

# Public Interest Environmental Litigation in Ethiopia: Factors for its Dormant and Stunted Features

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## Abstract

Public interest environmental litigation (PIEL) has been introduced into the Ethiopian legal system since 2002 with the prime purpose of facilitating and complementing the environmental protection efforts of the country. However, little progress has been recorded in utilizing this innovative litigation tool. The purpose of this article is to examine the legal and policy frameworks for PIEL and investigate some of the main factors impeding its effective use for the promotion and protection of the environment rights in Ethiopia. Laws related to PIEL are examined and interviews and discussions with the relevant stakeholders are conducted with regard to environmental management in Ethiopia. I argue that even though the legal and policy framework for PIEL, with all its limitations, is in place, gaps in judicial activism, legal culture, political will, public perception towards law, judicial process and justice, the type of legal system, the perception and behavior of the government towards civil society, and inadequate environmental information have adversely affected the development of PIEL.

## Key terms

Public interest litigation · Environment · Standing · Justice · Ethiopia

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### List of acronyms:

APAP	Action Professionals' Association for the People
CAC	Command and Control
EPA	Environmental Protection Authority
FDRE	Federal Democratic Republic of Ethiopia
PCP	Pollution Control Proclamation
CSP	Charities and Societies Proclamation
PIL	Public interest Litigation

## Introduction

Public interest litigation (PIL), is gaining increasing attention and appeal across much of the world in both constitutional democracies and transitioning societies. It is particularly heralded for it improves access to justice for marginal and vulnerable communities, raises awareness and debate about a particular issue of general public concern. It is also submitted that PIL acts as a mechanism of empowerment, voice, and accountability.<sup>1</sup>

PIL is a very important tool for the promotion and protection of environmental rights. It is so because it has been proved very difficult to fully address environmental concerns using the traditional command and control (CAC hereinafter) approach<sup>2</sup> and the private enforcements. It is very important

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<sup>1</sup> J. Oloka-Onyango (2015), "Human Rights and Public Interest Litigation in East Africa: A Bird's Eye View", *The George Washington International Law Review*, V. 47, No. 4, p. 1.

<sup>2</sup> Ever since the birth of modern environmental regulation in the 1970s, crafting and implementing effective, efficient and legitimate regulation and governance has always been a daunting challenge for governments and society. At the beginning, governments managed environmental problems through enforcement of strict rules and standards set out in legislation and treaties. This system is conventionally known as Command and Control (CAC). This approach typically specifies standards, and sometimes technologies, with which regulatees must comply (the "command") or be, penalized (the "control"). The key characteristic of command and control (CAC) regulation is that the regulator specifies what individual firms can and cannot do (enforced by the threat of penalties for non-compliance). This involves centralized legislatures setting blanket environmental targets, such as emission standards, exposure levels or technology standards (the command). Delegated agents, such as environmental protection agencies, are then empowered to police compliance and impose penalties where standards were breached (the control). CAC has been criticized for being inefficient, inflexible, subject to compromises in the political process. Nevertheless, in the 1980s, governments began to shift their attention away from this Westphalian vision of state power through hierarchy. Instead, environmental problems were, in most cases, to be tackled through market-based approaches, voluntarism and other 'light-handed' policy initiatives such as partnerships and cooperation. Yet, by the end of the 1990s, continuing ecological degradation and the increasing complexity of social and environmental problems saw a new shift towards environmental governance. Nowadays governments are working towards, a more comprehensive approach to upgrading the quality of existing regulations, a search for the best mixes of policy tools, linking command-and-control instruments with economic instruments and voluntary approaches. The new environmental governance (NEG) emphasized collaboration, integration, participation, deliberative styles of decision-making, adaptation and learning. Public interest litigation is part of the "new environmental governance" which aims at making the public part of the fight towards environmental degradation. See Neil Gunningham (2002), "Beyond Compliance: Next Generation Environmental Regulation", *Australian Institute of Criminology* available at:

<https://pdfs.semanticscholar.org/55d2/db0bf9c9002feca23073d1d8dff27c47556c.pdf>

(visited on December 15, 2017), see also Gunningham, N and Holley, C (2010) "Bringing

for developing countries like Ethiopia as there is a huge environmental law enforcement deficit and the conventional litigation is expensive, burdensome and unpredictable due to the nature of environmental problems and of relief sought. PIEL also makes sense in developing countries where environmental concerns of involuntary displacement, re-settlement, provisions of basic needs of water and sanitation, indoor air pollution are interlinked with the rights of the poor and the underprivileged sections of society.

Opponents criticize PIL on two grounds: (1) it is improper for judges to mandate social reform in a democracy, and (2) courts, because of institutional limitations and political vulnerability, are destined to see their reform efforts frustrated in the middle or long term.<sup>3</sup> The practice of countries with a mature PIL however shows that if properly regulated, it can entail immense benefits. At least in environmental matters, there is “convincing empirical evidence”<sup>4</sup> that it can be effective. Hence, PIEL can and should complement the government’s effort to protect the environment in countries like Ethiopia. This article examines the legislative and policy basis for PIEL in Ethiopia. It then goes on to critically analyze the main factors that have been impeding the development of PIEL.

## 1. Public Interest Litigation: Meaning, Definition and Concept

Public interest litigation<sup>5</sup> is a “legal action initiated in a court of law for the enforcement of 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 or liabilities are affected”.<sup>6</sup> It is a form of legal proceeding in which

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the ‘R’ Word Back: Regulation, Environment Protection and NRM”. Canberra: ASSA.; *The OECD Observer* No. 206 (1997) available at:

<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.613.789&rep=rep1&type=pdf> visited on December 15, 2017), pp.14-15.

<sup>3</sup> John Denvir (1976), “Towards a Political Theory of Public Interest Litigation”, *54 N. C. L. Rev.*, 1133 .Available at:

<http://scholarship.law.unc.edu/nclr/vol54/iss6/1>. p. 1133. (Accessed on July 15, 2017).

<sup>4</sup> Michael G. Faure and A.V. Raja (2010), “Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables”, *Fordham Environmental Law Review*, V. 21, No. 2. p. 239.

<sup>5</sup> Public interest litigation is known also by a variety of other terms like: public law litigation, social action litigation, causes lawyering, strategic impact litigation. See Access to Justice (2002), “*Litigating for Justice A primer on Public Interest Litigation (PIL)*”, edited by Joseph Otteh, pp. 1-6.

<sup>6</sup> Indian Supreme Court Judgment *Janata Dal v. H.S. Chowdhary* with Writ Petition (Crl.) No 114 of 1991 *Dr. P. Nalla Thampy Thera, Petitioner Versus Union of India and Others*, Respondents Criminal Appeal Nos. 304-311 of 1991 and Writ Petition (Crl) No. 114 of 1991.

