural Ethiopian affected by the land policy in place.

4.1. The Right to Food

What does the right to food mean? The UN Special Rapporteur on the right to food in 2002 defined the right to adequate food as follows:

> "Right to adequate food is a human right, inherent in all people, to have regular, permanent and unrestricted access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear."

To begin with, right to adequate food is a human right and hence there is an obligation on the part of the state to respect and fulfill this right at least progressively. Second, everyone is entitled to have adequate food both in terms of quantity & quality, and in terms of acceptability to one's culture. Hence, any government is obliged to do its best level to fulfill this right. However, it is not necessary that the government should ration food. The idea in here is in all economic rights the first obligation lies with the individuals yet all condition that enable the

individual to fulfill his need must be set in order by the government in power.

The right to adequate food is at the core of the right to adequate standard of living as there is no life without food or life is shorter and more prone to mental or physical ill health with hunger, malnutrition, or under-nutrition. Thus, the right to adequate food is indivisibly linked to the inherent dignity of the human person.[50] For people in rural Ethiopia starvation or hunger is no strange phenomenon. Often it is argued that the phenomenon of hunger is the result of land policy in place. The land policy by making land accessible to all robbed its meaningful potential to be a development factor especially with the drastically population number increase. The policy of public ownership of land was implemented in 1974 for the first time and since then the population number has nearly tripled yet the land did not naturally expand. Hence, all have to redistribute and distribute the available land and such fact has a bearing on food insecurity, which is a recurring phenomenon in Ethiopia.

The reasons for declining food production include: the overwhelming reliance on highly variable, erratic rainfall; frequent severe droughts; rising population pressure accompanied by declining farm size; falling soil productivity and land degradation; and the failure so far to tap the substantial irrigation potential.[51]

Given a doubling Ethiopia's population of every 25 years with little room to expand cultivated area and given the fact that land area is fixed, mobility of farm households and increasing productivity of both labor and land are critical to transform agriculture. Land reform is a

[50] Ben Chigara,ed.: *Reconsidering Property Rights in the New Millennium: Towards a New Sustainable Land Use,* (Routledge, 2012), P. 15

[51]ECA/SDD/05/09 - Land Tenure Systems and their Impacts on Food Security and Sustainable Development in Africa, (ECA Print shop in Addis Ababa, 2004)

key entry point to play this role.[52] If so, what ought to be the nature of the reform. The reform must achieve development that ensures freedom from fear of starvation for the people. Where the land policy is failing, it is the obligation of the government to try out new policies that serve the cause of much needed development. The government is under obligation by the law of human right to put best effort in place to get out the people from the yoke of poverty.

4.2. The Right to Development and Safe Environment

Environmental security is inextricably linked with human security, with some writers stressing environmental security as the capacity of humans to live harmoniously with nature or to maintain a sustainable environment, while others stress the human security element of individuals and groups being able to meet their basic needs from a sustainable environment.[53]

However, the environment is at peril because of the land policy that has caused forest clearing and has intensified desertification. Land shortage has caused rural farmers to clear forests and use every piece of land for farming; and absence of alternative energy source has taken a toll on the forest as well since biomass fuel is the primary source of energy. Clearing forests for fuel or farming has devastated the environment and has caused massive erosions that robbed the land of its potential for production. The devastation in the environment has intensified poverty in the rural Ethiopia, which has a bearing on the right to adequate standard of life. Hence, well-crafted land policy, which can effectively deal with these mentioned perils, must be developed and implemented in Ethiopia if the danger is to be averted

[52] GetnetAlemu, The Challenges of Land Tenure Reform to Structural Transformation of the Economy: Lessons from Country Experiences, *Proceedings of the 16th International Conference of Ethiopian Studies* (Trondheim 2009), pp. 763

[53] ECA, Supra note 51

from getting out of control. Land fragmentation and the ensuing soil erosion must be given priority in the order of things.

5. Conclusion and Recommendations

Public ownership of land has been anchored in Ethiopia since 1975 when the feudal regime was removed by popular revolution under the slogan "land to the tiller". The present government took power in 1991 (via force) from the *derg* military junta. The transitional government (1991-94) prepared a way for the ratification of the current constitution. The constitution was ratified in 1995 and answered the question (which land regime to endorse: private or public ownership?) in favor of public ownership of land policy. Many have immediately reacted as to the merit of the policy by citing the failure of the military government by pursuing the same. However, the current government has made plenty of modifications to the policy of the regime it succeeded. Such changes were lease system as far as urban land is concerned and in a restricted form for rural land; market liberalization which has enabled farmers to sell their produces in an open market; allowing rent out of rural land in a limited manner, and legally recognizing the right of landholder to inherit it to their family members. Many have also claimed that the government has closed the door for development by preferring a failed policy to a workable one i.e. private ownership of land. The author on his part would like to recommend the following.

The land policy is a critical issue in every country and especially it is more critical in the developing countries. Such is also the circumstances of Ethiopia where 83% of the populations depend on agriculture for livelihood and employment. The sector is also the source of the bulk of the country's export earnings. Hence, the land regime requires thoughtful policy, which brings overall development to the nation without even impairing the environment and over all human rights ethos. Accordingly, the policy given the present situation

of Ethiopia needs to be the mix of the following as deemed appropriate.

First, land use rights needs to be converted to freehold or private ownership where land is so fragmented, the area is over populated and small-scale framing cannot sustain life anymore. If one sees, the present realty in cooler-highland areas of Ethiopia the land is not only so fragmented but also over exploited so much so that unless recovery plan is there it cannot be of economic interest at all in the near future. Such is the hard truth in the northern, central, and some parts of southern Ethiopia (cooler-highlands) where over 85% of the people live encompassing less than 40% of the landmass of the nation. Thus, if land tenure is converted to freehold system in these areas; investors would take up interest and may invest on the recovery of the land and increase its productivity and use. Principally, the steeper slopes could be used for highland fruit production, tee plantation, forage (towards cut and feed system) and timber among others. Such freehold system underlying free transfer may even help farmers themselves to consolidate their land and work on it where credit facilities can be arranged from financial institutions. On the other hand, farmers by getting initial capital may think of alternative livelihood and the workforce may fill up the human power needs of the booming construction sector and emerging industries in the nation. In-total, freehold can fetch the following advantages in Ethiopia:

- The benefit from the land transactions can help the farmers to look for alternative economic base and better his or her lot;
- Such arrangement boosts tenure security over the holding right and mitigate the state stewardship which typified the land ownership issues in Ethiopia;
- Breaks off from the legacy of *derg* and socialist ethos which subjected the mass to extreme form of poverty and caused land

fragmentation leading to the environmental degradation, food insecurity and subsistence farming;

- It is in harmony with the idea of liberalization and free market policy endorsed by the government and hence brings ideology consistency for the government itself;
- It can potentially deals effectively with land fragmentation since investors or even the government can take land via sell or lease from the farmers to improve the fertility of the land or fight land fragmentation;
- It encourages investment with respect to land; and aids population movement towards creating one economic community thereby strengthening the polity.
- It can provide access to land to the most active farmer and the capital holder. It can also ensure access to the youngsters short of land redistribution;
- It may facilitate credit access and bank mortgage, thereby embolden property right.
- It can boost productivity and effective land administration
- It is consistent with the rights of liberty and freedom of movement[54];
- It increases transferability of land holding which in turn ensures tenure security, property right and boost productivity;
- Hence, brings overall development and ensures respect for human rights, which can be easily imperiled owing to poverty.

Second, Public ownership of land policy needs to be implements in areas where unoccupied land is there and population is sparsely available; especially in the lowland parts of the country where 60% of the nation's land mass is there and less than 15% of the people live.

[54] The laws in place now prohibit leasing land and settling somewhere else. Lease can only be done by farmers in a manner that does not displace the holder of land from the farm sight and ties the right to permanent residence on the spot.

Huge potential of the country in terms of arable land resides here too. Thus, the identification of available land for investment can be done easily by government and can be better administered by it. The present realities of the lowlands of Ethiopia shows that they lack infrastructures like road, water canals and so on and hence the government has to put in place these necessary infrastructures to utilize the land for farming. The government can negotiate also with investors on the price of lease having into consideration the investor's contribution for infrastructure development. It is often claimed by the current government that there are huge chunks of land available in the lowlands for investment and such land needs to be administered by the government itself. Moreover, people from overcrowded highland part can also settle in these places and get land from the government via lease. The secured and transferable lease rights can encourages the youth to organize and do agriculture for profit.

Third, Communal land ownership policy would be adopted as a temporary remedy and it will be a workable policy in the areas where indigenous pastoral societies live. Until such time that, their life style changes to sedentary life as the present government is working for it; communal land use ought to be preferable. Development has to come to these society and they need to settle in a permanent manner to benefit from infrastructures like school and health. Until then, their land needs to be communally owned with use rights fairly extended to all.

Therefore, in a country where 83% of the people depend on agriculture and that this same sector is 90% of the employing sector and that, it is also the single most important source of export earnings; the policy governing this sector and the land policy on which the sector totally hinges on needs to be wisely crafted and be resilient to the realities of the nation.. The policy needs to be developed in the interest of development and environmental causes only and nothings

else. Since the current land policy carries with it plethora of problems, it has to be revisited and corrected in a manner that would serve the causes of overall development, in line with different agro-ecological zones and environmental protection.

Equal and Effective Protection for Ethiopian Urban Indigents: Constitutionality of the Existing Urban Land Tenure System and Access to Land

Legesse Tigabu[♣]

Abstract

The FDRE constitution obliges the government to enact laws which 'guarantee to all persons equal and effective protection without discrimination on grounds of race, nation, social origin, color….property or other status' and formulate policies which ensure that 'all Ethiopians get equal opportunity to improve their economic conditions'. All resource related laws, policies and measures introduced by the government are, therefore, expected to be in light of these grand constitutional principles. A legislation which apparently treats individuals equally may indirectly discriminate against a section of the society for it has failed to consider prevalent facts and this might have detrimental effect on the livelihood of those discriminated against. 'Equal and effective protection' would require laws, policies and measures which give due attention for substantive and not formal equality. In this work, the author examines the constitutionality of the existing urban land lease system in Ethiopia and its implication on urban indigent residents.

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1. Introduction

Laws and policies governing urban land are multifaceted. The competition over a plot of land in urban areas is very fierce, and it involves many stakeholders including the government to do business, build offices and apartments, construct infrastructures, bury cables and pipes, install poles and perform other activities. Though complex and perplexing the urban land laws and policies may be, they should not stand against the constitution and grand land policies (land policies introduced by the constitution). They should not, particularly, set aside the very constitutional declaration that land belongs to the people and state of Ethiopia.[1] A land administration system which ensures access to secured land tenure is vital to ensure sustainable development.[2]In other words, a lease system should not become impediment to access urban land for Ethiopians. A lease system should also avoid uncertainties as they could hinder urban development.[3]

The existing lease system has introduced transparent and accountable land transfer system[4] and this in turn could minimize. Individuals cannot negotiate with and bribe public officials to get large tracts of land which are meant to enrich both the officials and the rent seekers who further transfer these plots of land to derive excessive money over bare land without adding value. Negotiation and similar procedures which are prone to corruption are banned once and for all.
Though the existing urban land lease system has made the land acquisition system transparent and accountable, the substantive rules governing acquisition of land have actually made a significant portion

[1] See Article 40(3) of the FDRE Constitution
[2] Peter Dale, *The importance of land administration in the development of land markets - a global perspective*, University College London, England, 2000
[3] Thomas J. Miceli, C.F. SirmansandGeofferyK.Turnbull, *Land ownership risk and urban development*, Journal of Regional Science, Vol 43 No. 1, 2003, pp 73-94
[4] See the preamble and Art 4 ofthe Ethiopian urban land lease holding proclamation no. 721/2011 and relevant provisions under the subsidiary urban land lease legislations.

of the society incapable of accessing urban land. This is evident when we see the urban land lease hold rules which prohibit acquisition of land other than through the lease system. Such lease system is, in principle, governed by the rules on tender. Allotment is open in exceptional cases for those who come up with especially relevant projects and at times for not-for-profit and government institutions. This article explores on these and related issues and is designed to have seven sections. Accordingly, section one, two and three examine the existing Ethiopian urban land lease hold system in light of the economic and social objectives of the constitution. Section four explores on the lease system and constitutional principles on land use rights. Section five addresses the constitutional right to use land and transfer and use of the leasehold right as a collateral or capital contribution. Section six examines the urban land clearing order and grievance handling. Finally, section seven provides conclusion and recommendations.

2. The Ethiopian urban land lease system versus the government's constitutional duty to ensure equal economic opportunity

The government is obliged to ensure that all resource related laws, policies, strategies and measures introduced by it are consistent with the constitutional economic objectives of the country. [5] Such constitutional economic objectives require equitable distribution of wealth and inclusive development. It is in light of these grand constitutional objectives that the validity of the existing urban land lease system in Ethiopia has to be tested.

[5] See Article 89 (1-8) of the FDRE Constitution

Under the existing lease system, individual citizens who do not have the financial means to compete in lease tenders[6] nor can make use of the modality of allotment to access urban land are denied equal opportunity with others in distribution of national wealth. Those who have been dealing over bare land and got rich overnight manipulating the previous lease system are now financially capable of offering highest prices in tender procedures and can easily drive out the majority whenever the government offers land lease bids. What is worse, there is no limitation on the number of lease bids an individual may participate in. The only limitation is that "no single bidder may be allowed to buy more than one bid document for the same plot."[7] As long as an individual is competing for different plots, there is no any limitation on the number of bid documents he/she may buy.

All these would mean that the dealing over the national wealth is between the rich and government. Thus, the government has failed to adhere to the constitutional economic objectives of the nation which are set under article 89 of the FDRE Constitution. This provision of the constitution has laid down the basic economic objectives of the country as those which require the government to "formulate policies which ensure that all Ethiopians can benefit from the country's resources and get equal opportunity to improve their economic conditions and to promote equitable distribution of wealth."[8] Ensuring equitable distribution of urban land is so important to foster steady and holistic urban development.[9]

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[6]In urban land tender proceedings, the amount of the down payment and the lease price offered by a bidder determine his/her chance of winning. It is, therefore, natural that the bidders will present higher down payments and lease prices to win the bid. This would effectively push out the lower class from the urban land deal.

[7] See art 11(2) of proclamation No. 721/2011

[8] See article 89(1) of the FDRE constitution

[9] Paul Hendler and Tony Wolfson, *the planning and "unplanning" of urban space 1913-2013: Privatized urban development and the role of municipal governments*, Land Conference Paper, South Africa, 2011

While all the sub articles under this provision strive to ensure equitable distribution of wealth, introduction of equal economic opportunities to citizens, advancement of public interest and protection of indigent people, a number of provisions under proclamation no. 721/2011 and subordinate urban land lease laws stood against the economic objectives of the nation. Art 5 of the proclamation, for example, has set the leasehold system as the only means to acquire urban land and this coupled with tender procedures (article 11) has made urban land unaffordable to the majority of urban residents. These provisions stand even against the urban land development and management policy of the country adopted in 2011[10] and the basic purposes and principles of the lease proclamation itself. The preamble of the lease proclamation has considered accountability, transparency and equity in land administration as pillars of just and well-functioning land market. Paragraph three of the preamble reads:

> *The prevalence of good governance is a foundational institutional requisite for the development of an efficient, effective, equitable and well-functioning land and landed property market, the sustenance of a robust free market economy and for building transparent and accountable land administration system that ensures the rights and obligations of the lessor and the lessee.*[11]

The basic principles under the lease proclamation dictate that the land delivery mechanism should comply with the principles of good governance, prevent corruption and ensure impartiality in the process.

[10] Federal Democratic Republic of Ethiopia, *the urban land development and management policy of Ethiopia*, Addis Ababa, 2011 (this policy was introduced before the enactment of the Ethiopian urban land lease holding proclamation No. 721/2011 to guide the adoption process of this proclamation. Yet, a number of provisions under the proclamation stand against an important objective set under the urban land policy which aims at making urban land accessible to the poor).

[11] Paragraph 3 of the preamble of proclamation No. 721/2011

They also proclaimed that the delivery system should ensure equitable benefit to citizens.[12]

The allotment based land transfer modality (article 12) which is set as an exception to tender is not also of any help either in addressing the land question of poor people as this provision benefits only the rich men who involve themselves in manufacturing industries, not-for-profit organizations and government institutions. Therefore, the existing lease system is detrimental to the majority of urban residents and has fallen short of rules which ensure the constitutional economic objectives under article 89 of the FDRE Constitution. It is in the interest of the public at large to introduce mechanisms which make urban land accessible to the poor. Failure to do so would force a significant portion of the society live on the streets and that poses danger to the normal social fabric.

3. The existing urban lease system versus constitutional social objectives

The social objectives of the country endeavor to improve living conditions of citizens. Ethiopia, being a party to ICCPR and ICESCR, is under international obligations to progressively advance the living standards of all Ethiopians. Article 9(4) of the FDRE Constitution has also made these instruments integral parts of the law of the land and article 13(2) has even made the constitution subject to such human rights instruments ratified by Ethiopia for the purpose of interpretations. [13] Hence, relevant laws, government actions and

[12] See art 4 of proclamation No. 721/2011

[13] Article 13 (2) of the FDRE Constitution requires consistency of chapter three of the constitution with international human rights instruments where it has been primarily transplanted from. It reads *"the fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by Ethiopia."*

decisions need to complement the government's obligation pertaining to progressively enhance socio-economic rights of individuals.

It is in light of this obligation of the state that article 90 of the FDRE Constitution stated that the country's policies should focus on improvement of social rights of all Ethiopians. This provision states that "to the extent the country's resources permit, policies shall aim to provide all Ethiopians access to public health and education, clean water, housing, food and social security."[14]The government, using the significant revenue it derives by implementing the lease system, may improve the social welfare. It can build infrastructure, schools, hospitals and communication networks. However, making urban land unaffordable to some section of the society would have serious implications on social rights of those who cannot access land and this becomes an impediment to progressive enhancement of citizens' access to food, clean water, health, housing, education and social security. Land is everything, particularly for those who don't have other means to generate income. If land is provided for these people for free or at lower prices, they can deal with their land to generate income or use their land to lead their livelihood. Individuals look for urban land not only to build residential houses but also to do other activities to survive. The bold activities on construction of condominium houses should not, therefore, be used as excuse for unsympathetic urban land transfer in Ethiopia. Thus, the existing urban land lease law, by failing to set accommodative land acquisition system, has defeated the grand social objectives stated under article 90 of the FDRE Constitution as it has pushed out the poor from urban land deal through tender procedures.

[14] Art 90 of the FDRE constitution

4. The lease system versus constitutional economic and social rights

Integrated land administration is crucial to foster sustainable development.[15] Sustainable development would in turn bring about progressive improvement of socio-economic rights. Realization of economic and social rights, to a large extent, depends on having access to properties. That is why these rights are progressive by their nature and an immediate government action may not be possible. A comprehensive land administration system is, therefore, the one which addresses these and other interdependent issues in an integrated way.[16] Available resources and their management determine these rights. Among the properties, the immovable (land and buildings) ones are so important in advancing socio-economic rights. Hence, access to some means of income in general and land in particular would be so vital in a comprehensive socio-economic rights development. Accordingly, article 41 of the FDRE Constitution has granted citizens "the right to engage freely in economic activity and to pursue a livelihood of his choice anywhere within the national territory"[17] and imposed an obligation to ensure citizens' access to resources on the state.

The government can realize the socio-economic rights and discharge its responsibilities mentioned above only when the relevant laws it adopts and the measures it takes aim at distributing resources including land equitably and allowing individuals get a means to generate income. Article 43(4) of the constitution has also strengthened the principles set under art 41. It proclaimed that "the

[15]European Environmental Agency, *Land in Europe: prices, taxes and use patterns,* EEA Technical report No 4/2010, Copenhagen, Denmark, 2010.
[16] StigEnemark, *Underpinning Sustainable Land Administration Systems for Managing the Urban and Rural Environment,*Regional Land Conference,Marrakech, Morocco, 2003 pp.1-22.
[17] See Art 41 of the FDRE constitution

basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs."[18] In this regard, the urban land lease system has failed to live up to the constitutional standards for it has not set flexible urban land acquisition system which makes land affordable to the majority.

5. The lease system and constitutional principles on land use rights

As explained in the foregoing sections, in Ethiopia, ownership of land and natural resources is 'vested exclusively in the state and peoples of Ethiopia' (article 40(3) of the FDRE Constitution). This would mean that the constitution is clear enough on ownership of land and natural resources and, therefore, the Ethiopian government cannot enact laws or take executive actions which introduce different modalities of land and natural resources ownership. What the government can do is to regulate and administer land use rights. The most important thing in regulation and administration of land use rights is determining land use right acquisition modalities.

The FDRE constitution has mentioned the methods of land use right transfer to farmers and investors. But it has kept silent on how ordinary (non-investor) people living in urban centers may acquire land use rights. The constitution declared that Ethiopian peasants, pastoralists and semi-pastoralists have the right to acquire land use rights without any payment and that they may not be evicted from their holdings except through expropriation proceedings (payment of commensurate compensation) when the land is required for public purposes.[19]

[18] See art 43(4) of the FDRE constitution.
[19] See Art 40(4, 5 and 8) of the FDRE constitution.

As long as transfer of land use right to investors is concerned, the constitution proclaimed that government should ensure the right of investors to use land on the basis of payment arrangements. This is stated under article 40 (6):

> *Without prejudice to the right of Ethiopian Nations, Nationalities, and Peoples to the ownership of land, government shall ensure the right of private investors to the use of land on the basis of payment arrangements established by law. Particulars shall be determined by law.*[20]

This provision doesn't make a distinction between urban and rural land.[21] Thus, as land belongs to the public at large, the investors should pay rent and benefit the Ethiopian people whenever they use rural or urban land. Sub-articles 4-6 of article 40 of the constitution have tried to set the right balance between the right to use land and the public interest in the use of land. While sub-articles 4 and 5 allow farmers to have access to and use rural land without any payment, sub-article 6 dictates investors to pay rent if they want to realize their right to use urban or rural land.

What is left unregulated under the constitution is the mode of delivery of land to non-investor urban residents. Should they get land for free? No! Had this been the intention of the constitution, it could have mentioned this category of people as urban land users without any payment. Why the constitution has to mention farmers as rural land users free of charge and kept silent about non investor urban residents if it was meant also to allow these residents use urban land for free?

[20] See art 40 (6) of the FDRE constitution

[21] As Art 40 (6) of the lease proclamation has not made any distinction between urban and rural land and because investors may rent and invest on both rural and urban land, transfer of any plot of land to investors is based on payment arrangements as the land owners, the state and people of Ethiopia, have to benefit from such arrangements following transfer of urban or rural land to profit makers.

To be precise, farmers and urban residents are not treated alike as long as acquisition of land use right in the respective areas is concerned.

Then, according to the constitution, should these non-investor urban residents acquire land use rights only based payment arrangements? The answer is no again. The constitution has mentioned only investors as those who are required to pay rent to secure land use rights. Had the intention of the constitution been to adopt an urban land delivery modality which requires all physical and legal persons to pay rent, the constitution would not have mentioned only investors.

What one can say here is that the constitution has neither intended to provide land to all non-investor urban residents for free nor close the room for free access to urban land when circumstances so require. The constitution seems to allow the government to come up with flexible urban land legislations and executive actions which can respond to prevailing facts. Accordingly, the constitution has granted the power to make land laws to the federal government and empowered the regional states to administer land in accordance with the federal laws.[22] Unfortunately, the urban land lease hold law of Ethiopia has banned all forms of urban land acquisition other than the lease system and adopted non-holistic[23] land transfer system. By doing so, it has failed to be flexible; and treated investor and non-investor urban residents alike, which is definitely unfair.

6. The right to use land and transfer leasehold right as a collateral or capital contribution

An individual with urban land lease holding right, in addition to using this land for the purpose stated under the lease contract, may transfer,

[22] See arts 51(5), 52(2) and 55(2) of the FDRE constitution.

[23] Non-holistic urban land administration system directly or indirectly excludes a significant portion of a society from getting access to urban land and land related services.

give as collateral or use such land as capital contribution.[24] The constitutional right to property which includes ownership right and other property rights short of ownership has enabled individuals to acquire, transfer, use or dispose their property as the case may be.[25] The constitution has also stated that only legally prescribed limitations may be imposed on property rights. Among such limitations is the prohibition, under the constitution itself, of private ownership of land. The constitution has set this restriction would mean that land use right is a property right which, however, may not include sale of the land. As explained before even though an individual may have land related property right, he/she cannot own the land. Thus, land use right is a property right over which an individual may carryout different dealings short of sale of the land.

Though the constitution has set such general principles on property rights, it has kept silent on the issue as to whether individuals can transfer or give their use right as collateral or capital contribution. Of course, the constitution doesn't have to address such details and its silence may not be interpreted to be prohibition. The urban land lease hold proclamation has incorporated detailed rules on these issues.
The most important principle in transfer, collateral or use of lease hold right as a capital contribution is that such arrangements may not change the lease period and prescribed purpose of the land.[26] The relevant provision reads:

> *Without prejudice to the period of lease determined pursuant to sub-article (1) of Article 18 of this Proclamation and the obligation to use the land for the prescribed purpose in accordance with sub-article (1) of Article 21 of this Proclamation, a lessee may transfer*

[24] Art 24 of the lease holding proclamation no. 721/2011
[25] See art 40 of FDRE constitution
[26] See Art 24(1) of the urban lease holding proclamation no. 721/2011.

his leasehold right or use it as collateral or capital contribution to the extent of the lease amount already paid.[27]

The other point worth considering here is that while the lessee is relatively free in transferring his holding right, she/he may use it as collateral or capital contribution only to the extent of the rent amount which has been paid. If the transfer of a lease holding right is before 'commencement or half completion of construction'[28], however, the lessee has to go through restrictive procedures. In such cases, article 24(2) will apply.[29]

This could discourage rent seekers who have been transferring urban land without adding any value to get rich overnight. Transfer through inheritance is an exception and this is appropriate given the fact that transfer through inheritance is not for consideration. What about donation? The government might have anticipated that transfer through donation as an exception may encourage individuals to use donation as a cover up while entering into other arrangements covertly. But, the proclamation could have prevented this by setting requirements like conclusion of contracts of transfer before the courts or concerned public offices and denying legal effect to the remaining ones.

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[27] Ibid

[28] Half-completion of construction is defined by the subsidiary legislations enacted by the regional states to implements the lease proclamation. See the relevant provisions under these legislations.

[29] Art 24 (2) has imposed restrictions in unequivocal terms on urban land users who transfer their holding right before commencement or half-completion of construction to discourage urban land lease price speculators. Among others, such land users can transfer their holding only through auction. This provision reads "If a lessee, with the exception of inheritance, wishes to transfer his leasehold right prior to commencement or half-completion of construction, he shall be required to follow transparent procedures of sale to be supervised by the appropriate body." Also see Art 24 (7) of the lease proclamation.

There are also other questions left unanswered under the proclamation. Assuming that the contract of collateral or use of the land as capital contribution has been concluded before construction commences, adoption of restrictive principles under article 24 can be justified based protection of the interest of creditors as no value is added to the land and a significant amount of lease payment remains to be paid.
But, if such arrangements are concluded after construction commences, why the value of a collateral or capital contribution should only be to the extent of the rent amount paid? Why can't the value of already started, nearly completed or completed construction be used as a collateral or capital contribution along with the land use right? Why don't we give the land lease holders freedom to determine their property's (lease hold right + building) value through freedom of contract?

If the proclamation is making reference to the value of the land use right only even after construction is underway or completed that is not practical. One may say that the lease hold proclamation regulates primarily land use (lease hold) rights and, therefore, is not concerned with buildings. But, we cannot separate buildings from leasehold rights. Sale of a building, for example, automatically transfers the land leasehold right to the buyer.[30] In collateral or capital contribution arrangements, can we think of a possibility where a lease holding right is subject of such dealings but not the building on the land? If one answers yes, then creditors, when the debtor is in default, may exercise the lease hold right given as collateral only after dealing with the debtor on the fate of the building. Laws are not meant to create

[30] See Article 24 (6) of the urban land lease hold proclamation no.721/2011

such anxiety.[31]Even the proclamation itself has recognized this and declared the following.

> *Unless agreed otherwise, a building constructed on leasehold and its accessories shall be subject to the collateral or transfer where the right to the use of land is made as collateral or transferred. Similarly, the right to the use of land shall be subject to the collateral or the transfer where a building on leasehold and its accessories are used as collateral or transferred.*[32]

If the prescribed purpose of the land doesn't require permanent improvement on the land or bare land is given as a collateral or capital contribution, what is declared under article 24(1) might work well as the lease holder won't construct buildings. For other cases, however, the lease law is far from being clear. The proclamation seems to allow lease holders to give their leasehold rights and buildings as collateral as separate interests. We may think of giving lease hold rights as collateral independently of permanent improvements on land. However, enforcement of creditors' rights finally results in removal of buildings to use the land or further dealings over the building. Hence, giving freedom to the individual to determine, through free market, the value of his lease hold right along with the improvements he has brought about would be better.

What is perplexing under the proclamation is this. Though the higher the amount of the lease paid the closer the time to the expiry of the lease period in most of the cases and thus the lower the market value of the lease hold right, the proclamation has envisaged higher capital

[31]The object of a land lease holding right is land and we cannot think of land without buildings once they are constructed on such land. Hence, right after permanent improvements are made on a plot of land, it is quite difficult to deal with the land use right alone setting aside the real property rights one may have over the permanent improvements (immovable properties) on such land.

[32] See art 24(6) of the lease hold proclamation no. 721/2011

contribution or collateral value for the lessee; because it employs the phrase to the 'extent of the amount of lease paid'.

The use of lease hold right as a collateral before construction commences has to pass through even more restrictive procedures. In such cases, the lessee even cannot use his right as a collateral to the extent of the lease amount he already paid as three are deductions to be made. Art 24(4) has stated this clearly.

> *Notwithstanding the provisions of sub-article (1) of this Article, where a lessee uses his leasehold right as collateral prior to commencement of construction, the collateral value may not exceed the balance of the lease down payment after considering possible deductions to be made pursuant to sub article (3) of Article 22 of this Proclamation.*[33]

Accordingly, the collateral value is the down payment (which is 10% or more of the total lease payment as proclaimed under the lease proclamation) minus 7% penalty and the due lease payment from the time of taking possession to entering to this arrangement.[34] This would mean that right after possession, the lessee may give only below 3% of the rent she/he has paid in most of the cases. As banks will also consider an interest to be paid by the lessee for the loan they provide, the value of the leasehold right to be used as collateral becomes insignificant. Though the law has set such very restrictive procedures, it should be appreciated as it discourages deriving benefit from bare land and avoids conflict of interest between the creditors and government. Art 24(5) can effectively serve such purposes and it reads:

> *Where a lessee who has used his leasehold right as collateral in accordance with sub-article (4) of this Article is in default and a*

[33] See art 24(4) of the urban land lease hold proclamation no.721/2011
[34] Ibid

> *claim, supported by a court execution order, on the collateral is presented, the appropriate body shall, upon terminating the lease contract, take back the land and settle the claim to the extent of the balance of the lease down payment after retaining the deductions to be made pursuant to sub-article (3) of Article 22 of this Proclamation, and return the surplus, if any, to the lessee.*[35]

The proclamation has also prevented the rent seekers from manipulating speculative market profits through transfer of their lease hold rights. Article24 (7) warned such land lease holders that they may be prevented from further participation in bids if they repeatedly transfer their land use rights before completion of construction.[36] This sub article proclaimed this:

> *If any person repeatedly transfers leasehold right, without completion of construction, in anticipation of speculative market benefits, the appropriate body may bar him from participation in future bids.*[37]

However, the proclamation is not clear on how many of such transfers may result in prevention from further participation in land lease bids.
In transfer of leasehold rights by whatever means, the transferee will assume all obligations which have been undertaken by the original lessee. The relevant provision has laid this:

> *The transfer of the leasehold right in any circumstance pursuant to the provisions of this Article shall unconditionally transfer all contractual obligations assumed by the lessee to the third party to whom the leasehold right is transferred.*[38]

[35] See art 24(5) of the lease hold proclamation no. 721/2011
[36] Art 24(7) of lease hold proclamation no. 721/2011
[37] Ibid
[38] Art 24(8) of lease hold proclamation no. 721/2011

Thus, the most important principle in transfer of urban leased holding right that the transferee should take note of is that he is obliged to perform all the obligations the original lessee would have discharged had there not been transfer of such lease hold right.

7. Urban land clearing order and grievance handling

Under the existing Ethiopian urban land lease system, the government may take land back from landholders following termination of lease hold. A concerned authority may terminate an urban land lease hold right based on the following grounds.

- Use of the land for a purpose other than what has been intended under a lease contract.
- Expiry of the lease period and government's refusal to renew it.
- Expropriation of land for 'public purposes'.

The urban land use right holder may use this land only for the purpose sated under the lease contract as declared under article 21 of the urban land lease proclamation.[39] He may use the land for other purposes only when the concerned authority permitted so following an application by the land user. This can be done only when the new proposal is consistent with the urban plan.[40] Failure to comply with these land use rules results in termination of land use rights. While use of the land for a purpose not intended in the lease contract without the permission of the concerned authority is absolutely prohibited and has no excuse, complete failure to use the land may be justified in exceptional circumstances. This is so when the land is not used for the prescribed purpose due to force majeure, the concerned body may grant time extension. The relevant provision under the proclamation has put the following.