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redress is sought in respect of injury to the public in general. Abram Chayes, writing about PIL (or public law interest litigation as he would like to refer to it), in the USA context, defines the term as “the practice of lawyers in ... seeking to precipitate social change through court-ordered decrees that reform legal rules, enforce existing laws, and articulate public norms”.<sup>7</sup> Though PIL is not an endeavour restricted merely to lawyers, as it could be exercised by NGOs, civic minded citizens or even by the courts. Particularly, compared to the foregoing definition that seems to be narrow and focuses on the rights and the liabilities of the class groups from a purely legalistic engagement in pursuit of financial or other interests and liabilities, it embraces the main aspect of the public interest litigation. It is in this sense that PIL is used in this article.

Promoted by judicial activism and encouraged by the legislative bodies, PIL has been getting momentum in “setting up valuable and respectable records, especially in the arena of constitutional and legal treatment for ‘the unrepresented and underrepresented’”.<sup>8</sup> Initially, public interest litigation started as a tool to fill the gap between government’s commitment and enforcement in the areas of degraded bonded laborers, humiliated inmates of protective homes, women prisoners, the untouchables, children of prostitutes, victims of custodial violence and rape. Many other oppressed and victimized groups are attracting remedial attention of the courts, and PIL expanded towards providing relief to “all kinds of critical social ills afflicting the ... society”.<sup>9</sup> As the result, nowadays, almost “[a]lmost any [public concern] under the sun is covered under the rubric, public interest litigation”.<sup>10</sup>

In addition to its role in filling the gap between government’s commitment and enforcement, PIL may also be justified from the point of view of the anti-positivists who “question the inevitable legitimacy of majoritarian outcomes”.<sup>11</sup> In what is called the “test” case that challenges the legality of existing laws and regulations or attempts to give new meaning to existing laws, judicial intervention via PIL could be justified by “process-defect in the enactment process that structurally works to exclude or dilute the interests of affected groups”.<sup>12</sup> Legislation may also be shady because of “inadequate deliberative

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<sup>7</sup> Abram Chayes (1976), “The Role of the Judge in Public Law Litigation”, 89 *Harv. L. Rev.* 1281 as cited in Helen Hershkoff “Public Interest Litigation: Selected Issues and Examples”, p.1. Available at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/PublicInterestLitigation%5B1%5D.pdf> (accessed ,17 Feb, 2017).

<sup>8</sup> *Janata Dal v. H.S. Chowdhary*, *supra* note 6.

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> Ely, *Democracy and Distrust* (1980) as cited by Hershkoff *supra* note 7, p. 9.

<sup>12</sup> Hershkoff, *supra* note 7, p. 7.

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process that ignores, distorts, or misstates the concerns of outsider groups”.<sup>13</sup> Sometimes the outcome of the legislative process, the majoritarian law, may “deviate from national normative commitments”<sup>14</sup> or lack “minimum rationality”.<sup>15</sup>

Furthermore, PIL is justified as it “recognizes the expressive<sup>16</sup> value of law and its constitutive relation to the customs and discourse of a civil society”.<sup>17</sup> According to this view, PIL is “part of what sociologists call the ‘new’ social movements in which participants contest the terms of public meaning”.<sup>18</sup> Hershkoff argued that “the very act of litigation affords a juridical space in which those who lack formal access to power become visible and find expression”.<sup>19</sup>

In some countries such as India, USA and Pakistan, the procedural restriction of approaching the court has been lifted to the extent of allowing letters and

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<sup>13</sup> Ibid.

<sup>14</sup> Olson (1965), *The Logic of Collective Action* as cited in Hershkoff, *supra* note 7, p.8

<sup>15</sup> Loffredo(1993), “Poverty, Democracy and Constitutional Law”, 141 *U. Pa. L. Rev.* 1277, (1993) as cited by Hershkoff, *supra* note 7, p. 8.

<sup>16</sup> The “expressive function” of law is the perceived social meaning of the law. It is the function of law in ‘making statements’ as opposed to controlling behavior directly. It is about the effect independent of sanction; *see also*, Richard H. McAdams (2000) An Attitudinal Theory of Expressive Law, 79 *Or. L. Rev.* 339, for instance, pp 372-378). Laws simply because they are enacted (though not enforced) can be adhered by citizens. According to Thomas Patricia Funk, there are different channels by which an unenforced law might work: First, people may obey a law out of civic duty. Secondly, by making a statement about what is right or wrong, law may affect the preferences over the regulated behavior (“preference-shaping” effect). Finally, expected social sanctions increase, if citizens are more inclined to enforce norms embodied in the law. The dominant reading of the literature is that through all these channels, the expressive function of law induces compliance. *See* Patricia Funk (2007), “Is There An Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines”, *American Law and Economics Review* V. 9 .N1 (135–159) P. 136. For a more valuable discussions of the expressive function of legal norms, *See* Cass r. Sunstein (1996), “On The Expressive Function of Law”, *University of Pennsylvania Law Review* .Vol. 144: 2021, Robert Nozick (1981), *Philosophical Explanations*, Harvard University Press, pp. 370-88, Thomas A.J. McGinn (2015), “The Expressive Functions of Law And Lex Imperfecta”. *Roman Legal Tradition*, 11, pp.1-41.

<sup>17</sup> McCann (1996), “Causal versus Constitutive Explanations (or, On the Difficulty of Being So Positive ...)”, 21 *L. & SOC. INQUIRY* 457 (1996) as cited in Hershkoff *supra* note 7, p. 9.

<sup>18</sup> Turaine (1985), “An Introduction to the Study of Social Movements”, 53 *SOC. RES.* 749 as cited by Hershkoff, *supra* note 7, p. 9.

<sup>19</sup> Hershkoff, *supra* note 7, p. 9.

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petitions to the court to be converted into public interest litigation.<sup>20</sup> Generally, individuals or NGOs can bring PIL against the government bodies, polluting companies or private individuals in an attempt to defend the interest of the public particularly of the poor, the marginalized and the less visible member/s of the communities. It is different from the conventional and adversarial system of litigation in that it is not filed by one private person against another for the enforcement of a personal right. On the contrary PIL, in the main, involves disputes over the rights of the public or a segment of it and the grievance is often against the state in respect of administrative or executive action.

According to Guardial Nijar, properly executed and channeled PIL generally serves the following purposes: it provides effective protection of the weaker sections of community; makes the government in general and the executive in particular accountable and act according to its established duty to abide by and enforce legal norms; it remedies democratic deficiency; makes the consideration of transparency in decision making real; protects and sustains democratic governance and the rule of law; by ensuring access to justice it makes it possible for the most effective proponents to bring cases before judicial bodies, i.e. it promotes effectivity in the use of judicial institutions; allows participative justice, and allows diffused interests air, water, environment, biodiversity and the like to be presented.<sup>21</sup>

## 2. Significance of PIL in Environmental Matters of Developing Countries

Owing to the failure of the command and control (CAC) approach and private enforcement to fully address environmental problems, PIL plays a key role to prevent, mitigate, remedy or compensate for harm done to the environment.<sup>22</sup> Efforts to enforce emission limit values upon polluters by using private law remedies, and advancing private interests such as nuisance, tort or contract law have not been fully successful due to the nature of environmental problems.<sup>23</sup>

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<sup>20</sup> Dinah Shelton and Alexandre Kiss (2005), *Judicial handbook on Environmental Law*, United Nations Environment Programme, p. 45

<sup>21</sup> Guardial Singh Nijar(2006), "Public Interest Litigation, A Matter of Justice: An Asian Perspective", available at <https://www.aseanlawassociation.org/9GAdocs/Malaysia.pdf> (accessed on August 26/2017), p. 3.

<sup>22</sup> Faure and Raja, *supra* note 4, pp.240-244. See also Justice Brian J Preston (2013), "Environmental Public Interest Litigation: Conditions for Success", a presentation by to the International Symposium Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective, 30-31, Awaji Island, Japan, p. 1.

<sup>23</sup> Faure & Raja, *supra* note 4, pp. 244-245.

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Usually, the harm may be too diffused<sup>24</sup>, thereby resulting in low damage amounts to individual victims even if the entirety of the damages is very high.<sup>25</sup> According to Schäfer, this situation creates a “rational apathy”<sup>26</sup> on the part of the victims. Therefore, a rational person could have very little incentive to take on the expensive litigation.<sup>27</sup> Damage to the publicly owned and publicly possessed natural resources, and to publicly owned but privately possessed natural resources that have a particular value to the public, is damage of a collective nature; and because no concrete individual interests are harmed, damages for this type of injury are in principle not recoverable under the traditional tort law.<sup>28</sup> Furthermore, a private suit may not be successful or never be brought to court due to problems in causation or latency, characterized by long time gaps between the emission and the actual occurrence of harm.<sup>29</sup>

The other key argument for PIEL is the immense “enforcement deficit” in environmental laws.<sup>30</sup> The CAC approach to environmental management, particularly in developing countries, is criticized for various reasons. In these countries environmental decay is either ignored or limited to a legislative recognition with little commitment of implementation. The failure of the state CAC approach may occur at the standard-setting level, particularly through the influence of private interest, resulting in less stringent regulatory solutions.<sup>31</sup> However, many failures occur at the enforcement level. In the decades since Stockholm, the developing world has reached an impressive sophistication in its environment-related legal regimes.<sup>32</sup> However, “in what has been the biggest disappointment with regard to these impressive legislative structures, the

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<sup>24</sup> The rule on the Application of the traditional measure of damages may prevent full restoration of the damaged natural resources. Consequently, under the traditional tort law, the costs of such measures are not to exceed the lost market value of the property. This may have the effect that the natural resources which lack a direct market value are not fully restored. See Edward H.P. Brans (2001), *Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment*, Published by Kluwer Law Int., p. 14.

<sup>25</sup> Faure & Raja, *supra* note 4, p. 245.

<sup>26</sup> Hans-Bernd Schäfer (2000), “The Bundling of Similar Interest in Litigation: The Incentives for Class Action and Legal Actions Taken by Associations”, 3 *Eur. J. L. & Econ.* 183, p. 184.

<sup>27</sup> Faure and Raja, *supra* note 4, p. 245

<sup>28</sup> See Brans, *supra* note 24, p.14.

<sup>29</sup> Faure & Raja, *supra* note 4, p. 245.

<sup>30</sup> *Id.*, p. 204.

<sup>31</sup> *Id.*, p. 245.

<sup>32</sup> P. Wilson, *et al* (2002)., “Emerging Trends in National Environmental Legislation in Developing Countries”, in Donna G. Craig et al. eds.,(2002), *Capacity Building for Environmental Law in the Asian and Pacific Region: Approaches and Resources*, pp. 185-186.

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symmetry between the making of laws and their implementation has not progressed to anyone's satisfaction".<sup>33</sup>

Constitutional provisions and elegant laws are nothing but 'printed futility' unless enforced through institutions established for that purpose.<sup>34</sup> As Wilson and others duly noted:<sup>35</sup> "apart from establishing appropriate legal and institutional frameworks, the effective implementation of environmental legislation remains one of the most daunting challenges for developing countries", and they underlined that "ineffective law may be worse than no law at all. It gives the impression that something is being done whereas the existing legal arrangements are contributing little in terms of practical environmental management."

Some of the enforcement failures are rather innocent. They may be because of lack of capacity or instruments to take actions against the environmental wrongdoers. In other cases however, a "collusive relationship between enforcers and environmental polluters inhibits effective enforcement of environmental standards".<sup>36</sup>

The principal factor that contributes for the asymmetry between legislation and enforcement in the developing countries is the absence of political will. Developing countries have been working aggressively to develop their economy through capital and resource incentive industrialization, urbanization and chemicalization of agriculture with a hope that "rapid growth will eventually trickle down and eradicate poverty".<sup>37</sup> That has resulted in resource exhaustion, species extinction, ecosystem collapse which threaten people's lives, livelihoods and their very survival.<sup>38</sup> Regardless of the formulation of elegant laws on the environment and sustainable development, developing countries have repeatedly shown acute lack of political commitment to implement these laws. The prized objectives of attaining self-sufficiency, growth and development have prevented these governments from giving priority to this area of concern.<sup>39</sup> Environmental concerns come in a "distant second place" in the order of priority of the

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<sup>33</sup> Parvez Hassan & Azim Azfar (2004) , "Securing Environmental Rights through Public Interest Litigation in South Asia", 22 *Va. Env'tl. L. J.* 215, p.221.

<sup>34</sup> See VRK Iyer, (1992), Justice at the Crossroads, 59, as cited in Adem K Abebe (2010), "Towards More Liberal Standing Rules to Enforce Constitutional Rights in Ethiopia",10 *African Human Rights Law Journal*, p. 408.

<sup>35</sup> Wilson, *supra* note 31. p. 180.

<sup>36</sup> Faure & Raja, *supra* note 4, p. 244.

<sup>37</sup> World Bank, Report No. 36946-PK (2006), "Pakistan: Strategic Country Environmental Assessment", available at [http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/10/02/000160016\\_20061002113552/Rendered/PDF/3694610vol011PK.pdf](http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2006/10/02/000160016_20061002113552/Rendered/PDF/3694610vol011PK.pdf). p. 1.

<sup>38</sup> Hassan & Azfar, *supra* note 33, p. 219.

<sup>39</sup> Ibid

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executive branches of the governments of these countries.<sup>40</sup> The agencies in charge of protecting the environment may be unwilling to bring legal actions against the violators of environmental standards because of political pressure from other mission oriented agencies or powerful investors.