[39] Art 21 of the urban land lease proclamation no. 721/2011
[40] Ibid

> *Notwithstanding the provision of sub-article (1)(a) of this Article, where it is ascertained that the land has not been used for the intended purpose as a result of force majeure as provided for under the civil code, the appropriate body may authorize time extension to compensate time lost due to the force majeure situation.*[41]

According to this provision, whether a given situation is a force majeure or not is determined based on the relevant provisions under the civil code. Article 1792 of the civil code has explained what force majeure mean and articles1793 and 1794 have given examples of force majeure and situation which cannot be considered as force majeure.[42]

If one or more of the circumstances mentioned under article 1793 happen or the situation can be considered as a force majeure by virtue of article 1792, the land use right holder may claim time extension following his failure to use the land for the intended purpose. On the other hand, article 1794 of the CC has set situations which may not be considered as force majeure.

Therefore, the lessee who has failed to use the land may claim time extension and escape termination of his lease hold right before expiry of the lease period only when he has failed to do so because of an unforeseeable circumstance which has absolutely prevented him from using the land for the intended purpose.

[41] See Art 25(2) of the urban land lease proclamation no. 721/2011. Also see Arts 1792-1794 of the Civil Code of Ethiopia. These provisions have defined force majeure and mentioned examples of circumstances which could be considered as force majeure and others which could not.

[42] Ibid

The second ground for termination of urban land use right is expiry of the lease period.[43] As explained earlier, the urban land lease proclamation has set lease periods. After expiry of a lease period, the government does have the discretion to accept or refuse applications for renewal of a lease period. The lease proclamation has kept silence on how the government may exercise such discretionary power. But, the urban land lease laws of the regional states have emphasized on public purpose as primary ground for rejection of renewal request.[44]

The third ground for termination of an urban land use right is expropriation or clearance order. Expropriation is an inherent right of the state and may be exercised at any time and against any landholder. Yet, two requirements should be satisfied before the government expropriates land use rights: the land should be required for a public purpose and commensurate compensation should be paid. The preamble of the expropriation proclamation no. 455/2005 has explained how expropriation is an indispensable power for the government. It reads:

> *"Urban centers of the country have, from time to time, been growing and the number of urban dwellers has been increasing and thereby land redevelopment for the construction of dwelling houses, infrastructure, investment and other services has become necessary in accordance with their respective plans as well as preparation and provision of land for development works in rural areas has become necessary."*[45]

Expropriation proceedings serve public purposes while at the same time providing due compensation for those whose holdings are

[43] See the relevant provisions under the lease proclamation and subsidiary legislations adopted to implement this proclamation.
[44] See relevant provisions under the urban land lease regulations of regional states
[45] The preamble of expropriation proclamation no. 455/2005

expropriated. An important question that one may raise here is, what is 'public purpose' and how should we determine its scope?

Different laws of Ethiopia have defined this important precondition in expropriation proceedings differently. While the constitution, the C.C and expropriation proclamation no. 455/2005 employ the phrase 'public purpose', other laws including the urban land lease holding proclamation no. 721/2011 and regional land laws define this precondition broadly and employ the phrase 'public interest'.

Here, the phrase used by the constitution and its meaning should prevail over what is proclaimed in other laws as the constitution is the supreme law of the land. The relevant provision under the constitution has proclaimed that "without prejudice to the right to private property, the government may expropriate private property for **'public purposes'** subject to payment in advance of compensation commensurate to the value of the property."[46]

The civil code of Ethiopia has also employed the phrase 'public purpose'. The constitution might have taken this phrase from the C.C as this code is decades older than the constitution and was the only comprehensive legal document on land and other properties at the time of adoption of the FDRE constitution. The relevant provisions under the C.C have explained expropriation proceedings in unequivocal manner stating that 'Expropriation proceedings are proceedings whereby the competent authorities compel an owner to surrender the ownership of an immovable required by such authorities for public purposes."[47]

[46] Art 40(8) of the FDRE constitution
[47] See art 1460 of the civil code

We use expropriation to place immovable properties under the public domain.[48] When land is expropriated, it forms part of the public domain and is held by the state or administrative bodies.[49] The infrastructures and services to be introduced on such land have to be directly placed at the disposal of the public.[50] What is bizarre under the C.C is that it has also used the phrase **'public interest'**[51] which is ambiguous as will be explained later. It is not clear if the C.C is meant to give the same meaning to these phrases and use them alternatively.
The expropriation proclamation employs the expression 'public purpose' like the constitution and C.C. But, it defines the scope of public purpose broadly as follows.

> *"Public purpose" means the use of land defined as such by the decision of the appropriate body in conformity with urban structure plan or development plan in order to ensure the interest of the people to acquire* ***direct or indirect benefits*** *from the use of the land and to consolidate sustainable socio-economic development.*[52]

According to this definition, any possible direct or indirect benefit to the public may justify expropriation/clearing order. Thus, though this legislation concurred with the constitution and the C.C in using the phrase 'public purpose', it is similar, in substance, to the other laws which have broadened the scope of the precondition using the clause 'public interest'.

The urban land lease proclamation is identical to the expropriation proclamation in defining expropriation precondition except the fact that it has used the clause 'public interest' instead of public purpose. Here is the relevant provision under the proclamation.

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[48] See the provisions under title 9 of the civil code
[49] Art 1444 of the civil code
[50] Art 1445 of the civil code
[51] See art 1463 of the civil code
[52] Art 2(6) of expropriation proclamation no. 455/2005

> ***"Public interest"*** *means the use of land defined as such by the decision of the appropriate body in conformity with urban plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable socio-economic development.*[53]

The distinction between public interest and public purpose is not irrelevant. Given all the ambiguities and inconsistencies discussed above, interpreting 'public purpose' and putting its right meaning is indispensable to set the right balance between individual land use rights and the inherent right of the state to expropriate land to introduce public goods and services. If we use its narrow meaning, land holding right of an individual will be expropriated only when such land is required for public purposes which can benefit the society directly. This can ensure tenure security for individual land holders. The broad meaning (as some statutes set it using the clause public interest) on the other hand allows the government to expropriate individual holdings whenever it can establish any direct or indirect public interest. Perhaps, it is quite easy for the government to show at least indirect public interest in almost all cases. This undermines the land use rights of individual citizens.

Whatever meaning we might use, the most important assurances for individuals whose holdings are to be expropriated for public use are that notification of the clearing order and agreement over the amount of compensation preceding expropriation. Hence, government cannot take away the land until the individual agrees on the amount of compensation or the court decides on the commensurate compensation to be paid at times of disagreement. Article 27 (1) and the following of the urban land lease hold proclamation have set such important procedures.

[53] Art 2(7) of the urban lease holding proclamation no.721/2011.

> *Where urban landholding is decided to be cleared…, the possessor of the land shall be served with a written clearing order stating the time the land has to be vacated, the amount of compensation to be paid and the size and locality of the substitute plot of land to be availed.*[54]

If an individual is dissatisfied with such clearing order, he can submit his grievance along with substantiating evidences to the 'appropriate body' within 15 working days following receipt of the clearance order.[55] The appropriate body is required to properly investigate a complaint submitted to it and announce its resolution to the claimant in writing.[56] The proclamation has not defined the 'appropriate body' which is assigned to handle such a crucial issue and such a gap may open a room for abuse of power and corruption. Its organization, accountability and working procedures should have been made clear under the proclamation. There are many departments under land administration offices and the applicants may get confused in identifying the appropriate body. To ensure clarity and uniformity, explicating the appropriate body is apt. The proclamation has not also set a definite time within which the appropriate body renders decisions. Such a gap can lead to delay in decisions and bad governance and thus needs to be addressed.

A claimant dissatisfied with the decision of the appropriate body can lodge an appeal to the Appellate Tribunal established by the proclamation. Article29 (1) has set this rule and it reads:

> *An applicant who is aggrieved by the decision of the appropriate body rendered in accordance with sub-article (3) of Article 28 of this Proclamation may appeal to the Appellate Tribunal established*

[54] Art 27(1) of the urban land lease proclamation no. 721/2011
[55] See art 28 (1) of the urban land lease proclamation no. 721/2011
[56] See art 28(3) of the urban land lease proclamation no. 721/2011

under Article 30 of this Proclamation within 30 days from receipt of the decision.[57]

Here a point worth considering is that the 'decision' which might be appealed to the Appellate Tribunal is a decision only on a clearance order as can be inferred from articles 27(1) and 28(1). Hence, the remaining urban land related grievances against the concerned body can be lodged to the ordinary courts as the proclamation has not set special adjudication mechanisms for all land issues. For example, urban land users may institute a case before ordinary courts following decisions by a concerned body on start, half completion and completion of construction on a leased land, renewal of lease period, tender and allotment procedures, payment of lease price and related issues.

When the dispute is over land clearing order, the applicant may not submit an appeal against a decision given by the appropriate body to ordinary courts but to the Appellate Tribunal. The Appellate Tribunal is required to investigate the appeal and give its decision within 30 working days of submission of the clearing order related appeal.[58] Such decisions of the tribunal on all issues of law and fact are final except the issue of compensation. Article 29(3) of the proclamation has declared this in unequivocal terms. "Decisions of the Tribunal, except relating to compensation, on issues of law and facts including claims for substitute land shall be final."[59]

The constitutionality of this provision of the proclamation is questionable. Though there is no problem with the establishment of such quasi-judicial institutions which exercise judicial power, denying

[57] Art 29(1) of the urban land lease hold proclamation no. 721/2011
[58] Art 29(2) of the urban land lease hold proclamation no. 721/2011
[59] Art 29(3) of the urban land lease hold proclamation no. 721/2011

the courts power to review decisions given by such bodies undermines the constitutional principle that "judicial powers, both at Federal and State levels, are vested in the courts".[60] What is more, real property rights including land use rights are so important and should finally be protected through ordinary court proceedings.

The Appellate Tribunal established under the proclamation is not required to follow the provisions of the ordinary civil procedure law of the country. It will rather be governed by the procedures to be issued by the regional or city administration. Art 30(8) reads:"The Tribunal may not be governed by the provisions of the ordinary Civil Procedure Code while conducting its functions. It shall, however, be governed by expedient procedures to be issued by the region or city administration."[61]

By virtue of article 78(4) of the constitution, no special or ad-hoc court which takes judicial power away from ordinary courts or legally empowered institutions and sets aside legally prescribed judicial procedures may be established. It is not clear if the expedient procedures to be issued by the regional or city administrations, as proclaimed by the proclamation, are regular laws which need to be published under *Negarit Gazeta*. Legally prescribed judicial procedures which the constitution refers to, are those rules set by laws published by the *Negarit Gazeta.* Therefore, expediency may not be an excuse for using executive rules which are not published. The lack of clarity under the proclamation may result in injustice as too flexible and unpublished procedures may be employed. This would lead to uncertainty.

[60] Art 79(1) of the FDRE constitution
[61] See art 30(8) of proclamation no. 721/2011

The proclamation is also far from being clear on composition and independence of the Appellate Tribunal. As long as composition of this body is concerned, it doesn't say anything further than this: "the Tribunal shall consist of not less than five members drawn from different relevant bodies".[62] Its independence is also questionable. Though the proclamation stated that "the Tribunal shall be free of any influence except the law"[63], it doesn't ensure its independence. Given the fact that the term office of a member of the tribunal is determined by the region or city administration,[64] members are selected from administrative organs and the tribunal is accountable to the council of the region or city administration,[65] it is quite difficult to consider such a tribunal as an independent and impartial organ.

The other important point worth considering here is the proclamation's deviation from the constitutional principle that compensation should be paid in advance. Though the proclamation allows an individual dissatisfied with the decision of the tribunal on compensation to submit an appeal to ordinary courts,[66] such an appeal is admitted only after the appellant has transferred the land required to be expropriated/cleared to the concerned body. The relevant provision under the proclamation has set this:

> *An appeal under sub-article (4) of this Article may be admitted only if the appellant has handed over the land subject to the clearance order to the appropriate body and attached evidence to this effect.*[67]

[62] See art 30(4) of proclamation no. 721/2011
[63] Art 30(7) of the urban land lease proclamation no. 721/2011
[64] Art 30(9) of the urban land lease proclamation no. 721/2011. Also see the relevant provisions under the subsidiary urban land lease legislations.
[65] Art 30(3) of the urban land lease proclamation no. 721/2011
[66] See sub art 4 of art 29 of the urban land lease proclamation no. 721/2011
[67] See sub art 5 of art 29 of the urban land lease proclamation no. 721/2011

This provision of the proclamation undoubtedly contradicts with article 40(8) of the constitution which proclaims the following.

> *Without prejudice to the right to private property, the government may expropriate private property for public purposes subject to payment in advance of compensation commensurate to the value of the property.*[68]

According to the constitution, payment of commensurate compensation in advance is a precondition for expropriation. The country's expropriation proclamation no. 455/2005 and other relevant laws have also set the same principle. It is only after the land user agrees on or the court determines (in case of disagreement) the amount of compensation to be paid that a plot of land may be expropriated. Therefore, the urban land lease proclamation, by making handing over of land to government a precondition to lodge an appeal against compensation related decisions made by the tribunal, has compromised the constitutional right of individuals.

8. Conclusion and recommendations

This work revealed the inconsistencies between the urban lease holding system and the constitution. Individual citizens who do not have the financial means to compete in lease tenders nor can make use of the modality of allotment (which is permitted in exceptional cases only for special projects, not-for-profit organizations and governmental institutions) to access urban land are denied an equal economic opportunity with others in distribution of national wealth. This is clear violation of articles 25 and 89 of the FDRE constitution. The current urban land lease holding law, by failing to set accommodative land acquisition system, has also defeated the grand social objectives stated under article 90 of the FDRE constitution. Progressive improvement of social rights (which is an obligation

[68] See 40(8) of the FDRE constitution

imposed on the state) couldn't be realized as long as land, which is the most important resource for mankind, is inaccessible to the lower class of a society. Such inflexible and unaffordable urban land transfer system would also paralyze the constitutional economic and social rights under article 41 of the FDRE constitution.

Though the constitution is clear enough on transfer modalities of rural land to farmers and rural and urban land to investors, it has kept silent on the mode of delivery of land to non-investor urban residents. The constitution allows the government to come up with flexible urban land legislations and executive actions on such issues so it can respond to prevailing facts. Unfortunately, the current urban land lease holding law of Ethiopia has banned all forms of urban land acquisition methods other than the lease holding system. It has, therefore, failed to be flexible; and treated investor and non-investor urban residents alike, which is completely undeserved.

What is more, the detrimental effects of the broad definition given to public purpose (i.e. direct or indirect public interest) under the urban land lease holding proclamation and related legislations have been examined. Adoption of such a broad definition in urban land expropriation (clearing order) proceedings would allow the government to take land back from individuals easily and that in turn makes urban land tenure insecure.

It is also further concluded that the constitutionality of urban land clearing order related dispute handling procedures set under the lease holding proclamation is doubtable. Though quasi-judicial institutions like the urban land Appellate Tribunal may be established, denying the courts power to review decisions given by such bodies undermines the basic constitutional principle that judicial power belongs to the courts. Art 29(3) of the lease holding proclamation, by denying such power of the courts, therefore, stands against the constitution.

The author, therefore, suggests rectifying measures to be taken by the government. As the urban land acquisition modalities under the current urban land lease holding system stand against grand constitutional economic and social objectives of the country and have detrimental effects on economic and social rights of individuals, the government should assess the scope and nature of the problems associated with the existing lease holding system. It should then introduce informed and accommodative urban land lease holding system. The urban land lease rules which deny the courts' power to review decisions made by administrative tribunals should be repealed and the vague terminologies related to expropriation/urban land clearing order have to be clarified.

Integration of EIA into Biodiversity Conservation Endeavours in Ethiopia

Dejene Girma Janka[♣]

Abstract

Biodiversity is indispensable for the proper functioning of the biosphere and, hence, for all systems on the planet. As a result, measures have been adopted at all levels to ensure that biodiversity is well conserved. This is true in Ethiopia, too, because it has so far accepted international obligations, adopted national laws, and established institutional frameworks, among other things, to ensure that its biodiversity is conserved while using it sustainably. In order to achieve this objective, Ethiopia has been employing various strategies one of which is the recognition and implementation of environmental impact assessment (EIA), one of the key tools to ensure biodiversity conservation. Nevertheless, from all indications, the integration of EIA into biodiversity conservation efforts has not been adequate. This article plans to explore, in detail, why this is the case by reviewing and analyzing existing laws and literature and also by conducting interviews with appropriate persons from relevant institutions.

1. General Background

1.1. Introduction

The term *environment* can be defined as everything that surrounds an animal, planet or human being, be it man-made, natural, or chemical,

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biotic or physical.[1] Thus, it comprises the atmosphere, the hydrosphere, the lithosphere, and the biosphere[2] (which refers to the actual livable space covering the earth).[3] To sustain life on the planet, the existence in healthy and functional state of the environment in general and all its basic elements in particular is indispensable. For example, if one of the basic elements of the environment like the hydrosphere is affected by pollution, the whole system will be affected thereby affecting the lives on the planet. *Mishra* and *Das* explain this fact by analogizing the basic components of the environment with the basic components of our body system. They argue that all the elements of the environment should be protected because impact on one affects the other or the whole system as for example effect on our heart affects the whole system of our body.[4] Hence, the need to protect the environment in general and all its basic elements in particular is no more a point of contention. As a result, we now have different environmental laws which aim, generally speaking, at preventing irreparable environmental harm from occurring, forcing the consideration of environmental values into all realms of activities, and restoring the damaged environment.[5] For the purpose of achieving

[1] H.V. Jadhav and S.H. Purohit, *Global Warming and Environmental Laws*, 1st Edition, Himalaya Publishing House, Mumbai, 2007, p 8

[2] The Australian geologist, Eduard Suess is considered to have coined the term *biosphere*, or its close German equivalent, in 1875, but he did not give a strict definition for the term. Even today, it is commonly used in more ways than one. The preferred meaning derives from the work of the Russian chemist Vladimir I. Vernadsky who defined the biosphere as the zone or surface envelope of the earth which is naturally capable of supporting life. See S.V.S. Rana, *Essentials of Ecology and Environmental Science*, 3rd edition, Prince-Hall of India, 2007, Delhi, p 128

[3] H.V. Jadhav and S.H. Purohit, supra note 1, p 8

[4] P.C.Mishra and R.C. Das, *Environmental Law and Society: A text in Environmental Studies*, Macmillan, India, 2001, p 1

[5] See Steven Ferrey, *Environmental Law: Examples and Explanations*, 3rd Edition, ASPEN Publishers, New York, 2004, p 1 and 5

these objectives, environmental laws recognize the use of different mechanisms such as *environmental impact assessment*.

The theme of this article is the conservation of biodiversity as an element of the environment (via the biosphere). We know that biodiversity (the life on the planet) is spread all over the world. Thus, its complete and effective protection is not something that can be done by any single state or any single system. As it is spread all over the world, its complete and effective protection necessarily requires the participation of every member of the international community. Cognizant of this fact, the international community has come up with a legally binding instrument-the Convention on Biodiversity (CBD)-which has been ratified by many countries including *Ethiopia*. This Convention imposes different obligations on its members to achieve its objectives. For example, it obliges them to introduce the system of environmental impact assessment to conserve biodiversity. The primary goal of this article is, therefore, exploring the extent to which institutions that have the responsibility to ensure biodiversity conservation in Ethiopia have been using environmental impact assessment as one tool for biodiversity conservation to meet, among others, Ethiopia's obligations under the CBD.

1.2. Biodiversity

As stated above, the biosphere is the actual livable space covering our planet and this is basically so because it is the only element of the environment that has a vital life supporting system. This vital life supporting system of the biosphere is its complex collection of innumerable organisms known as the *biological diversity*, or simply called the *biodiversity*. This means, biodiversity, which refers to the total variety of life-plants, animals and microorganisms-on our

planet,[6] makes the biosphere a hospitable place. Therefore, the existence of the biosphere in a healthy and functional state is essential for the existence of the human race,[7] whereas the existence of the biosphere in such a state is contingent upon the existence of its biodiversity in a safe state. On the other hand, if biodiversity is affected, the life supporting system of the biosphere will be affected. Let us, for example, consider some instances of the direct and indirect benefits we get from biodiversity.[8] One of the most important direct benefits of biodiversity to the human race is its importance as a valuable natural resource such as food,[9] whereas its indirect benefits include carbon fixation through photosynthesis, pollination, soil formation and protection from erosion, maintaining essential nutrient cycles, absorbing and decomposing pollutants, regulating climate at both macro and micro levels, and preserving water cycles and recharging underground water.[10] So, any negative effect on biodiversity will hinder our chance of deriving these innumerable and invaluable benefits from them.

Sadly, however, we are losing our biodiversity at a very fast rate. This has led evolutionary biologists to argue that we are now in the midst of the sixth wave of extinctions in geological history but this time due to human activities.[11] The international community has also recognized that our biodiversity is being significantly reduced by

[6] For a legal definition of *biodiversity*, see article 2 of the 1992 Convention on Biodiversity.
[7] D.K. Asthana and Meera Asthana, *Environment: Problems and Solutions*; S. Chanda and Company LTD, 1998, India, p 221
[8] For more discussions on the value of biodiversity, see David Hunter, James Salzman, and Durwood Zaelke, *International Environmental Law and Policy*, 3rd ed, Federation Press, Thomson West, 2007, p 1008-1009
[9] S.V.S. Rana, supra note 2, p 195 and D.K. Asthana and Meera Asthana, supra note 7, p 226
[10] S.V.S. Rana, supra note 2, p 196
[11] David Hunter and others, supra note 8, p 1011

human activities[12] to the detriment of our own existence. It is, therefore, imperative that we do something to conserve our biodiversity and preserve the foundation of our own existence. Indeed, given the 'biological poverty' we are currently undergoing, any conservation measure in this regard should not be taken as a philanthropic act but as a measure of self-help.

1.3. Environmental Impact Assessment

As state above, the conservation of biodiversity is a measure of self-help. Thus, it is necessary that every possible conservation mechanism is employed to withstand the impact of 'biological poverty' we are now facing. One possible mechanism to employ to conserve biodiversity is the Environmental Impact Assessment (EIA).[13] EIA refers to the study of impact on the environment of proposed project;[14] it is a process of anticipating or establishing the changes in physical, ecological and socio-economic components of the environment before, during and after an impending development project so that undesirable effects, if any, can be mitigated.[15] EIA is, therefore, a tool for decision-making which enables decision-makers to take environmental issues into account in the early stages of project

[12] See the preamble of the Convention on Biodiversity

[13] Investigations conducted into the impact of specific projects on the environment are known as EIAs, EI Reports (EIRs), EI Statements (EISs), or planned analysis (the term used in the general environmental policy which is also called Strategic Environmental Assessments (SEAs)). In SEAs a region is assessed to determine its ability to absorb impacts. In integrated environmental management (IEM) the investigation forms part of a management process. 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 179

[14] D.K. Asthana and Meera Asthana, supra note 7, p 186

[15] Id, p 336

conception and development although it does not necessarily eliminate projects that have adverse impacts on the environment.[16]

At this juncture, it is necessary to note that the idea of assessment of the possible impact on the environment before starting a development project is an old one; for example, U.S. Army Corps of Engineers had developed techniques and methodology for impact assessment as early as 1870.[17] However, EIA in its present form was introduced by the National Environmental Policy Act (NEPA) of the USA in 1969[18] which made EIA a legal requirement prior to making decisions likely to have significant impacts on the environment.[19] Since 1970, EIA has been adopted as a legal requirement by both developed and developing countries.[20] Different international instruments such as the Rio Declaration and the Convention on Biodiversity of 1992 have also been recognizing the need to make environmental impact assessment in relation to actions that are likely to have significant impact on the environment. This, therefore, is why some people argue that the legal requirement of EIA is now certainly one of the principles of environmental law which have received universal acceptance in national legislation and international instruments.[21]

In any case, EIA is nothing more, or less, than simple fact-gathering exercise[22] and its primary function is to make available to both

[16] John Ntambirweki, *Environmental Impact Assessment as a Tool for Industrial Planning*, included in *Industries and Enforcement of Environmental Law in Africa*, UNEP, 1997, 1997, p 75. In relation to the relevance of EIA in reducing costs, see H.V. Jadhav and S.H. Purohit, supra note 1, p 10
[17] D.K. Asthana and Meera Asthana , supra note 7, p 336
[18] Id., p 336
[19] Robert V. Percival, *Environmental Law, Statutory Supplement and Internet Guide 2003-2004*, ASPEN Publishers, USA, 2003, p 873
[20] D.K. Asthana and Meera Asthana , supra note 7, p 336
[21] See, for example, John Ntambirweki, supra note 16, p 75
[22] Duard Barnard, supra note 13, p 179

developers and the national authorities the opportunity to choose development actions with full knowledge of their impacts on the environment.[23] In relation to biodiversity, EIA makes biodiversity evaluations by those making it possible. Here, *biodiversity evaluation* refers to the process of measuring the value (ideally quantitatively) of biodiversity components, such as the population of species, a habitat (usually meaning a vegetation community) or the sum of all such components within a given area or site.[24] One of the purposes of such evaluation is to identify, document and quantify as far as possible all potentially valuable ecological components that may be affected by development activity including those that may be affected by off-sites impacts such as those from emissions or effluents, waste material dumping, production of material to be used on site, road construction, water supplies and building materials. If EIA includes biodiversity evaluations, then decision-makers will be able to consider at least the impact of a proposed project on biodiversity in the project site, the extent of such impact, whether or not the benefits to be derived from the project is worth the damage, if any, to the biodiversity, and the possible measure that can be taken to mitigated the adverse impacts of the project on biodiversity.

At this point, it may be worth considering that EIAs are sometimes conducted not to make decisions but for different purpose.[25] For example, in some countries, EIAs were prepared and used to justify environmentally degrading activities. Moreover, officials use EIAs in an attempt to postpone the duty of making decisions. Further, sometimes, officials may make decisions and order EIAs to be made

[23] John Ntambirweki, supra note 16, p 75

[24] For the discussion in this paragraph, see generally, David Arnold Hill, Matthew Fasham, Graham Tucker, Michael Shewry and Philip Shaw (Eds), *Handbook of biodiversity methods: Survey, Evaluation and monitoring*, http://books.google.com/books?id=9Jspmhkyex4C&printsec=frontcover#v=onepage&q=&f=false, accessed on 7 August 2009, p 65

[25] For detailed discussion on this point, see Duard Barnard, supra note 13, p 179

to determine the validity of their decisions. Likewise, EIAs have been used to hide the truth behind reams of paper. The bulkiness of some reports has been used to impress the gullible audience. However, all these are contrary to the purpose of EIA. EIA should be used as a tool for decision-making. If that is not so, then the whole purpose of undertaking EIA will be defeated. For example, one of the reasons why the public particularly the community that will be affected by the implementation of a project is given the right to participate in EIA is to enable it to participate in decision-making on matters affecting them. However, ordering EIA to be conducted after decisions have already been made amounts to asking the public to comment on the decisions that are already made instead of giving them the opportunity to participate in their making. This is contrary to the notion of *environmental democracy*.[26]

2. Legal Regimes on the Conservation of Biodiversity

Until recently, conservation efforts were aimed at something called "wildlife". Beginning in the late 1970s, however, many biologists became concerned that the focus on wildlife was too narrow because concerns over the fate of cute or ferocious mammals or beautiful birds missed the larger issue of a loss in the overall richness of life on the planet. As a result, they claimed that the better object of conservation should be the *biological diversity* because it covered all forms of life.[27]

Subsequently, the view that conservation efforts should aim at *biodiversity* had been shared by the rest of the world. Moreover, the

[26] E*nvironmental democracy* is defined as a participatory and ecologically rational form of collective decision-making. In other words, the concept refers to a process whereby people participate in making decisions that have bearing on the environment. See generally, Michael Mason, *Environmental Democracy*, Earthscan Publications Ltd, London, 2006,p 1

[27] For more on this point, see David Hunter and others, supra note 8, p 1004

world started appreciating the fact that conserving biodiversity, not just wildlife alone, was a matter of utmost urgency because biodiversity helps the biosphere retain its life supporting systems.[28] It was also understood that the conservation of biodiversity is a keystone to sustainable development-development that meets the needs of the present generation without compromising the ability of the future generations to meet their needs. [29] Eventually, therefore, the international community came up with some international laws dealing with the conservation of biodiversity. In this regard, the *Convention on Biodiversity* and the *Cartagena Protocol on Biosafety* can be cited.[30] At national level, too, countries like Ethiopia have been exerting efforts to conserve biodiversity by adopting different policies.

[28] Suresh K. Dhameja, *Environmental Science and Engineering*, 3rd Ed, S.K. Kataria and Sons, 2006-2007, p 156

[29] S.V.S. Rana, supra note 2, p 203. For example, in Ethiopia, exploring, collecting, conserving, and utilizing biodiversity is considered as one of the priority areas for sustainable development. See the preamble of the Institute of Biodiversity Conservation and Research Establishment Proclamation, Proclamation No. 120/1998.

[30] The Cartagena Protocol on Biosafety will not be discussed in detail here because the discussion of the CBD suffices for the purpose of this paper. But the Protocol is an international agreement on biosafety as a supplement to the CBD. It seeks to protect biological diversity from the potential risks posed by living modified organisms resulting from modern biotechnology. It is clearly stated that the objective of the Protocol is, in accordance with the precautionary principle, to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling, and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on trans-boundary movements (article 1). The Protocol became legally effective on 11 September 2003 in accordance with its article 37 after the required number of 50 instruments of ratification/accession/approval/acceptance by countries was reached in May 2003.

2.1. International law

2.1.1. Convention on Biodiversity

The major international legal regime governing the conservation of biodiversity is the CBD. In 1992, more than 100 heads of states met in Rio De Janeiro, Brazil, for the Earth Summit to address urgent problems of the environmental protection and socio-economic development. Then, conscious of the intrinsic value of biodiversity and of the ecological, genetic, social, economic, scientific, education, cultural, recreational and aesthetic values of biodiversity and its components, conscious also of the importance of biodiversity for evolution and maintaining life supporting system of the biosphere, and further realizing that the conservation of biological diversity is a common concern of humankind, signed the Convention on Biodiversity at the Summit,[31] which became legally effective on 29 December 1993.[32] The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Hitherto, the CBD has been signed and ratified by many countries and Ethiopia became one of these countries by signing and ratifying it in 1993 and 1994, respectively. Thus, by virtue of article 9(4) of Our Constitution, the CBD has been an integral part of the law of the land as of the date of its ratification. So, Ethiopia is obliged to perform the obligations the Convention imposes on its parties.

2.1.1.1.Requirement of EIA

Under article 6, the CBD prescribes the general measures that contracting parties should adopt to achieve its objective of conserving

[31] See the Preamble of the CBD. See also S. Shanthakumar, *Introduction to Environmental Law*, 2nd edition, Wadhwa and Company Nagpur, 2007, India, p 399

[32] S.V.S. Rana, supra note 2, p 208. For detailed notes on the history of CBD, see generally David Hunter and others, supra note 8, p 1003-1004, 1021-1022

biodiversity.[33] Under article 14(1)(a), it requires states parties to introduce a specific measure; that is, introducing appropriate procedures requiring EIA of proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures. Therefore, all states parties to the CBD including Ethiopia must adopt measures that would lead to the conservation of biodiversity. Specifically, they must use EIA before approving projects that are likely to have significant impact on biodiversity. Naturally, therefore, their EIA guidelines must require making biodiversity evaluations by project owners. The question to what extent Ethiopia has been using EIA in its efforts to conserve its biodiversity will be considered later on.

At this juncture, it is necessary to note that article 14(1)(a) of the CBD seems to require only one type of EIA; that is project level EIA. However, EIA is done not only at project level but also at strategic level which is known as EIA for public instruments. For example, in Ethiopia, our EIA law (to be seen later on) requires EIA to be conducted before certain public instruments (laws, policies, etc) are adopted. Thus, for example, if a government plans to declare previously protected areas to be grazing areas for pastoralists, the impact of such plan on biodiversity ought to be studied in advance. Moreover, if a government has planned fighting a rebel group in a given forest area, such plan has to be subjected to EIA to know the impact of the fighting on the biodiversity at the scene of the fighting.

[33] For instance, article 6(a) requires states parties to develop national strategies, plans or programs for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programs which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned. The measure envisaged under this article may include the adoption of EIA because EIA can be taken as a strategy that enables states to know whether their actions will affect biodiversity adversely or not thereby leading them to make a decision to take conservation measures, if need be

This requirement is missing from article 14(1)(a) of the CBD which talks about *projects*. Nevertheless, one may still argue that since 14(1)(b) of the CBD provides for the duty to introduce appropriate arrangements to ensure that the environmental consequences of programs and policies that are likely to have significant adverse impacts on biological diversity are duly taken into account, strategic EIA is also recognized by the CBD.

2.2. National laws

As stated before, the CBD imposes on its parties different obligations to achieve its purposes. One of these obligations is the obligation to introduce appropriate procedures requiring environmental impact assessment of proposed projects that are likely to have significant adverse effects on biodiversity with a view to avoiding or minimizing such effects. The question then remains whether Ethiopia has introduced such a procedure requiring EIA for projects likely to have the impact the CBD envisions.