Therefore, PIEL is introduced to supplement the failures of the CAC approach and private enforcements. It is principally important to make the government and particularly the executive discharge its responsibility of implementing environmental laws faithfully and diligently.<sup>41</sup> PIEL “increases the frequency and scope of judicial review of agency action”.<sup>42</sup> However, it is not a tool of enforcement intended to displace or replace government enforcement.

Moreover, PIEL enhances access to environmental justice in developing countries. It is a tool of immense importance to people who are not sufficiently powerful to be directly influential in social, environmental, economic and political policy issues that affect them and their communities. Courts in developing countries are criticized for primarily protecting the interest of rich.<sup>43</sup> The needy are considered “unwilling suitors” as either defendants or accused. This seriously dents access to justice and jeopardizes the proper functioning of rule of law.<sup>44</sup>

In countries where PIEL is vibrant, it is used by the courts as a tool to correct this despicable image of the courts in the eyes of the poor citizenry and thus restore the rule of law in the justice system.<sup>45</sup> In this regard the courts in South Asian Countries are seen as the champion of the legal protection of sustainable

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<sup>40</sup> Id., p. 219.

<sup>41</sup> The disparity between “law on the books” and “law on the ground” may not be bridged successfully as court decrees may go unenforced because of political decision, failure of will; or a kind of slippage between text and action different from that found in the legislative arena. See, Hershkoff, *supra* note 7, p. 9.

<sup>42</sup> Michael S. Greve (1989), “The Non-Reformation of Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law,” *Cornell International Law Journal*: Vol. 22: Iss. 2, Article 2, 229.

<sup>43</sup> Nijar, *supra* note 21, p.1. PIL is also heralded for its substantive emphasis on the needs and interests of groups long excluded from conventional majoritarian politics. See, Hershkoff, *supra* note 7, p. 7.

<sup>44</sup> *Ibid.* In this regard, Justice Bhagwati states that

“The weaker sections of ... humanity have been deprived of justice for long years; they had no access to justice on account of their poverty, ignorance and illiteracy. ... On account of their socially and economically disadvantaged position, they lack the capacity to assert their rights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice.”

See *Bihar Legal Support Society vs The Chief Justice Of India & Anr* on 19 November, 1986.

<sup>45</sup> Nijar *supra* note 21.p. 1.

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development and the environment.<sup>46</sup> Interestingly the courts extend their helping hands using PIEL to the exploited and the underprivileged in the protection of their rights and interests not just against the dominant social elites but also against the mighty government.<sup>47</sup>

When the Court finds, on being moved by an aggrieved party or by any public spirited individual or social action group, that the executive is remiss in discharging its obligations under the Constitution or the law, so that the poor and the underprivileged continue to be subjected to exploitation and injustice or are deprived of their social and economic entitlements or that social legislation enacted for their benefit is not being implemented thus depriving them of the rights and benefits conferred upon them, the Court certainly can and must intervene and compel the Executive to carry out its constitutional and legal obligations and ensure that the deprived and vulnerable sections of the community are no longer subjected to exploitation or injustice and they are able to realise their social and economic rights. ...<sup>48</sup>

In the developing countries, most environmental concerns of involuntary displacement and re-settlement, provisions of basic needs of water and sanitation, indoor air pollution are interlinked with the rights of the poor and the underprivileged sections of society. Consequently, it is less likely that these groups “will use the traditional method of litigation, which is expensive and cumbersome”.<sup>49</sup> Hence, a public spirited citizens or NGOs must be allowed to bring their grievances to the attention of the court without being hurdled by the requirement of standing. In this regard PIEL could be viewed not just as a form of legal practice, it also constitutes a political practice that affords marginalized groups and interests an entry point into contested issues”.<sup>50</sup>

### 3. Aspects of Public Interest Litigation

#### 3.1. Liberalization of standing

*Locus Standi* (or standing) is a Latin term, which means legal standing before a court. It can be explained as the legal right of a person to initiate legal proceedings in the court. It determines whether hearings should be held and who should be heard. It can determine the issues that are decided and the interests that are represented in those decisions.<sup>51</sup> A person with standing “is someone

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<sup>46</sup> Ibid

<sup>47</sup> Bihar Legal Support Society v. the Chief Justice Of India & Anr, *supra* note 44.

<sup>48</sup> Ibid.

<sup>49</sup> Hassan & Azfar, *supra* note 33, pp. 223-224.

<sup>50</sup> Hershkoff, *supra* note 7, P. 11

<sup>51</sup> Environmental Law Centre (2014), *Standing in Environmental Matters*, p. 7.

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with the necessary legal status to trigger a hearing that would not otherwise occur, or someone with full party status in hearings that have been triggered".<sup>52</sup>

The traditional conceptions of standing were very focused on a private individual's enforceable legal rights. These conceptions "do not distinguish between standing and the merits of the substantive claim advanced by the person seeking standing".<sup>53</sup> Standing is equated "with entitlement to the relief sought from the courts".<sup>54</sup> Standing is also associated with "entitlement to seek relief rather than the entitlement to that relief".<sup>55</sup> Generally, the traditional approach to standing "focuses on the 'interest' that an individual holds, for example being 'directly affected' by a decision".<sup>56</sup> This conception of standing makes it usually unsuitable for public law matters in the courts, and it is even more questionable for use at administrative agencies. The traditional economic argument against expanding litigation is that it would "lead to many, inefficient procedures, resulting in an inefficient use of the court system and potentially to over-deterrence".<sup>57</sup>

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<sup>52</sup> Ibid.

<sup>53</sup> Ibid. See also Jonathan H. Adler (2001), "From Stand or Deliver: Citizen Suits, Standing, and Environmental Protection", 12 *Duke Envtl. L. & Pol'y F.* 39; *Symposium Citizen Suits and the Future of Standing in the 21st Century: From Lujan to Laidlaw and Beyond*, p. 40.

<sup>54</sup> Ibid.

<sup>55</sup> Thomas A. Cromwell (1986), *Locus Standi: A Commentary on the Law of Standing in Canada* as cited in Environmental Law Centre *supra* note 51 p. 7.

<sup>56</sup> Environmental Law Centre, *supra* note 51, p. 7.

<sup>57</sup> Hassan & Azfar *supra* note 33, p. 250. It is also argued that only concrete adverseness can assure that the issues are framed and presented with sufficient specificity for consideration by the court, i.e. only a party whose legal position is affected by the Court's judgment can be relied upon to present a serious, thorough and complete argument. The relaxation of standing and the consequential judicial involvement in social change is also viewed as not being compatible with the notion of separation of powers. The judiciary is neither a representative institution nor has the expert knowledge to deal with such matters. It should thus leave issues of public policy to the exclusive territory of the legislature. Besides it is argued against the liberalization of standing from a more practical point of view. It is said that "to open wide the door of the Court to public interest litigants would be to risk opening the virtual floodgates to a multiplicity of proceedings. It is felt that these litigants "disproportionately divert the Court's attention and energy from pressing criminal, anti-trust executive or other private civil litigation". See, Dianne L. Haskett (1981), "Locus Standi and the Public Interest", 4 *Can.-U.S. L.J.* 39, Available at: <http://scholarlycommons.law.case.edu/cuslj/vol4/iss/4>.(accessed on July 10, 2017) PP. 41-45. See also Schaffner (1977), "Standing and the Propriety of Judicial Intervention: Reviving a Traditional Approach", 52 *Notre Dame Law.* 944, 945 as cited by Dianne L. Haskett (1981), "Locus Standi and the Public Interest", 4 *Can.-U.S. L.J.* 39, pp. 44-45.

According to Thomas Cromwell, modern public law jurisprudence focuses on whether the “issue” raised is suitable for determination.<sup>58</sup> The shift from plaintiff’s vested interest to an issue is the foundation of PIL.<sup>59</sup> PIL requires courts to allow plaintiffs with a more unsubstantiated connection to a case than an ordinary civil plaintiff to file a suit. Liberalized standing rule that dissociates standing from a concrete and particularized injury is the main aspect of PIL in environmental matters.

Liberalization of standing is a function both of judicial interpretations and legislative enactment.<sup>60</sup> The relaxation of standing in the United States was the main features of PIL.<sup>61</sup> The relaxation of restrictive rules of standing that started in the 1960s by the judiciary has been expanded by the legislature as of 1970s particularly in environmental matters. By bestowing standing to citizens, the US Congress enables citizens to act as “private attorney general”.<sup>62</sup> By lifting a restrictive “direct interest” requirement, modern public law jurisprudence has allowed standing to speculative claims of perceived threats to a statutorily recognized interest from governmental action or private actions.<sup>63</sup>

The scrupulous involvement of the judiciary in India with the environment began with the relaxation of the rule of *locus standi* and the departure from the “proof of injury”. In this regard in 1976, the Supreme Court of India in *Maharaj Singh v. State of Uttar Pradesh*, stated:

[w]here a wrong against community interest is done, ‘*no locus standi*’ will not always be a plea to non-suit an interested public body chasing the wrongdoer in court... *locus standi* has larger ambit in current legal semantics than the accepted, individualist jurisprudence of old.<sup>64</sup>

The *first* reason that justifies the liberalization of standing rules in environmental matters is the “rational apathy” discussed earlier. The *second* reason is that the decree in a case with a large number of stakeholders, such as environmental matters, has the nature of a “public good,” which would not be provided for, or is, at best, underprovided by a rational victim.<sup>65</sup> Hence, the requirement of standing “becomes an impediment to the redress process”.<sup>66</sup> *Thirdly*, the relaxation of standing and PIL is usually more efficient in dealing

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<sup>58</sup> Cromwell, *supra* note 55 p. 7.

<sup>59</sup> Environmental Law Centre, *supra* note 51, p. 7.

<sup>60</sup> Adler *supra* note , 53. p.51.

<sup>61</sup> Greve , *supra* note 42, p. 198.

<sup>62</sup> J Adler, *supra* note 53 , p. 52.

<sup>63</sup> Ibid.

<sup>64</sup> *SP Gupta and others vs Union of India & others*, AIR (1976) SC 578 .

<sup>65</sup> Hassan & Azfar, *supra* note 33, p. 251.

<sup>66</sup> Ibid.

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with environmental cases, because these cases are concerned with the rights of the community rather than the individual.

PIL is typified by a non adversarial approach, the participation of *amicus curiae*,<sup>67</sup> the appointment of expert and monitoring committees by the court, and the issue of detailed interim orders in the form of continuous mandamus.<sup>68</sup> Unlike the traditional tort approach, in liberalized standing, the environment is valued as a unity and that the protection and conservation of natural resources does not stop at the border of private property.

The liberalization of the standing rule in some countries resulted in important consequences which were particularly relevant to environmental matters.<sup>69</sup> First, it was possible that there could be several petitioners for the same set of facts dealing with an environmental anguish, and the court was able to deal with the issue from the point of view of an environmental problem to be solved, rather

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<sup>67</sup> *Amicus curiae* translated as “friend of the court” is a traditional device which allows for the interests of outsiders to be placed before the court during a legal action. The term is usually applied to a solicitor or barrister of the court who, being present during the proceedings makes some suggestions to the court in regard to the matter before it. Meriam-Webster Dictionary defines it as “... a professional person or organization ... that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question. See *Meriam-Webster Dictionary* at <http://www.merriam-webster.com/dictionary/amicus%20curiae>. Black’s Law Dictionary defines *amicus curiae* as “a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.” See *Garner B, Black’s Law Dictionary*, 7th Edition (1999) 83. It also applies to persons who have no right to appear in a particular suit but are allowed to protect their own interest and to a stranger present in the court who calls the court’s attention to some error in the proceedings. The *amicus* who assists the court is not an original party to the proceedings (unlike the case of the public interest plaintiff) and his position is also quite different from that of an intervening party. An *amicus* does not possess the right to demand service of papers, to file pleadings or to examine a witness, nor is he or she entitled to appeal against a decision or to apply for a rehearing. Even though its role is being changed recently, the traditional role of the *amicus curiae* is simply to assist in a detached, independent manner by placing oral arguments before the court. It is very important in PIL. As will be discussed in the sections to come in this article, APAP has requested Ethiopian Human Rights Commission to appear as *amicus curiae* in the first and hitherto the only PIL case in Ethiopia. See *infra* note 142. See also Loretia RE (1984) “The Amicus Curiae Brief: Access to the Courts for Public Interest Associations”, *Melbourne University Law Review*, Vol. 14, June ' 84, pp. 524-525.

<sup>68</sup> Justice B.N. KIRPA, “Developments in India Relating to Environmental Justice”, p. 3. Available at <http://staging.unep.org/delc/Portals/119/publications/Speeches/INDIA%20.pdf> (Accessed, August 10, 2017).

<sup>69</sup> *Ibid.*

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than a dispute between two parties.<sup>70</sup> *Second*, the rule enables the court to deal with many interests that went unheeded such as the environmental interests of the under-resourced and illiterate who normally had no access to the judiciary.<sup>71</sup> *Third*, the relaxation of *locus standi* and PIL brought into sharp focus the conflict of interest between the environment and development, and set the stage for a number of specific decisions thereof.<sup>72</sup>

As part of broadening access to justice in addition to relaxation of the standing rules, the courts also relaxed the forms of petitions and allowed *epistolary jurisdiction* (petition written in a letter form).<sup>73</sup> In the seminal judgment on public interest litigation in India, *S. P. Gupta v. Union of India*,<sup>74</sup> the court criticizing procedures as nothing “but a handmaiden of justice”,<sup>75</sup> opined that “the cause of justice can never be allowed to be thwarted by any procedural technicalities”.<sup>76</sup> The court stated that it would “unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public-minded individual as a writ petition and act upon it”.<sup>77</sup> Hence, a petition may be filed just by letter addressed to a court instead of going through the complex and expensive requirements of preparing a regular petition.<sup>78</sup> It is a measure aimed at making justice accessible to the disadvantaged and the poor. Fairness also demands that a person acting in *pro bono* in the interest of the poor should not incur personal expense.<sup>79</sup>

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> Ibid.