To begin with, in our Constitution, there is understandably no vivid recognition of the principle of EIA. However, the Constitution requires the environment to be protected and preserved besides recognizing everyone's right to live in a clean and healthy environment. As a result, it may be argued that the Constitution impliedly requires EIA in as long as EIA is one of the ways of protecting and preserving the environment and ensuring the enjoyment of environmental right by individuals.[34] More importantly, however,

[34] For example, article 92(2) of the FDRE Constitution states that the design and implementation of programmes and projects of development shall not damage or destroy the environment. Article 92(4) of the Constitution stipulates that the government and citizens shall have the duty to protect the environment. Article 44(1) recognizes everyone's right to live in clean and healthy environment. Therefore, one may safely argue that the proper implementation of these

the 1997 Environmental Policy of Ethiopia and the 2002 Environmental Impact Assessment Proclamation have plainly recognized the principle of EIA as one of the most important principles of environmental law. First of all, the EIA Proclamation recognizes EIA as a broad concept as it defines it as *the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument*.[35] Thus, the Proclamation links EIA not only to projects but also to public instruments such as laws and policies. Then, it places on all persons the duty to conduct EIA in advance in relation to any action (projects or public documents) for which prior EIA is required.[36] Further, it strictly prohibits the commencement of any project requiring EIA before *appropriate assessment* is made while the power to ensure that EIA is made and evaluate the same is given to the Federal EPA and relevant regional environmental authority.[37] This shows that the legal requirement of EIA is granted a superior place in our system of environmental law (although the practice shows, as we will consider later on, that it has a lower position). It is, therefore, evident that Ethiopia has put in place policy frameworks requiring EIA before adopting projects or even public instruments[38] that may have significant adverse environmental impacts such as on biodiversity.

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constitutional provisions largely depends on the use of EIA as a tool for decision-making whenever appropriate.

[35] Article 2(3), Environmental Impact Assessment Proclamation **of Ethiopia,** Proclamation **No. 299/2002**

[36] See articles 7 and 11 together with article 3 of the Environmental Impact Assessment Proclamation, Proclamation No. 299/2002

[37] See articles 3 and 14 of the Environmental Impact Assessment Proclamation, Proclamation No. 299/2002

[38] *Public instrument* is defined as a policy, a strategy, a programme, a law or an international agreement. See article 2(10) of the Environmental Impact Assessment Proclamation, Proclamation No. 299/2002

3. Institutional Framework for Biodiversity Conservation and the Use of EIA in Practice

As we have seen from the discussions so far, Ethiopia has different policy frameworks in place to conserve its biodiversity which will enable her to discharge its international obligation under the CBD. However, the existence of policy frameworks by itself is not enough unless they are accompanied by institutional frameworks. Accordingly, the government has come up with different organs which have, in one way or another, the responsibility to contribute to the conservation of biodiversity. These organs will be discussed below together with the extent to which they have been using EIA to contribute to the conservation of biodiversity.

3.1. Environmental Protection Authority (EPA)

As some people write, Ethiopia is deeply concerned for its environment as it has attached great importance to its protection and preservation.[39] Of course, this is apparently a fair judgment because a look at our legal system reveals that we are cognizant of the need to protect and preserve the environment. For example, our Constitution and other legislative measures demand the environment to be protected. The establishment of the Federal Environmental Protection Authority (EPA) can also be taken as an indication of this concern.[40]

[39] Khushal Vibhute, *Environmental Policy and Law of Ethiopia*, Journal of Ethiopian Law, Volume xxii, No.1, p. 76, 82-83. The assertion that the country has deep concern for the environment seems to hold water because, for example, Ethiopia has recognized the right to clean and healthy environment in its Constitution and this right is meant to protect people against environmental hazards. In this regard, Michael Mason argues that environmental rights are in part designed to make it more difficult for political communication to ignore important ecological problems. See Michael Mason, supra note 26, p 65-66.

[40] **See, for example, t**he 1995 Constitution of the Federal Democratic Republic of Ethiopia, Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002, Environmental Pollution Control Proclamation, Proclamation No.300/2002, Environmental Impact Assessment Proclamation**,**

In any case, the primary responsibility of ensuring environmental protection in Ethiopia lies on the Federal EPA. It is an organ that is authorized to set environmental standards against which the impact of an action on the environment should be assessed,[41] it decides on projects that require EIA, it ensures that EIA is done and gives, after evaluation, authorization to project owners to implement their projects if they require environmental impact assessment.[42] Now, with this in mind, what does the practice look like: for example, is EIA done? Is EIA report evaluated? If so, is such evaluation participatory? To what extent is biodiversity considered in the course of EIA report Evaluation?

On one occasion, I had the chance to attend a public lecture given by the Director of the Federal EPA where I was able to raise the following question: *we know that Ethiopia is undertaking different development activities. On the other hand, our EIA Proclamation requires that EIA must be done in respect of activities requiring prior EIA. So, is EIA really done in practice? If so, who ensures that it is done properly?* The Director then responded that EIA is actually being done in relation to activities requiring EIA regardless of who is undertaking them. Moreover, he indicated that the Federal EPA plays primary role in ensuring that EIA is done properly, when it is required,

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Proclamation No. 299/2002. The Federal EPA was established in 1995 and re-established in 2002 by virtue of article 3(1) of the Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002. The Proclamation that has re-established the EPA also requires the establishment of Regional Environmental Agencies. Some experts at the EPA state that the EPA is not doing what it ought to because environmental issues are still political issues in our case. At times, it lets environmental harms happen in order not to confront with top government officials.

[41] See article 6(7) of the Environmental Protection Organs Establishment Proclamation, Proclamation No.295/2002.

[42] See article 3(1) of the Environmental Impact Assessment Proclamation**, Proclamation No. 299/2002**

before issuing a go ahead permit with a project.[43] Similarly, I interviewed different persons from the EPA (such as Ato Solomon Kebede, Head of the EIA Department at the Federal EPA,[44] Ato Abraham Hailemelekot, EIA Expert at the Federal EPA[45] and Ato Wondosen Sintayehu, Acting Head, Environmental Policies and Legislation Department at the Federal EPA[46]) and outside the Federal EPA but those who are interested in having EIA done such as the people from the Institute of Biodiversity Conservation (IBC) and Ethiopian Wildlife Development and Conservation Authority (EWDCA). These people also confirmed that in fact EIA is done in practice at least in relation to certain projects. More importantly, Ato Solomon Kebede, who is the head of the EIA Department of the Federal EPA, indicated that EIA is done in practice although there are projects for which EIAs have not been done even if they are subject to it. Furthermore, I have been able to see some documents at the Federal EPA containing EIAs of different projects.[47] Therefore, although there are projects which require prior EIA but which have not passed through EIA, the fact that EIA is made for certain projects is a point beyond dispute.

As far as the person that is responsible for making EIA is concerned, our EIA Proclamation imposes the duty on a proponent (project owner). In practice, too, the personnel I interviewed at the Federal EPA indicated that EIAs are being made by project owners. Then, the

[43] Tewolde Berhan Gebre Egziabher, Director General, Ethiopian Environmental Protection Authority, Public Lecture on 7 May 2009 at Addis Ababa University, Akaki Campus.

[44] Interview with Ato Solomon Kebede, Head of the EIA Department of the Federal EPA on 7 and 8 September 2009

[45] Interview with Ato Abraham Hailemelekot, EIA Expert, Federal EPA, 24 August 2009

[46] Interview with Ato Wondosen Sintayehu, Acting Head, Environmental Policies and Legislation Department, Federal EPA, 24 August 2009

[47] Of course, I did not go through these documents.

Federal EPA evaluates the EIAs presented to it by using people from different fields such as law, biology, and agriculture as evaluation requires multidisciplinary knowledge. In the course of its evaluation, the Federal EPA acts strictly when sensitive areas such as cemeteries, valleys, and lakes are involved. Nevertheless, Ato Abraham Hailemelekot indicated that the evaluation of EIA does not specifically consider whether or not project owners have made biodiversity evaluations. Moreover, he added, the Federal EPA does not make its own side EIA for the verification of project owners' EIAs than simply trusting them even if they do not make genuine reports.

One of the causes for the Federal EPA not specifically considering effects of projects on biodiversity can be, according to Ato Wondosen Sintayehu, the lack of comprehensive guidelines or checklists that require project owners to produce comprehensive EIAs by considering the impacts of their projects on the complete ecosystems of their project sites. In this regard, the Federal EPA's guidelines or checklists are fragmented and sector-specific. This makes our system of EIA poor and disorganized because, among others, EIAs will be evaluated only in light of sector specific checklists, not in light of the overall environmental impacts a project may have on the project site. For instance, if a project is to be implemented around water areas, impacts on fish will be considered, not on the ecosystem of the area as a whole thereby causing failure to take the other elements of the environment into account.

Ato Wondosen Sintayehu further stated that the absence of comprehensive guidelines causes problems to project owners as well because they are sometimes required to do EIA again to consider the impact of their projects on certain elements of the environment they had not been required to consider initially. More importantly, however, the Federal EPA does not know whether the project owners make genuine reports or not on the other elements of the environment

unless they are required to do EIA again to verify what they have reported, which is less likely to happen. If the guidelines were comprehensive, not sector specific, it would be very easy to consider the impact of a project on other elements of the environment. For example, it would be possible to ask: *what would be the impact of cutting a particular tree on human beings, flora, and fauna or simply on the surrounding ecosystem?*

As far as the involvement in EIA report evaluation of persons who may be more interested in using EIA to conserve biodiversity, such as people from the IBC and EWDCA, is concerned, the people in the Federal EPA have stated that networking is very poor. For that matter, some of them have indicated that officials from these organs (Federal EPA, IBC, and EWDCA) meet only on workshops. The basic reason according to Ato Abraham Hailemelekot and Ato Wondosen Sintayehu is the reluctance (unwillingness) of the Federal EPA to engage these organs in EIA evaluation. They said that the Federal EPA is reluctant or unwilling to engage them in EIA evaluation in most cases because; firstly, it thinks that it is capable of taking care of all EIA related matters; and, secondly, it wants to avoid inconveniences to project owners by cutting out 'unnecessary' bureaucracies because it fears that these other organs may not comment on EIAs timely or they may comment on them negatively.

Therefore, in conclusion, one can say that the Federal EPA is not very much interested in considering biodiversity as one of the criteria to approve or reject EIAs. It considers adverse impacts on biodiversity only when sensitive areas such as valley or lake areas are involved although biodiversity is found everywhere. Moreover, it is very much reluctant to engage other organs who can use EIA for biodiversity conservation to discharge their responsibilities. Therefore, the use of EIA by the Federal EPA to conserve biodiversity as one of the

elements of the environment is pretty much limited seen in light of what it could have done. Of course, it may be thought that the Federal EPA has been facing challenges not to be strict in its approach to protect the environment. However, neglecting biodiversity in most cases does not seem tenable as well. Sadly, there are projects that are subject to EIA but which have been implemented before EIA is conducted. Here, the use of EIA to conserve biodiversity by the Federal EPA is unthinkable. In this regard, Ato Solomon Kebede indicated that although many such projects exist, the Federal EPA could not do anything because it does not have the power to take actions like prohibiting them from proceeding.

It is important to mention here that the Federal EPA has the power, according to article 12 of the EIA Proclamation, to monitor the implementation of an authorized project in order to evaluate compliance with all commitments made by and obligations imposed on a proponent during authorization and take appropriate actions, if need be. These measures are ordering the proponent to take specific rectification measure, suspending or canceling authorization to implement a project. Corollary to the Federal EPA's measure of suspension or cancellation, investment authorities that have issued investment permits are also required to suspend or cancel, as the case may be, their investment permits. Nevertheless, the EIA Proclamation has sadly failed to recognize the Federal EPA's power to take action against projects that have not passed through EIA even if they are required to.

3.2. Institute of Biodiversity Conservation (IBC)

The Ethiopian government felt that the establishment of a body that is particularly responsible for undertaking, directing and coordinating biodiversity conservation, research and proper utilization endeavours at national level was necessary. As a result, in 1998, it enacted Proclamation 120/1998 which established the *Institute of Biodiversity*

Conservation and Research (IBCR) as an autonomous body of the Federal Government with the objective of causing and ensuring the appropriate conservation, research, development and sustainable utilization of the country's biodiversity.[48] However, in 2004, the IBCR Proclamation (Proclamation No. 120/1998) was amended by Proclamation 381/2004 which renamed the IBCR as *Institute of Biodiversity Conservation* (IBC) and also redefined its objective as *ensuring the appropriate conservation and utilization of the country's biodiversity*.[49]

With regard to its powers and duties, the IBC Proclamation (Proclamation 381/2004) contains a long list. All the same, generally speaking, the IBC is empowered to perform anything that is appropriate for the achievement of its objectives. For example, it is empowered to initiate policy and legislative proposals on conservation of the country's biodiversity and, upon approval, enforce and follow up their implementation; implement, in cooperation with the concerned bodies, treaties on biodiversity to which Ethiopia is a party; work in cooperation with the concerned federal and regional bodies with respect to conservation of biodiversity; identify processes that promote or threaten the existence of the country's biodiversity resources; formulate and propose policy ideas to concerned authorities which enable them to promote the healthy processes and control the threatening ones.[50] However, the power to ensure that EIA is conducted in relation to projects possibly affecting biodiversity or the right to participate in the evaluation of EIAs is not specifically given to the IBC. However, one may argue that the IBC is empowered take

[48] See the Preamble, articles 3 and 5 of the Institute of Biodiversity Conservation and Research Establishment Proclamation, No. 120/1998

[49] See articles 2(1) and (5) of the Institute of Biodiversity Conservation and Research Establishment /Amendment/ Proclamation, Proclamation No. 381/2004

[50] Id., article 2(6)

part at least in the evaluation of EIAs because that enables it, for example, to identify processes that threaten the existence of the country's biodiversity. Accordingly, one may wonder the extent to which the IBC has been participating in the evaluation of EIAs made by proponents so far.

In this regard, the people in the IBC have the following to say.[51] The IBC does not ensure that EIA is done because that power is not specifically given to it. However, it believes that it must take part in the evaluation of EIAs for projects likely to affect biodiversity (flora and fauna). Fortunately, the EPA sometimes sends to the IBC some EIAs for comments before it acts upon them. However, more often, the EPA marginalizes the IBC thinking that it would comment on EIAs negatively. Consequently, the participation of the IBC on EIA evaluation is very limited. This has been causing, under certain circumstances, controversies between the IBC and project owners because project owners have been trying to implement projects that would have significant adverse impact on biodiversity. Here, mentioning one incident suffices to elaborate the point at hand.

> *Babille* is one of the protected areas in Ethiopia for its biodiversity richness. It is a sanctuary of many endemic animals particularly elephants. A certain investor wanted to establish oil plant in the area to produce biofuel. As a result, the investor approached the IBC to study the impact of his project on the area's biodiversity. The IBC outrightly informed him that the area was already studied and no development activity could be undertaken in the area unless it would be for

[51] I tried to interview the director and the vice director of the IBC. However, I did not succeed in this regard. As a result, I had to resort to interviewing other people who were heads of certain offices within the Institute. The names of these persons are not mentioned here because they gave me the information I wanted on condition that I keep their anonymity. The interview with them was conducted on 1 September 2009.

> the good of the area itself. Then, the investor went to the place and started removing the forest. The IBC did not know where the authorization to do so came from. Finally, fight broke out between the investor's employees and the areas guards which led the investor to flee the country. The case lasted for a year and half. But, finally, the IBC, joined by other concerned organs, was able to win the case.

According to the Federal EPA's Head of EIA Department, Ato Solomon Kebede, the investor actually conducted EIA and submitted its report to the Federal EPA. The Federal EPA also looked at the report and ordered the investor to make modifications to his EIA (perhaps doing EIA again on certain element of the area). However, the investor never reappeared before the Federal EPA again. Instead, he proceeded with his project as a result of which thousands of hectors of Babille forest was cleared before it was noticed. Finally, an NGO called *Forum for Environment* noticed the action and brought it to the fore which caused many organs to join efforts to have the project quitted.

In any case, according to the IBC, in most cases, the Federal EPA decides on EIAs on its own and without involving the IBC as one of the stakeholders. As a result, many forests, for example in South West Ethiopia, have been removed and changed to tea and coffee plantation areas. Other biodiversities have also been affected adversely without the IBC's knowledge although the IBC should have known these facts and participated on the evaluation of their EIAs.

Therefore, it can be said that, because of the Federal EPA's reluctance or unwillingness to engage it, the IBC has been incapable, in most cases, of integrating EIA into its endeavors to conserve the country's biodiversity. Indeed, such integration has been happening only under

limited circumstances as the IBC has been using EIA, through participation on its evaluation, only when the Federal EPA volunteered to send EIAs to it for comments. Unfortunately, although they have the same ultimate goal, the coordination between Federal EPA and the IBC and integration of their efforts is very poor.