<sup>73</sup> Hassan and Azim, *supra* note 33 .p.227.

<sup>74</sup> *Gupta v. Union of India*, A.I.R. 1982 S.C. 149.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> Yoseph Mulugeta Dadwaza (2005), “Public Interest Litigation as Practiced by South African Human Rights NGOs: Any Lessons for Ethiopia?”, unpublished LLM thesis, University of Pretoria, p. 16.

<sup>79</sup> Risks of costs being imposed on PIL lawyers in case they lose has been one of the hindrances to the development of the institution. Different attempts have been made to address this problem in different jurisdictions. In the Us for instance, in what is termed as “cost shifting”, the Freedom of Information Act Attorney fee (costs) awards (1966); Environmental citizen suit attorney fee awards (1970-1973); Civil Rights attorney fees Awards (1976); Equal access to justice Act (1980); and 200 other Federal statutes modified the rule requiring a loser to pay into ‘one way costs’ in which the loser is not required to pay. Other countries try to address the challenge via court discretion (protective cost orders). In India for instance, more often than not, the litigant (PIL plaintiff) will not bear the obligation of paying the cost of litigation even when he loses unless it is proved that the PIL was motivated by private interest. In Arts. 362, 363 and

### 3.2. Remedies

Redress in PIL may be limited to a declaration of the law on the point or an injunction, as “compensation is not usually the main objective”.<sup>80</sup> Especially ‘structural reform suit’, that challenges deficiencies in the enforcement of existing laws and ‘test’ case that challenges the legality of existing laws and regulations or attempts to give new meaning to existing laws, remedies depend on declaratory relief i.e., “judicial expression of a constitutional or statutory norm that informs and educates the other branches and the public at large”.<sup>81</sup>

Indian courts have demonstrated the ability to press against the boundaries of the traditional understanding of remedies. The courts have not limited themselves to the usual remedies. They have shown a willingness to experiment with remedial strategies that require continuous supervision and that appear significantly to shift the line between adjudication and administration. Apart from appointing socio-legal commissions to gather facts during proceedings, they would also create agencies to suggest appropriate remedies and to monitor compliance with orders. The courts’ final orders in public interest litigation matters are also detailed, specific and intrusive with a view to facilitating compliance.<sup>82</sup>

### 3.3. Liberal interpretation of rules

The other aspect of PIL is that courts interpret constitutional and legislative rules as broadly as possible with the view to converting formal guarantees in the constitutions into positive human rights.<sup>83</sup> When faced with PIL, courts take a different role from what they do in private litigation. They give substantive content to public norms in constitutional or statutory provisions that underlie the

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364 of the Ethiopian Civil Procedure Code, the discretion is given for the court to determine who bears the litigation fee. In some cases, the public interest plaintiff can raise the funds themselves through fund raising events, seeking funds from NGOs, etc. See Lara Friedlander(1995) “Costs and the Public Interest Litigant” ,55,*McGill Law Journal* v. 40, Thomas D. Rowe, JR (1982), “The Legal Theory of Attorney Fee Shifting: a Critical Overview” *Duke law Journal* vol. 651; Hon. Justice Brian J Preston SC(2013) “Environmental Public Interest Litigation: Conditions for Success” a paper presented at the International Symposium entitled “*Towards an Effective Guarantee of the Green Access: Japan’s Achievements and Critical Points from a Global Perspective*” 30-31 March 2013, Awaji Island, Japan; Chris Tollefson (2011) ”Costs in Public Interest Litigation Revisited”, *The Advocates’ Quarterly* , V.39, Robert v. Percival & Geoffrey P. Miller (1984), “The Role of Attorney Fee Shifting in Public Interest Litigation”, 47 *Law & Contemp. Probs.* 233.

<sup>80</sup> Shelton & Kiss (2005) *supra* note 20, p. 45.

<sup>81</sup> Hershkoff, *supra* note 7, p.11.

<sup>82</sup> J. Cassels (1989), “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?” *Am. J. Comp. L.*, V. 37, Issue 3, 498, p. 506.

<sup>83</sup> *Id.*, p. 498.

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cases and attempt to prevent or correct inappropriate governmental behavior.<sup>84</sup> Although judicial activism reflected in the liberal and positive interpretation of human rights provisions is a key component, it is not enough. Activism should also be demonstrated by those who are engaged in public interest intervention by way of creatively exploiting gaps and loopholes in those provisions in a manner that could motivate the courts to interpret them in favour of a wider protection and promotion of the rights and freedoms.<sup>85</sup>

## 4. Public Interest Litigation in Ethiopia

### 4.1. Access to Environmental Justice

Access to justice is a right guaranteed to everyone in Ethiopia. According to Article 37 (1) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) " [e]veryone has the right to bring a justiciable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power".<sup>86</sup> The Constitution also guarantees the right to any association representing the collective or individual interest of its members.<sup>87</sup> The right is guaranteed equally to everyone without discrimination.<sup>88</sup>

The right has been further recognized in the major international and regional human rights instruments to which Ethiopia is a party such as: the Charter of the United Nations, the Universal Declaration of Human Rights (UNHR)<sup>89</sup>, the International Covenant on Civil and Political Rights (ICCPR),<sup>90</sup> the African Charter on Human and Peoples' Rights,<sup>91</sup> and the International Covenant on Economic, Social and Cultural Rights (CESCR).<sup>92</sup>

In the context of the environment, Principle 10 of the Rio Declaration provides that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."<sup>93</sup> Agenda 21 calls on governments and legislators to establish judicial and administrative procedures for legal redress and remedy of actions affecting the environment that may be unlawful or infringe on rights under the law, and to provide access to

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<sup>84</sup> Carl Tobias (1991), "Standing to Intervene", *Wis. L. Rev.* 415. p.420

<sup>85</sup> Yosef, *supra* note 78, p. 16.

<sup>86</sup> Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Article 37(1).

<sup>87</sup> *Id.*, Art. 37(1(a & b))

<sup>88</sup> *Id.*, Art. 25.

<sup>89</sup> See Article 8 of Universal Declaration of Human Rights.

<sup>90</sup> Article 2(3) of the ICCPR

<sup>91</sup> See Article 7 of African Charter on Human and Peoples' Rights.

<sup>92</sup> See the Preamble of ICESCR and United Nations. 'General Comment No. 9', Committee on Economic, Social, and Cultural Rights", E/C.12/1998/24 (1998) para. 2.

<sup>93</sup> The Rio Declaration on Environment and Development (1992), Principle, 10.