3.3. Ethiopian Wildlife Development and Conservation Authority (EWDCA)

Ethiopia possesses diverse, rare and endemic species of wildlife which are of great value to tourism, education and science.[52] However, these species have been subjected to unplanned and inappropriate utilization which has resulted in their depletion and endangered existence while conservation measures taken so far have not been productive.[53] So, to regulate the use of wildlife and make conservation measures more productive, the government of Ethiopia enacted the Development, Conservation and Utilization of Wildlife Proclamation.[54] Further, realizing that wildlife threatening conditions are ever growing, and noting also that the effective conservation of wildlife requires, among others things, undertaking appropriate conservation and development of wildlife for sustainable use, and halting the ever growing threats to wildlife by establishing an organ specifically dealing with wildlife development and conservation, the government established the *Ethiopian Wildlife Development and Conservation Authority* (EWDCA) as an autonomous public agency of the federal government in 2008. The objective of the EWDCA is ensuring the development,

[52] See the Preamble of the Ethiopian Wildlife Development and Conservation Authority Establishment Proclamation, Proclamation No. 575/2008

[53] See the Preamble of the Development, Conservation and Utilization of Wildlife Proclamation, Proclamation No. 541/2007

[54] The objectives of this Proclamation are to conserve, manage, develop and properly utilize the wildlife resources of Ethiopia; to create conditions necessary for discharging government obligations assumed under treaties regarding the conservation, development, and utilization of wildlife; and, to promote wildlife-based tourism and to encourage private investment. Id., Preamble and article 3

conservation, and sustainable utilization of the country's wildlife resource.[55] At this juncture, it is important to note that both the IBC and EWDCA share the objective of conserving biodiversity. However, as compared to the IBC, EWDCA is specific in its objective in that it deals only with *wildlife.*[56]

As far as its responsibilities are concerned, EWDCA has been given a number of powers and duties by its establishment Proclamation. However, the power to ensure that EIA is conducted or evaluate EIAs or participate in their evaluation is not specifically entrusted to it. Instead, its establishment Proclamation empowers it to *carry out such other activities as are necessary for the fulfilment of its objectives.*[57] Thus, one may argue that this open-ended mandate to carry out other activities that are necessary for the fulfilment of its objectives includes the power to ensure that EIA is done and also evaluate its reports at least on joint basis with the Federal EPA. However, officials from the EWDCA do have different opinions on the role of the EWDCA in relation to EIA.

For instance, Ato Yeneheh Teka,[58] Director of EWDCA, stated that the Federal EPA enjoys a *monopoly* to ensure that EIA is done and evaluate its reports whereas EWDCA has no share in such power. According to him, in practice, too, Federal EPA has been exercising such monopoly power to ensure that EIA is made and also evaluate its

[55] See the Preamble, articles 3 and 5 of the Ethiopian Wildlife Development and Conservation Authority Establishment Proclamation, Proclamation No. 575/2008

[56] *Wildlife* is defined as *any live or dead vertebrate or invertebrate animal other than domestic animal.* See Article 2(1) of the Development, Conservation and Utilization of Wildlife Proclamation No. 541/2007

[57] Article 6(17) of the Ethiopian Wildlife Development and Conservation Authority Establishment Proclamation No. 575/2008

[58] Interview with Ato Yeneheh Teka, Director, Wildlife Development and Protection Authority, 31 August 2009

reports. However, Ato Yeneheh indicated that sometimes the Federal EPA sends EIAs to EWDCA for comments and this usually happens when the areas where proposed projects are to be implemented concerns EWDCA. For example, he stated that if a road is to cross a park, the Federal EPA sends to EWDCA the EIA of the Ethiopian Road Authority for its comments before taking action.[59] At this juncture, Ato Yeneneh has indicated that in Ethiopia, sometimes, investors get investment permits from investment authority[60] and start implementing projects before doing EIA and getting approval from the Federal EPA. Then, they do EIA later on only if they are required to do it. Obviously, this affects not only the interest of the Federal EPA but also of the EWDCA because it denies the Federal EPA the chance to send to EWDCA EIAs for comments in case projects are to be implemented in areas that 'concern' the EWDCA.

Ato Fanuel Kebede,[61] Senor Wildlife Expert at EWDCA, also has the following to say:

> EWDCA does not have the mandate to ensure that EIA is made by concerned persons or evaluate their reports. Its mandate is developing and conserving wildlife. Thus, EWDCA does not ensure that EIA is done; nor does it evaluate it report. Nonetheless, EWDCA sometimes gets that chance to participate in the evaluation of EIAs and this happens usually when the Federal EPA seeks its comments on EIAs thinking

[59] Incidentally, it is worth raising that, according to Ato Yeneheh Teka, EWDCA makes EIA on its own only when it undertakes certain activities itself such as roads and houses in parks.

[60] Nevertheless, the investment authority is obliged, in accordance with article 3(3) of the EIA Proclamation, to ensure that EIA is made and it is approved by the EPA before issuing investment permit. This means, any time the authority fails to check that EIA is made and it is approved by the EPA before issuing investment permit, it breaches its duty.

[61] Interview with Ato Fanuel Kebede, Senor Wildlife Expert, Ethiopian Wildlife Development and Protection Authority, 31 August 2009

that the interest of EWDCA is at stake. In this regard, the Federal EPA thinks that EIA evaluation should involve EWDCA when a project is to be implemented in protected areas such as wildlife sanctuaries, parks, and reserves. However, in most cases, the Federal EPA does not send EIAs to EWDCA for its comments. In fact, even when such claims are likely to arise, the Federal EPA claims that it enjoys a monopoly over matters of EIA evaluations. Thus, by raising the issue of mandate, the EPA refuses to engage EWDCA in EIA evaluation. This enables the Federal EPA to sometimes negotiate, as it has been doing, with project owners. At any rate, EWDCA's role on the evaluation of EIAs is very rare. After all, formal communication and cooperation between the two organs are very poor and this is primarily so because the Federal EPA does not seem open to make things participatory. This ultimately denies EWDCA the chance to employ EIA as one of the mechanisms for conserving biodiversity in general and wildlife in particular.

Nevertheless, if a project is going to affect (be implemented in) a protected area, no one can do any job in this area without the permission of EWDCA. Hence, in this case, the Federal EPA will, as a matter of necessity, be forced to engage EWDCA in the evaluation of EIAs. In this regard, the *Babille case* is a turning point. As soon as EWDCA came to know that the investor started implementing its project in the area, it prohibited him from proceeding which finally led to conflict between EWDCA's scouts in the area and the employees of the investor. Since then, the Federal EPA is conscious of the need to get the comments of EWDCA on EIAs for projects affecting protected areas.

In conclusion, as both officials from EWDCA have indicated, the Federal EPA has been allowing the participation of EWDCA on the evaluation of EIA reports if protected areas are involved. Thus, we can conclude that EWDCA has been integrating EIA into its wildlife conservation (or biodiversity at large) endeavor in relation to protected areas. Nonetheless, still one major problem remains. It is known that, particularly in countries like Ethiopia, the presence of wildlife is not limited only to protected areas. In fact, while wildlife is found everywhere, certain unprotected areas do have strong potential for wildlife conservation. So, based on the interviews with the above two EWDCA personnel, the Federal EPA does not send EIAs to EWDCA for comments if unprotected areas are involved. Moreover, Ato Fanuel Kebede indicated that EWDCA's own role to get EIAs for comments in relation to projects that are to be implemented in unprotected areas but with some wildlife potential is not meaningful. As a result, EWDCA has not been using EIA to conserve wildlife that is found outside the protected areas. More importantly, while Ethiopia is rich in wildlife resources, protected areas for their conservation are few in number. This makes the participation of EWDCA in the evaluation EIAs of projects to be implemented outside protected areas necessary.

4. Involvement of Stakeholders in EIA

The fact that stakeholders' involvement in making EIA and the evaluation of its report makes EIA more effective is not disputable. Here, the term *stakeholder* may include not only the community that may be directly affected by the implementation of a project but also other interested persons such as NGOs and government agencies. In our case, therefore, the IBC and the EWDCA will be appropriate stakeholders to participate in the evaluation of EIAs at least by way of commenting on them. Hence, they can use this leeway to integrate EIA into their efforts to conserve biodiversity. In this regard, the EIA Proclamation obliges the Federal EPA to ensure that the *public* has participated in environmental impact study and to make EIA

accessible to the *public* and solicit comments on it.[62] So, although the Proclamation uses the term *public*, not stakeholders, one can argue that *public* here refers, in its broadest sense, to all interested persons.

5. Conclusion and recommendations

As we have seen form the discussions hitherto, the conservation of biodiversity is a matter of top urgency. As a result, the Ethiopian government has put in place policy frameworks, including the ratification of the CBD, to conserve and sustainably use its biodiversity. These policies are also supported by necessary institutional frameworks to put them into force by employing different strategies. One such strategy is the use of EIA which enables decision makers to know projects that are likely to have significant adverse impact on the country's biodiversity and to act accordingly. Here, the power to ensure that EIA is done and to evaluate same is given to the Federal EPA with regard to matters falling under federal jurisdiction. Thus, the EPA can consider the impact of a project on biodiversity before it approves EIAs thereby using EIA as one means to conserve biodiversity-one element of the environment. Nonetheless, there are certain projects which are subject to EIA but which are implemented without EIA thereby denying the Federal EPA the chance to consider the impact of these projects on biodiversity. However, what is more bewildering is the fact that even in relation to projects that are preceded by EIA, the Federal EPA does not specifically consider biodiversity conservation in the course of evaluating EIAs. For that matter, it does not have a comprehensive guideline project owners have to use in the course of conducting EIA so as to take biodiversity into account at all times. Further, the Federal EPA does not usually engage other organs that are closely concerned with the conservation of biodiversity. Thus, the IBC and EWDCA get the chance to

[62] See articles 9(2) and 15 of the Environmental Impact Assessment Proclamation, Proclamation **No. 299/2002**

participate in the evaluation of EIA reports under limited circumstances. As a result, these two organs have not been able to use EIA adequately as one of their strategies to conserve biodiversity.

Now, bearing in mind the problems we have identified in relation to the use of EIA as a method of conserving biodiversity, the following recommendations ought to be adopted. First, the EPA must engage the IBC and EWDCA in the process of EIA evaluation. One, of all, the ultimate goal of these organs is the same; that is, the protection and preservation of the environment which necessitates integration of their efforts. Two, the EPA will be better off in relation to the evaluation it makes on EIAs as the other two organs have more experts at their disposal for biodiversity conservation. Three, such engagement of other organs in EIA report evaluation will facilitate the conservation of biodiversity that are found in unprotected areas as well. Second, the IBC and EWDCA must demand the permission to participate in EIA evaluations instead of waiting for the Federal EPA to invite them to do so. Such measure will enable them to use EIA as a means to an end-conservation of biodiversity-not only in protected areas but also in all other areas with biodiversity potentials. Here, it should be noted that there is a loophole for them to demand permission from the Federal EPA for such participation because they are, after all, allowed to do anything that would enable them to achieve their objectives. Thus, if they interpret their establishment Proclamations generously, not restrictively, they will arrive at the conclusion that they in fact have the right to demand such participation. Third, both the IBC and EWDCA should make studies in relation to unprotected areas but with biodiversity potentials and submit the results of such studies, in advance, to the Federal EPA to enable it to accommodate the interests of biodiversity in the course of evaluating EIAs. Finally, the Federal EPA should adopt comprehensive EIA checklists requiring project owners to study the complete ecosystem of their project sites. If this is done, project owners will be able to make and come up with

comprehensive EIA reports whereas the team that undertakes EIA evaluation will be in a position to consider the extent to which a project may have adverse impact on biodiversity.

Lecture Note: Enforcement of fundamental rights vis-à-vis *Locus Standi* in Ethiopia

Aron Degol H.[♣]

1. Introduction

The concept of *Locus Standi* is very much significant in the protection and enforcement of human rights and freedoms enshrined both in Ethiopia's Constitution as well as in international human rights instruments. Despite its importance, however, since the concept was interpreted very strictly, it was felt problematic to apply it in human rights litigations and it is only recently that the trend has started developing. This is what this note will be dealing with in three sections. The first section will give readers a general overview of the conceptual understanding of the principle of locus standi, a comparative analysis of the principle in the field of human rights enforcement and exceptions restricting the absolute application of the principle. The second section will deal with the incorporation of the principle in the Ethiopian justice system by way of making a reference to civil and criminal litigation processes. The third section will discuss the application and significance of the principle of locus standi in constitutional/human right litigations in Ethiopia; in this section, attempt will be made to mention the impact of the principle in human rights enforcement, the emerging trends in human right litigations in relation to the principle and the respective role of Non-Governmental Organizations (NGO) in applying the principle in their human rights and freedoms enforcement activities.

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2. Conceptual foundation

2.1. Definition and purpose of *Locus Standi*

The term Locus Standi is derived from two Latin terms namely "**Locus**" which means place [1] and "**Standi**" meaning standing/to stand.[2] Therefore, *Locus Standi*, together, refers to a place of standing. Legally, the term refers to the right of appearance in a court of justice.[3] The concept demands that a person must have a sufficiency of interest to sustain his/her standing to sue. It signifies a right to bring an action and to be heard.[4] In short, this institution requires the plaintiff to show the existence and a violation of a given right or interest in order to be allowed to institute a case in a court of law. Why this concept or why restrict anyone from initiating a legal suit by putting such qualitative criterion?

- The first reason is to prevent suits by a person who wants to litigate someone else's claim against the defendant.[5] If, for instance, Mr. A concluded a contract with Mr. B, but if, unfortunately, B failed to discharge his obligation as per their agreement, it is the interest of A that is affected and as a result it is only Mr. A who solely reserves the right to take Mr. B to court. But if Mr. C wants to litigate on behalf of A without getting an express or implied authorization from A, as a rule, there is no reason to permit C to go ahead since he is not the one whose interest is affected.
- The second reason is to prevent two suits against a defendant for a single wrong.[6] Where the interest in the subject matter of the suit has been transferred to another person, the defendant should not be subject to suits both by the person who had the interest

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[1]. Lokesh Rana, ***Encyclopedia of Law***, (2007), pp. 138
[2]. P. Ramanatha Aiyar, ***Concise Law dictionary***, (2006), pp. 699
[3]. *Ibid.*
[4]. *Ibid*.
[5]. Sedler, R. A., ***Ethiopian Civil procedure***, (1968), p. 52
[6]. *Ibid.*

originally and by the person to whom the interest has been transferred. For instance, in contractual transactions, if one of the contracting parties assigns his/her right to a third party as per art. 1962 of the Ethiopian civil code, and once the assignment is complete; it is the assignee not the assignor who will have the interest or the right to stand, [7] and the assignor will lose all his rights towards the original defendant in the suit.

So, the concept of *Locus Standi* is designed with the intention of making litigations smooth, cost and time wise and convenient for both of litigants in the case as well as for the decision-making body, be it a court or another competent extra-judicial organ.

2.2.Locus Standi in comparative jurisprudence

Locus standi has a great place in many countries civil, criminal as well as constitutional/human rights jurisprudence. For the purpose of comparison, I will try to mention this institution is treated in American, Indian, Nigerian and South African constitutional legal order especially in constitutional litigation.

United States

In the U.S.A, it has been established that the court will not allow a person to challenge the constitutionality of a statute unless that particular individual has a litigable interest, i.e. the right to bring a legal case/proceeding in the court.[8] The primary rule as to standing is that the individual who challenges the constitutionality of a statute must show that his/her material interest will immediately be or has been adversely affected by the enforcement of such a law or he will be one amongst those who could be so injured. The injury complained of must be fairly or casually related to the challenged action, and the

[7]. *Ibid.*
[8]. Basu, Durga. D., (Dr.), ***Human Rights in Constitutional Law***, (2003), pp. 174

injury complained of must be to the plaintiff personally.[9] American courts will not declare the unconstitutionality of a statute where the plaintiff has not sustained or is not immediately in danger of sustaining some direct injury. This position of the courts is shown by a Supreme Court justice's opinion that the courts can't annul congressional acts on the ground that they are unconstitutional unless there is a justification for a direct injury suffered or threat which has the capacity of presenting a justiciable issue upon such an act.[10]

The reason for such a position can be traced back to the very roots of the power of judicial review that unlike civil law constitutional courts, American courts follow the "*case or controversy*"[11] approach to a constitution or any other litigation where they will only be operational if there is a living controversy or real case between two or more disputants.

India

Like that of the U.S.A, in India too, the same position is taken. Art. 3 of the Indian Constitution clearly stipulate that a law which violates a basic right is void. This being the principle, however, the Indian Supreme Court like its American counterpart, has applied both the "Standing" and "injury" tests before coming to the question of the constitutionality of a given statue.[12] Here, as well we have the same reason for such a criterion like that of the American courts that Indian courts can only decide a judicial controversy if presented before it in the form of a *lis* (a suit).[13] It follows from the very essence of the judicial function that the court has no power of making a simple

[9]. *Ibid.* , pp. 175
[10]. Opinion of justice Sutherland in *Massachusetts vs. Mellon* (Cited in Basu, *Op. Cit*., pp.175)
[11]. *Ibid.*, pp. 174
[12]. *Ibid.*, pp. 176
[13]. *Ibid.*

pronouncement in the abstract.[14] Nevertheless, one distinguishing features of the Indian Supreme Court which differentiates it from the American judicial function is that the former, by virtue of art. 143 of the Indian constitution, has some advisory jurisdiction that the court pronounces an opinion on a given draft law.[15] In the Indian constitutional litigation process, the question of *locus standi* has three aspects,[16] these are;

a) The legal or constitutional right, which is alleged to have been violated, should belong to the person who moves the court,
b) The right or interest which is violated should be due to the existence/enactment of a certain law or other state act; and
c) The injury alleged to have been sustained must be to the plaintiff or the petitioner individually.

Nigeria

In Nigeria, a person will not be competent to challenge the constitutionality of a statute or an administrative act unless he/she personally has a civil right which has been infringed by the impugned law or administrative act.[17] It must be an interest or injury over and above that of the general public. In other words, a general interest common to all members of the public is not a litigable interest to accord standing in Nigeria.[18] This position was taken by the Nigerian Supreme Court in its decision, by using the 1979 Nigerian constitution a ground, which reads "*the judicial power vested in accordance with the fore going provisions shall extend to all matters between persons,……and to all actions…… relating thereto for the*

[14]. *Ibid.*
[15]. *Ibid.*
[16]. *Ibid.*
[17]. *Ibid.* pp. 184
[18]. *Ibid.*

determination of any question as to the civil rights and obligations of that person" [19]

Therefore, in the Nigerian constitutional/human right litigation system, the principle of Locus Standi has a decisive place even stringent[20] than that of the U.S.A. and India.

South Africa

In the South African constitutional order, especially in human right litigation we observe a relatively different and broader view unlike the American, Indian and Nigerian system discussed above. South African courts seem to take an opposite stand that broadens the conceptual understanding of locus standi; and their ground is the 1997 South African constitution which authorizes, apart from the one whose rights are allegedly violated, his/her representative, or if some rights which belongs to a certain group/class has been violated, anyone acting as a member of, or in the interest of the group or anyone in the public interest to bring a suit in the court of law.[21]

Therefore, when an applicant alleges that a fundamental right has been infringed or threatened; Sec. 38 may be directly relied on to obtain standing,[22] and pursuant to the cited provision of the constitution, not only his/her personal right infringement can be subject of the litigation, he/she can also bring another person's violation of right in a form of suit though the plaintiff/petitioner is not interested in the outcome of the case.

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[19]. Sec. 6(6)/b/ of the 1979 Nigerian constitution (cited in Basu, *Op. Cit*., pp. 183)

[20]. In the American and Indian constitutional system, Locus standi is the principle and it has its own exception, (Jayakumar N.K., *infra note*, 30) however, in the Nigerian system, the situation seems to be absolute. (Basu, *Op. Cit*, pp. 184)

[21]. Sec. 38(a)-(e) of the 1997 south African Constitution

[22]. Johan De Wall and et al**, *The Bill of Rights Hand book***, (2001), p. 82

However, this provision of the constitution is not without qualification of its own. The South African Constitutional Court in a leading case concerning standing held that someone will have standing if and only if**:**[23]

- there is an allegation that a right in the bill of rights has been infringed or threatened, and,
- The applicants can demonstrate with reference to the categories listed under Sec. 38 (a)-(e) that there is a sufficient interest in obtaining the remedy they seek.

To come to a conclusion, in many countries, the traditional interpretation accorded to the principle of locus standi especially in constitutional litigation seems to be relatively narrow except in the South African system which follows a relatively broader approach. But, in other systems as well, there are newly emerging trends which erodes the restrictive interpretation of the principle.

1.3. Exceptions to the rule

As mentioned above, nowadays, the old idea of locus standi can't be interpreted in a very restrictive manner any more due to the emergence and development of certain important notions at least in the field of human rights directly or indirectly. These can, therefore, be considered exceptions to the basic rule of locus standi. I will try to mention three important areas as exceptions; i.e. the *notion of Habeas Corpus*, the *concept of Public Interest Litigation (PIL)* and *the notion of Writ of Quo Warrento*.

i. The notion of *Habeas Corpus*

Etymologically, it is a Latin term derived from two phrases *Habeas* and *Corpus*. Habeas means to bring and Corpus means a body.

[23]. Judgment of the Constitutional Court of the Republic of South Africa in the case *Ferreira vs. Levin No*. (Cited in Johan De Wall, *Op. Cit*., pp. 85)

Together, they refer to the process of bringing the body.[24] This concept is not actually new especially in litigation and enforcement of Criminal law rights of an arrested person. It is a popular writ to preserve personal freedom, directed to the person in whose custody a person is kept, ordering the body of the person so kept to be brought before the court issuing the writ, so that judicial inquiry may be made in to the legality of the restraint or imprisonment and appropriate judgment rendered thereon.[25] The institution of habeas corpus found its historical origin in the famous British Habeas Corpus Act of 1679. According to the Act, *any person or persons shall bring any Habeas Corpus directed unto any officer for any person who is kept under the office's custody*.[26] This means, in the case of a petition for the writ of habeas corpus, the general rule of locus standi is not applicable; in other words, the petition can be made not only by the person whose right to liberty has been infringed but also by any other person who is a complete stranger. This is for the sole purpose of protecting the criminal law rights, which are ensured by domestic as well as international human right instruments, of the person who is illegally kept under custody.

ii. The concept of Public Interest Litigation (PIL)

Public interest litigation is a relatively recent development in litigation proceedings. The notion "public interest" is not capable of precise definition and has no rigid meaning and is elastic and takes its colors from the statute in which it occurs.[27] It can be defined as, simply, the interest which concerns the public at large. It doesn't mean, however, that matter which is interesting as gratifying curiosity or love of

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[24]. Gunther, W. Harms, ***Blackstone's pronouncing Law dictionary***, (1968), p. 84

[25]. *Ibid.*

[26]. The British Habeas Corpus Act of 1679, Sec. II (Cited in **M.V. Pylee, *Select constitutions of the world*,** (2006), p. 794)

[27]. P. Ramanatha A., *Op Cit*., pp. 945

information or amusement; but that in which a class of a community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected.[28] If this is the literal definition of the notion of "public interest", what is then "public interest litigation"? The Indian Supreme Court, in a leading case on this issue,[29] defined public interest litigation as a legal action initiated in a court of law for the enforcement of a public interest or general interest in which the public or a class of the community have pecuniary interest or some interest by which their legal rights and liabilities are affected. This definition was given by the court which gave the same definition for the term public interest. (*See the above definition of the term public interest*). What does this mean to the traditional restrictive notion of locus standi? The answer is, if the interest which is affected is of the public or the community at large and if an individual or group of individuals who may or may not have a direct or indirect connection to the issue brings a legal suit before a competent court requesting for the abolishment/annulling of the practice or a law which allegedly affects the interest of the general public, the court cannot reject the claim based on the traditional ground that they don't have any sufficient or definite interest in the case. In other words, this type of litigation which concerns the general public is a clear exception to the principle of locus standi.

This being the conceptual background of the notion of public interest litigation, the basic requirement to apply it is the existence of a law which provides such a remedy especially in human right litigation proceedings. In the American and Indian justice systems, this social action or public interest litigation is widely accepted as a legitimate method to seek judicial remedies against public authorities.[30] In both

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[28]. *Ibid.*

[29]. *Jonatha Dal. vs. H.S. Chowdhury* **(**Cited in Saharay and Saharay, ***Words and Phrases under the constitution***, (2003), pp. 326)

[30]. Jayakumar N.K. (Dr.), ***Administrative Law***, (2005), pp. 97

countries, however, the notion is developed in the opinions given by imminent chief justices of the supreme courts in certain leading cases. Conversely, in the South African legal and constitutional order, we find a constitutional provision backing the notion; Sec. 38 (d) clearly states that anyone acting in the public interest has the right to approach a competent court by alleging a violation of a fundamental right of the general public. Nevertheless, there are two prerequisites to apply this constitutional provision.[31] These are:

- It must be shown that a person is acting in the public interest; and
- It must also be shown that the public has a sufficient interest in the requested remedy.

In Nigeria, as I tried to mention it elsewhere above,[32] the institution of public interest litigation finds no place. Therefore, a person will not be competent to challenge the constitutionality of a statute or an administrative act unless he/she personally has a civil right which has been infringed by the impugned law or administrative act.[33] In short, a general interest common to all members of the public is not litigable interest and the traditional concept of locus standi seems to be absolute; i.e. without an exception.

The other point in relation to PIL, which is worth mentioning here, relates to the situations/transactions which raises the question of public interest and whose harm initiates litigation by any person in a court of law. To the knowledge of the writer of this term paper, the most fertile area in public interest litigation seems to be environmental disputes. For instance, in Malaysia, as per the revised environmental quality act of 1996 and by the effective activity of the department of

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31. Johan De Wall and et al., *Op. Cit*., pp. 89
32. See pp. 4 above FN # 20
33. Basu, *Op. Cit*., pp. 184

environment under the ministry of natural resources and environment of the country; anyone can make a formal complaint relating to any environmental case.[34] In India as well, the area in public interest's contribution has been significant in environmental law. M.C. Mehta, as a petitioner in person, was the first individual in bringing a large number of issues to the court concerning environmental and ecological degradation. He brought five major suits which makes the courts to order the closure of several industries.[35] On the other hand, Non-Governmental Organizations (NGOs), in some countries, have the right of standing on behalf of anyone to bring an alleged human right violation of any kind and claiming compensation under the tort law despite the non-existent of an interest on their own. For instance, we find such a provision in the Netherlands civil code art. 3:305 a.[36]

To sum up, we can safely conclude that public interest litigation, by setting aside the old concept of locus standi, especially in environmental disputes and, as we've tried to see, to some extent, in human right litigations, is playing a decisive and constructive role.

iii. The writ of Quo Warrento

Literally, *Quo Warrento* means "by what authority". It refers to an extra-ordinary remedy and proceeding by information to prevent one usurping an office or using a franchise or privilege that is not rightfully his.[37] This writ (remedy), especially in England, is usually issued on behalf of the Crown by the Queen's Bench division of the

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[34]. Maizatun Mustafa (Dr.), ***Clean Water: right and remedies under environmental law in Malaysia***, p. 5 **(*Internet Source*)**

[35]. Jona Razzaque, ***Public interest environmental litigation in India,*** (Legal service India. Com) **/Internet Source/**

[36]. Gerit Betlem**,** ***Trans-national litigation against multi-national corporations before Dutch's civil courts*****, (internet source) /** See also M. Kamminga and S. Zia-Zarifi(eds.), ***Liability of multi-national corporations under international law***, (Kulwer Law International, 2000), pp. 283-305/

[37]. Harms, *Op Cit*., pp. 168

high court of justice against a person who claims or usurps any office, franchise or liberty to enquire "by what authority" he supports his claim in order to determine the right.[38] In India, quo warrento proceedings afford a judicial inquiry in which any person holding an independent and substantive public office or franchise or liberty is called upon to show by what right he holds in relation to the said office or franchise or liberty. If the inquiry leads to a finding that the holder of the office has no valid title to it, the issue of the writ ousts him from that office.[39]

Who can apply for the writ? An individual in spite of the fact that his/her right has not been infringed can move a petition for the writ to challenge the holding of a substantive public office by a usurper.[40] Therefore, if someone has a ground to challenge the holding of a substantive public office by an unqualified person, he/she has the right to apply for the writ though he/she doesn't have any direct or indirect interest or a standing.

3. *Locus Standi* in the Ethiopian justice system

Locus Standi or the right to stand or to bring a suit in a court of law is a well-established principle in Ethiopia especially in civil litigations and the exceptions that I've tried to mention above are not that much popularized.

3.1. *Locus Standi in civil matters*

The legal provision guiding civil litigations in Ethiopia with regard to locus standi is art. 33(2) of the Ethiopian code of civil procedure. It reads "*no person may be a plaintiff unless he has a vested interest in*

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[38]. Saharay, H.K. and Saharay, M.S., ***Words and Phrases under the Constitution***, (2003), pp. 461

[39]. *Ibid*

[40]. Jayakumar, N.K., *Op Cit.*, pp. 95

the subject matter of the suit." The reading of this provision clearly tells that in order to be a plaintiff in Ethiopian courts, one has to show that the other party; i.e. the defendant had infringed his/her right in one way or another and due to such an infringement, he/she sustains a damage no matter how much the amount is. But what is the power of this legal provision or what will be the possible effect if this provision is not properly observed? If one institutes a case in a court without being qualified as a plaintiff due to his/her failure to show a vested interest, the legal consequence is striking of the suit by the court upon the objection made by the other disputant (the defendant).[41] Therefore, it is safe to say that the Ethiopian civil justice system seems to take a strong position concerning the principle of standing.

3.2. Locus standi in criminal proceedings

The question of standing hardly arises in criminal proceedings. The possible situation in which the issue may arise is in the case of public and private prosecution, and the institution of either of these proceedings will be determined by the seriousness of the crime committed by the accused. If a public prosecutor, as per art 42(1) of the Ethiopian code of criminal procedure, refuses to institute a criminal proceeding against an accused as the alleged offence is only punishable on complaint, he/she (the public prosecutor) shall authorize *the appropriate person* to conduct the private prosecution.[42] This means the individual who was directly aggrieved/injured by the accused will get the right to standing in the shoe of the prosecutor to move the court. But who is this appropriate person who gets the standing? Art. 47 of the same code lists down the appropriate persons who can enjoy the right of standing by virtue of art. 44(1).[43]

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[41]. See Art. 244(2) and Art. 245(2) of the Ethiopian code of civil procedure.

[42]. See Art. 44(1) of the Ethiopian code of criminal procedure.

[43]. - The injured party him/herself or his/her legal representative
- The husband or wife on behalf of the spouse
- The legal representative of an incapable person, and/or

To conclude, normally criminal proceedings are instituted by the representative of the state; i.e. the public prosecutor since the presumption is the offender, by committing the offence against an individual citizen, indirectly inflicts harm on the society on the state in general, so, technically, the interest belongs to the public though the immediate injured one is the individual and as a result the prosecutor is the one who has the right to institute the case in court. But, this may not be always the case as some offences, though they may have the tendency of harming the interest of the society, the degree of the harm may not be that much high and so that instead of the public prosecutor, the individual him/herself will have the right to bring the case to court. That is why from the out set, I've said that the issue of locus standi arises in criminal proceeding hardly.

The other issue which needs focus here is if there are exceptions to the rule of standing in the Ethiopian justice system. To answer this question, it needs a reference to the relevant laws of the country. With regard to the writ of habeas corpus, it is well treated under art. 177(3) of the Ethiopian code of civil procedure that if the person restrained is unable to use his/her right, *any person* on his/her behalf, can make the application. Again, even if the idea of public interest litigation is a newly emerged legal regime in Ethiopia, we have laws which recognize it in environmental litigations.[44] Considering the last exception, i.e. the writ of *Quo Warrento*, it doesn't seem to get a proper status. Neither the constitution nor administrative laws such as the civil service proclamation, the 1994 draft proclamation on administrative procedure made a reference to the concept. A seemingly relevant provision in the FDRE constitution in this regard is

- The attorney of a body corporate.

44. See Art. 11(1) of Procl. # 300/2002 (*The Environmental Pollution Control Proclamation*)

art. 12, which is about the conduct and accountability of the government and its officials and the people, if lost confidence in their representatives, may call them back. But the situation where by an individual may challenge the holding of a public office by a person who is allegedly unqualified, unlike other countries, is nonexistent in Ethiopia.

4. *Locus Standi* in constitutional/Human Right litigation

4.1. Global overview

When we come to human right protection regime vis-à-vis the locus standi criterion to lodge a petition, the international community doesn't seem to be sure whether or not the requirement of the of the existence of a vested interest can be a bar for an individual who came with a petition involving a violation of a fundamental rights and freedoms. For instance, if we look at art. 1 and art. 2 of the optional protocol to the ICCPR of 1976:

- First, state parties should give their consents or become parties to the protocol in order for the human right committee to be able to receive individual communications/ petitions;
- Secondly, even if this is so, as per art. 2 of the same protocol, the petitioner must show his/her standing.[45]

Therefore, if one wants to bring a claim on behalf of another person, there has to be an authorization unless the individual whose right is allegedly violated is unable to give his/her formal consent.[46] Similarly, in the European human right regime, if a violation occurs, it is only the real party in interest; i.e. the one whose right has been denied, who can bring a complaint to the European commission now to the court,[47] and just like the ICCPR optional protocol provision, the European system, too, requires ratification of the state parties of the existence of

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[45]. You must show that you are personally and directly affected by that law, policy … (See the Human Right Fact Sheet #7, *Complaint Procedure*, pp. 7 and 9.)