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individuals, groups and organizations with a recognized legal interest. The United Nations Convention on the Law of the Sea (UNCLOS) also provides that states shall ensure that recourse is available for prompt and adequate compensation or other relief for damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.<sup>94</sup>

## 4.2. Public Interest Environmental Litigation (PIEL)

### 4.2.1 The constitutional framework

Article 37 of the FDRE Constitution which, as stated earlier, embodies right to access to justice is recognized applies to any action including violations of environmental rights. Unlike the Civil Procedure Code of Ethiopia which puts the requirement of ‘vested interest’<sup>95</sup> for one to petition any judicial or quasi-judicial body, the plain reading of Article 37(1) does not seem to embody the requirement of standing. There are some scholars who argue that the constitutional provision should be understood in a literal sense as relaxing or otherwise lifting the “vested interest” requirement, thereby enabling any one, including NGOs, to bring a legal action and seek relief thereof.<sup>96</sup> Others, on the other hand, believe that sub-article makes such interpretation very difficult,<sup>97</sup> and that it is very difficult to establish PIL based on Art. 37 of the Constitution.

Article 37(2) provides that “[t]he decision or judgment referred to under sub-article 1 of this Article may also be sought by any association *representing the collective or individual interest of its members*; or any group or person who is *a member of*, or represents a *group with similar interests*”.<sup>98</sup> Article 37(2(a) provides that for an association to bring a legal action, it must show an injury to the collective or individual interest of its members. Hence, an association can challenge only those actions that violate the rights of its members or its rights as an association. For example, an environmental organization in Ethiopia can

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<sup>94</sup> United Nations Convention on the Law of the Sea (UNCLOS) (Art. 235(2)).

<sup>95</sup> Civil Procedure of Ethiopia, 1960, Article 32 (2) reads: No person may be a plaintiff unless he has a vested interest in the subject matter of the suit.

<sup>96</sup> See, Yosef, *supra* note 78, p. 40; Getahun Kassa (2007) “Mechanisms of Constitutional Control: A Preliminary Observation of the Ethiopian System” 20 *Africa Focus* 75, p. 86; Mebrahtom Fitiwi, Tsegay Berhane and Tecele Hagos, “Public Interest Litigation (PIL) as a Means to Protect the Environment: The Case of Tigray Regional State” in Mulu Beyene and Zbelo Haileselassie (editors)(2016), *The Role of Law in the Protection of the Environment and Natural Resources*, Mekelle, p.31; See also Ayalew Abate, “Public Interest Environmental Litigation (PIEL) by Civil Society Organizations (CSOs) in the FDRE: A Study on the Legal Framework/Infrastructure” in Molla Addisu and et.al. (Eds) (2011), *Proceedings of The Second National Research Symposium On: Research for Socio- Economic Transformation*, Debre Markos University.

<sup>97</sup> Adem, *supra* note 34.

<sup>98</sup> FDRE Constitution, *supra* note 88 Art. 37(2), emphasis added.

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claim that pollution from an industry endangers the lives of the group's members and thus its existence as a group.<sup>99</sup> Thus, in addition to the right that every physical person has, associations possess a special right in that they can litigate for the interest of their members under the FDRE Constitution. Even though allowing associations to bring a legal action representing the interest of their members is commendable, it is very difficult to establish PIEL based on Article 37((2(a)) as the requirement of *vested interest* is still there.

According to Article 37(2(b)) any group or person who represents a group with similar interest has a standing to bring justiciable matters before a court of law or any other competent body with judicial power. What constitutes a group with similar interest? Do residents of a certain area who are affected by emissions from a factory constitute a group with similar interest? What about those persons who have 'a similar interest' in protecting their right to a clean and healthy environment? The term seems to be broad enough to include these and other groups.

Another important issue in this regard relates to the meaning of 'representation'. Does it require the consent<sup>100</sup> of victims of pollution from a factory or other activities? Or is it possible for an NGO or a public spirited individual to represent "a group with similar interest" without their consent or even without their knowledge?

The Minutes of the Constitution do not offer any help in relation with the interpretation of these issues. The broader interpretation of Article 37(2(b)) that allows PIEL seems more plausible because during the enactment of the FDRE Constitution, PIEL was in the mainstream in most countries and the protection of environment, particularly with participation of all including NGOs, was a pertinent agenda of the time by the world community. At least, the ambiguity

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<sup>99</sup> There seems to be no consensus with regard to the association's standing to bring a legal action representing the interest of the members of an association. For instance, the US permits groups to sue on behalf of their members; whereas the German administrative law does not allow an association to sue on behalf of the members (based upon the premise that the interests of association members are different from the association's own interests). See, for example, *Sierra Club v. Morton*, 405 U.S. 727, 739 (1971) ("It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review"). See also Faber, *Die Verbandsklage im Verwaltungsprozess* 39-40 (1972) as cited in Greve, (1989) *supra* note 42 p. 214.

<sup>100</sup> If it is with the consent of the victims, it is a class action and not a PIL. For a detailed discussion on difference and similarity between class action and PIL, See, Renato Corona, "Class Action, Public Interest Litigation and the Enforcement of Shared Legal Rights and Common Interests in the Environment and Ancestral Lands in the Philippines", available at <https://www.aseanlawassociation.org/9GAdocs/Philipines.pdf>, (Accessed on 24/12/2017)

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of the provision does not render such line of wider interpretation absurd or contrary to legislative intent.<sup>101</sup>

This line of interpretation seems to be accepted by the House of the Peoples' Representatives (HPR hereinafter) when it enacted the Pollution Control Proclamation (PCP) which expressly introduced PIEL in the Ethiopian legal system for the first time. On the face of the ambiguity of the Article 37(2)(b), it is not plausible consider the Pollution Control Proclamation as unconstitutional. Yet, the above line of interpretation of the Constitutional provision is still restrictive with regard to standing, because (unlike the Pollution Control Proclamation) it does not accord personality to the environment which could have protected the environment without the need to represent any victim. In *Action Professionals' Association for the People (APAP) v. the Ethiopian Environmental Authority (APAP v. EPA)* for example, the applicant (APAP) argued that Article 37(2) (b) provides enough standing to bring PIL cases to court or to any competent body with judicial power.<sup>102</sup>

The HPR seems to lack consistency in its understanding of Article 37(2)(b) with regard to a standing for constitutional interpretation. As per Article 84(2) of the FDRE Constitution, any court or interested party is entitled to challenge the constitutionality of any federal or state law before the Council of Constitutional Inquiry (CCI).<sup>103</sup> According to the Proclamation issued to consolidate the House of the Federation and Definition of its Powers and Responsibilities, law is defined to include proclamations issued by the federal or state legislative organs, and regulations and directives issued by the federal and states government institutions.<sup>104</sup> It also includes international agreements that have been ratified by Ethiopia.<sup>105</sup> According to the Council of Constitutional Inquiry Proclamation<sup>106</sup> it is not just the federal or state laws that can be challenged for unconstitutionality. Article 4 of the Proclamation states that "...