[46]. *Ibid*.

[47]. Robertson and Merrils, ***Human Rights in the world***, (1996), pp. 127

the right of individual petition to the commission and as a result, the provision was made optional that it applies to states who have ratified the convention.[48] However, the overall implementation of human right and fundamental freedoms recognized in the convention through the commission had been deleted as an old system by protocol XI and replaced it by the European court of human rights.[49] And, under the present court system, ratification by the state parties to accept the jurisdiction of the court concerning individual communication/petition is no more a prerequisite and state parties shall not hamper, by any means, the effective exercise of this right.[50] As to the principle of vested interest, however, the provision seems to hold the *status quo* as it clearly provides, "……*any person*…….*claiming to be the victim of a violation* ……." Therefore, one must show that he/she has an interest in the case since he/she is the one whose rights are violated. Similarly, the Inter-American human right regime doesn't seem to give a solution to the issue.[51]Considering, the African human right context, the situation goes even from bad to worse. Pursuant to the protocol of the African Charter on Human and Peoples Rights (ACHPR) which established the African Court of Human and Peoples Rights, state parties should first make a solemn declaration accepting the competence of the court to receive individual complaints.[52] This means, even if the individual can show an interest, if his/her state doesn't make the required solemn declaration, he/she may not be able to lodge his/her petition to the court.

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48. *Ibid*.

49. Kapoor, S.K. (Dr.), ***International Law and Human Rights***, (2002), pp. 814& 818

50. See art. 34 of protocol XI of the European convention for the protection of human rights and fundamental freedoms of 1950.

51. See art. 44 and art. 45 of the American convention on human rights of 1969.

52. Art. 34(6) of the protocol of the ACHPR (The Protocol that established the African Human and poples rights Court)

This being the case, then, what will happen in all the systems discussed above, if a person without an interest is found lodging a petition to one of the institutions? Will it be declared inadmissible? It doesn't seem so as in all the instruments, the grounds of inadmissibility are listed and the requirement of locus standi is not included in any of these instruments under the category of the grounds of inadmissibility of a petition. That is why I have started my discussion at the beginning of this section by saying that the international community is not sure about this issue.

4.2. Locus Standi's impact in the enforcement of human rights under the current Ethiopian Constitution

In the Ethiopian constitutional structure, the right to petition and the right of access to justice are recognized as fundamental democratic rights under art. 30 and art. 37 of the FDRE Constitution respectively. Art 30 of the constitution clearly stipulates that everyone has "the right ……*to petition*" and art. 37(1), on the other hand, ensures the right of access to justice by spelling out "*everyone* has the right to bring *a justiceable matter* to …..A court of law."

From the above two provisions of the constitution, at first glance, one may think that the criterion of locus standi is losing its significance in the Ethiopian justice system especially in human rights litigations. This position seems to be supported by one Ethiopian constitutional law scholar who wrote "…..*the law and the courts would interest themselves and actively engaged in broad social issues, such as enhancing the democratization process or the ethnic and gender equalization process or ensuring a clean and healthy environment, etc…this is the constitution that wants to operate with its hands on the business and begs to be employed to radically transform the society on the basis of the principles it unfolds*."[53] Others, however, don't buy

[53]. Fasil Nahum (Dr.), ***Constitution for a Nation of Nations*****,** (1997), pp. 151

this line of argument rather they want to construe the words of the provision restrictively. We can summarize this position as follows.

- First, the strict meaning of justiceability requires the existence of a vested interest of the claimant or the plaintiff; and art. 37 (1)'s phrases "*everyone*…." And "……*justiceable matter*….."Should be understood strictly to mean "everyone who can show a vested interest".
- Secondly, even sub art. (2) of art 37 clearly substantiate the above line of argument that an association or even an individual may bring a suit in a court either by a representative capacity or by way of showing a similar interest with those of his/her fellow peers.
- Thirdly, locus standi is an important principle by setting out the procedural qualification to be a plaintiff and it also avoid court congestation by removing unnecessary and unqualified suits from the scene.[54]

Therefore, according to the above argument, we can't totally deny the significance of the principle of locus standi.

In the Ethiopian constitution, there are various provisions intended to protect fundamental human and democratic rights and freedoms. Some of these rights are justiciable that they can be enforced by the regular courts or by any other competent organ with judicial power. But, is anyone allowed, without being required to show a vested interest, to bring a complaint by alleging that some other person's fundamental rights are violated/infringed to a court or any other competent organ? The constitution gives no clear answer in this regard. Better than the constitution, which is said to be the mother of all laws, the code of the

[54]. ***The right to petition and access to justice***, (1998), /unpublished material in Amharic/ pp. 18, (translation mine)

Ethiopian civil procedure under art. 177(3) clearly stipulates that if an individual is restrained illegally and unable to make application to the court to order his/her physical release, any person can make the application on behalf of that individual; nevertheless, the constitution in its provision where it states the right of habeas corpus of an arrested person, failed to answer the question. Either like that of art. 38 of the South African constitution or like our own subordinate laws concerning a specific type of rights,[55] the FDRE constitution should have some sort of remedy to solve the problem.

If locus standi is going to be a bar, under the pretext of narrow interpretation of art. 37's term justiceability in human right litigation and if all suits involving the violation of human rights in all social, economic, political and cultural aspects of life, are going to be rejected for lack of standing by the so called "competent organ" to which the petition is submitted[56] the constitutional provision on human rights are going to be less effective and violators of human rights will usually get a defense to escape from the law and perhaps they may even take it as a green light to continue their act. But whether we like it or not, this is a possible consequence of the vagueness of the constitution or the non-existence of any subordinate law on the issue.

4.3. Newly emerging trends in human right litigation vis-à-vis locus standi

- **The Role of Non-Governmental Organizations (NGOs)**

One of the newly emerging trends in human right litigation is that the role of both international as well as local/domestic Non-Governmental Organizations (NGOs). NGOs pervade and are a vital part of the overall human rights regime. Above all, human rights NGOs bring out facts, contribute to standard setting as well as to promotion,

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[55]. See the environmental pollution control Proclamation, *Supra Note* 44.

[56]. The competent organ which is authorized in our country's constitutional system to day to adjudicate human right disputes is the House Of the Federation (HOF).

implementation, and enforcement of human rights norms. They provoke and energize, spread message of human rights and mobilize people to realize that message.[57] NGOs operate on the basis of differing mandates, each responding to its own priorities and methods of action, bringing a range of viewpoints to the human rights movement.[58] The post-cold war efforts to make human rights an integral part of the mainstream in a wide range of activities have highlighted that expansion by bringing a significant number of development and humanitarian NGOs in to picture, by urging business and other private actors to accept human right responsibilities and by underscoring the relevance of human rights considerations in areas such as trade, environment or labor.[59] Apart from the above activities undertaken by NGOs and apart from the preparation and distribution of reports on specific countries concerning human right violations, they use usually those reports and information to engage in lobbying or other forms of advocacy before national executive officials or legislatures and international organizations. Through their lobbying activities, they may be able to urge particular forms of pressure against the violators, they may be able to initiate litigation before national or international tribunals or join in an already instituted proceedings like that of the *amicus curiae.*[60] In our legal system as well, the role of domestic NGOs is growing in an increasing manner both in types and in numbers. Today, in Ethiopia, we have various types of NGOs some of which are engaged in human right promotion activities. And recently, some NGOs are actively participating in human right litigations concerning the violation of a specific type of right protected under the constitution of the country. One typical example for this is a

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57. Steiner, H.J.& Alston, P., ***International Human Rights in context***, (2000), pp. 938

58. *Ibid.*

59. *Ibid.* pp. 940

60. Literally, It means "*the friend of the court*" (See the discussion, infra note, 63)

court case on environmental pollution issues.[61] The plaintiff - Action Professionals' Association for the People (APAP), is a non-governmental organization engaged, among other things, in public interest litigation. It lodged complaints on urban pollution to the 5th Civil Bench of the Federal First Instance Court, placing the Environmental Protection Authority as the sole defendant. The issue of the matter revolves around two rivers allegedly polluted with, among other things, hazardous effluents and chemical wastes released by the industrial establishments within the vicinity. The first river known as the "Akaki" River crosses the capital city and ends up in the Awash River, which is the mainstay in terms of water supply to the (Afar) people.

The Akaki River has two tributaries, both with in the city of Addis Ababa. Particularly in one of the tributaries is released industrial effluent from around 41 industries, mainly untreated and of hazardous nature. Mojo River lies further down the stream, itself being a tributary to the Awash River. This river lies beside some industries allegedly releasing their pollutants into it. The main of these industries is the Mojo Leather Factory. APAP alleges that it has learnt from a multitude of researches conducted in the past and Environmental Audit Reports of the EPA that the two river basins i.e., Akaki and Mojo are being polluted by solid and liquid wastes of the metropolis and the untreated liquid as well as solid wastes discharged into these rivers by different factories in and around Addis Ababa and Mojo towns. It also stated that this was a clear violation of international human rights instruments and chemical related Multilateral Environmental Agreements ratified by Ethiopia. Also violated are national laws, particularly the Environmental Pollution Control Proclamation (No.300/2002), enacted for the protection and promotion

[61]. Action Professional Associations for the People (APAP) vs. Environmental Protection Authority (EPA) reported by Wondwossen Sintayehu (EPA).

of the right to the highest attainable state of health of citizens and safety to the environment. The plaintiff based its right to bring a case before the court on Article 11 of Proclamation No 300/2002). As per the wording of this provision of the law, any person shall have, without the need to show any vested interest, the right to lodge a complaint at the EPA against any person allegedly causing actual or potential damage to the environment. The law further goes to state that it is possible for the person to institute a court case with in sixty days from the date the decision was granted by the EPA. The plaintiff stated that it has passed the initial stage of fetching a local remedy and affirmed that it can enforce the same cause through the court.[62] From this what we can understand easily is that some of our local NGOs are taking the initiatives in participating in the human right litigations to contribute their share in the overall human rights protection and enforcement regime.

- **The role of the institution of *Amicus Curiae***

The Latin term "*amicus curiae*" is derived from the Greek phrase, *amaykas kuriyay*, which literally means a friend of the court.[63]Considering the role and the scope of power of this institution, it is designated by the court to interpose in a dispute and inform or advise the court with regard to points of law or fact about which the court is doubtful or which may escape its attention.[64] Some scholars argue that this institution, since its historical origin traces back to the Anglo-Saxon legal system, has no relevance to the continental legal traditions while others don't buy this argument that if it works to the common law system, why is it not possible to work in the civil law

[62]. For the purpose of convenience and to have a complete understanding about the case, I attached the full document of the case here with as a form of appendix.

[63]. Getachew Aberra, ***The Amicus Curiae: its relevance to Ethiopia***, Journal of Ethiopian Law (JEL) Vol. XIX, December, 1999, pp. 82

[64]. *Ibid*. pp. 83

system.[65] When we come to the human rights enforcement problem in our country, we can easily understand the immediate relevance of the institution since the law and the courts of Ethiopia are getting ever more in accessible to large sections of the population such as women, children the disabled and so on. It is a hard fact that these groups of the societies are facing lack of resources, ignorance and other problems and due to which they cant be represented at all or may be poorly represented in a dispute in the outcome of which they are personally interested.[66] This is why, then, the amicus curiae's relevance to the Ethiopian justice system and more specifically to human right proceedings should not be questioned.

- **The role of the Human Right Commission and the office of the Ombudsman**

Both democratic institutions are created in Ethiopia in 2000. The Human Right Commission was established pursuant to proclamation No. 210 /2000 whereas the office of the Ombudsman came to existence by proclamation No. 211/2000. Both institutions are created to protect, promote and respect the fundamental rights and freedoms of citizens though from two different angles.[67] The Human rights Commission is vested with the power of *ensuring* the respect of human rights enshrined in the constitution by all stakeholders, the compatibility of laws and acts of the government with that of the human rights of citizens and making recommendations on revision of laws and policies, *educate* the public through all means possible about the relevance and values of human rights, *investigate* alleged human right violations upon complaint or by initiation of its own, and others.[68] Similarly, the office of the Ombudsman has the power to investigate any alleged mal-administration in government offices and

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[65]. *Ibid*. pp. 101
[66]. *Ibid*. pp. 102
[67]. Art. 5 of both Procl. # 210/2000 and 211/2000.
[68]. Art. 6 of Procl. # 210/2000

to supervise that directives and decisions made by the executive do not contravene the basic rights of citizens.[69] Both institutions have also, arguably, powers to enforce the recommendations that they have rendered to the concerned government office.[70] Despite this and other major turning points in human rights protection in Ethiopian political history, both institutions don't have the power to participate in human right litigations by representing others in a court of law. In the above case involving environmental disputes, APAP had requested the Human Rights Commission to act as an amicus curiae and join the suit.[71]

To sum up, since scheme of human right protection and respect in our country and the application of international human right law is still in its infancy, especially in our country, much of the human rights lawyer's and other institutions work involves norm enunciation as well as interpretation and application.[72] And one of this means of interpretation and application is making human right litigation among one of the exceptions of locus standi so as to create conducive atmosphere for all stakeholders to participate in the protection and enforcement of human rights movement both locally as well as globally.

5. Final Remarks

The concept of locus Standi, its relevance to human right litigation and the current situations in Ethiopian human right protection and enforcement regime and the impact of the principle on this regime have been discussed. Generally, we can't deny the significant role that the traditional principle of locus standi plays in any country's justice

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[69]. Art. 6 of Procl. # 211/2000
[70]. Art. 41 of both Procl. # 210/2000 and 211/2000.
[71]. APAP vs. EPA , *Op. Cit*, pp. 3
[72]. Fransisco F. Martin *et al*., ***International Human Rights Law and Practice***, pp. 1328

system especially in the concept of speedy trial. But, some area of court cases may not be always possible to proceed with by applying the principle in a very restrictive manner, as a result of which, as any other legal principles, locus standi also suffers from some exceptions mentioned above in a very brief manner. One of this exceptions, which, however, is not clearly and sufficiently incorporated in the Ethiopian system of litigation, is human right litigation which may not require the petitioner to show his/her vested interest from the outcome of the case. This widens the opportunity for the public at large, especially in our country's practical reality where the community has not or has a very little knowledge of its rights and duties; some concerned bodies may take the step in the judicial organs of the country without facing any stringent procedural barriers such as locus standi and get fair justice. But this may be done if some other tasks are accomplished by the concerned stakeholders in the movement for effective human right protection and enforcement. But first, there are some conditions to be fulfilled, such as the following:

- The first and perhaps the most important role should be played by the government by reviewing its judicial policy with special reference to human right issues by making the constitution free from any doubt with respect to the human right protection and enforcement mechanisms and by making new laws which expressly allow anyone to participate in human right litigation process by continuing what is started before like that of the institution of public interest litigation. And it is also expected to improve and strengthen the already existing democratic institutions like the Human Right Commission and the office of the Ombudsman by way of widening their scope of power and by also creating a better enforcement mechanisms so that they may play some role in enforcing human rights and ensuring good governance and sustainable development. The government is also expected to educate its citizens about the relevance and

practical significance of the concept and other pertinent institutions such as the amicus curiae and it should also facilitate the establishment of such institutions along side with the already existing ones.

- The second categories of stakeholders, next to the government, are NGOs and other civil societies. They are also to play as equal role as the government. They are expected to promote respect, value and protection of human rights by way of raising awareness through formal or non-formal education, they should also be able to exert much pressure on the government and other institutions to pay due attention to the issue. They should also assist the government in its activity. They are also expected to continue and strengthen their active role by participating directly in human right litigations as is started by some of them currently.
- The third categories of entities are private lawyers. They should abide strictly by the code of conduct enacted by the government in relation to rendering free service to clients (*Pro Bono service*) at least 50 hour annually (as per the regulation on the code of conduct of private attorneys) and they should use this opportunity in human right litigation process by designing a special litigative strategy, advocacy and client relations.

nformation to Authors

The Editorial Board of JULJ will be pleased to consider contributions provided they are not published or have not been submitted for publication elsewhere.

1. Contributions must be presented in their final form in English. The Board may consider contributions presented in other languages.
2. Special attention should be given to quotations, footnotes, and references which should accurate, complete and in accordance with the Journal's style sheet. The style sheet may be obtained from the editor-in-chief upon request.
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