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<sup>101</sup> Adem Kassie argues that the restrictive interpretation of Article 37(1) is the most reasonable interpretation to save the whole provision of Article 37 from looking absurd. He argues that had it not been for restricting standing (with a vested requirement), sub-article 1 of the provision would have been enough to allow the liberalization (or the complete abolition) of standing. According him, if the intention of the legislature was to lift the standing requirement, sub-article 2 would have been unnecessary. But it should be noted that in the absence of sub-article 2, sub-article one would have been absurd as "just everyone" cannot bring a legal action even in the absence of the requirement of standing. *see* Adem Kassie, *supra* note 34, p. 417.

<sup>102</sup> APAP Policy document, unpublished. On file with the author.

<sup>103</sup> FDRE Constitution, Article 84(2).

<sup>104</sup> Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation No. 251/2001, Article 2(2).

<sup>105</sup> *Ibid.*

<sup>106</sup> Council of Constitutional Inquiry Proclamation No.798/2013, Article 3.

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customary practice or decision of government organ or decision of government official...” can also be challenged for unconstitutionality before the CCI.

An interested party may mean only a party to litigation in a narrower sense or any person or entity that seeks to challenge the constitutional validity of a law irrespective of him/her having a personal interest affected by the challenged legislation or decision. According to the CCI Proclamation, if the case is pending before a court of law, the court on its own motion or by the petition of one or more of the parties, or one or more of the parties can submit their petition to the CCI.<sup>107</sup> With regard to issues of constitutional interpretation outside courts of law, the CCI Proclamation applies to “[a]ny person who alleges that his fundamental right and freedom provided under the Constitution have been violated due to the final decision rendered by government organ or official”.<sup>108</sup>

Hence, only persons with vested interest can approach CCI (and hence the HOF) for constitutional interpretation. Therefore, if any NGO, *bona fide* citizen or the court for that matter, wants to challenge the constitutionality of an environmental legislation or international treaty to which Ethiopia is a party or government decision with regard to the environment, it must show vested interest to approach the CCI.

#### **4.2.2. Enabling Laws of the Ethiopian Human Rights Commission and the Institution of Ombudsman**

The Ethiopian Human Rights Commission is established with the general objective to serve as one of the institutions that would take the responsibility to enforce human rights and freedoms<sup>109</sup> and with specific objectives, *inter alia*, to monitor the conformity of laws and policies to human rights standards; disseminate human rights education and investigate human rights violations both on its own initiative and upon receiving complaints.<sup>110</sup> The Ethiopian Ombudsman is established with the aim ‘to see to bringing about good governance that is of high quality, efficient and transparent, and [ ... ] based on the rule of law, by way of ensuring that citizens’ rights and benefits provided for by law are respected by organs of the executive’.<sup>111</sup> While the Commission has a broader mandate, relating to all government institutions, the Ombudsman has the power to investigate cases concerning the action and inactions of the executive branch of the government.

According to Article 2(9) of the Ethiopian Human Rights Commission Proclamation, a “person claiming that his rights are violated”, or “his spouse,

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<sup>107</sup> Id. Art. 4.

<sup>108</sup> Id. Art. 5(1).

<sup>109</sup> Ethiopian Human Rights Commission Establishment Proclamation No.210/2000. Art. 5.

<sup>110</sup> Id., Art.6.

<sup>111</sup> Institution of the Ombudsman Establishment Proclamation No. 211/2000. Arts. 5 & 6.

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family member, representative, or ... *a third party*' has a standing to bring complaints before the Commission.<sup>112</sup> 'Third party' includes 'a deputy, an association or an NGO representing an individual or a group'.<sup>113</sup>

Likewise, by lifting the special interest requirement, the Ombudsman Establishment Proclamation allows a standing to "a person claiming to have suffered from maladministration, or his spouse, family member, his representative or *a third party*".<sup>114</sup> Unlike the Human Rights Commission Proclamation, this Proclamation does not define the scope of "*third party*". But given the fact that the Ombudsman can entertain anonymous complaints considering the gravity of the impugned maladministration,<sup>115</sup> it seems logical to conclude that 'third party' may (as in the case of the Human Rights Commission Proclamation) include a deputy, an association or an NGO representing an individual or a group'.

The standing rules before the Ombudsman and the Commission are thus relatively liberal as compared to the ones before the CCI, the House of the Federations, or the ordinary courts. Hence, it can be argued that the enabling laws of Ethiopian Human Rights Commission and Ombudsman accommodate PIEL although the findings of these institutions are nonbinding.

#### **4.2.3. The Federal Courts Advocates Licensing and Registration Proclamation**

The Federal Attorney General is entrusted with the power of registration of federal advocates, issuance, renewal and revocation of licenses.<sup>116</sup> Of the three types of licenses,<sup>117</sup> the special advocacy license is issued to any Ethiopian lawyer who seeks to defend the general interests and rights of the society<sup>118</sup> provided, among other things, that he/she: has a degree in law from a legally recognized educational institution; may not receive any kind of reward from a section of a society and has suitable character to shoulder such responsibility.<sup>119</sup> This provision paves the way for PIL, as it encourages public spirited lawyers who seek to engage in public interest lawyering including the provision of legal

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<sup>112</sup> Art 22(2), Ethiopian Human Rights Commission Establishment Proclamation No.210/2000., Emphasis added.

<sup>113</sup> Id., Art 2(9).

<sup>114</sup> Art. 22(1), Institution of the Ombudsman Establishment Proclamation No. 211/2000.

<sup>115</sup> Id., Art 22(2).

<sup>116</sup> Federal Attorney General Establishment Proclamation No. 943/2016.

<sup>117</sup> Federal Courts Advocates Licensing and Registration Proclamation, 2000, Art.10, Proclamation No.199, *Federal Negarit Gazeta*, Year 6, No.27. The three types of licenses are: federal first instance court advocacy license; federal courts advocacy license; and a federal court special advocacy license.

<sup>118</sup> Id., Art. 7

<sup>119</sup> Id., Art. 10.

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assistance to the disadvantaged and litigation targeted at bringing about respect and promotion of human rights. Moreover, advocates are required by law to render *pro bono publico* services for minimum of fifty hours a year legal service free of charge or upon minimal payment.<sup>120</sup>

To the knowledge of this author, however, there is no PIEL case brought by an attorney in Ethiopia as far. One of the reasons could be the fact that environmental NGOs do not have this opportunity as advocacy license is granted only to natural persons of Ethiopian nationality.<sup>121</sup> The other reason could be the absence of law authorizing the establishment of law firm as a firm would be in a much better position to bring PIL as seen in other jurisdictions than individual lawyers. Finally, the fact that the granting, supervision and renewal of the advocates license is controlled by the executive branch, this may be a huge impediment for the development of PIL in the fullest sense with a primary objective of correcting the inactions of the executive branches of the government.

#### 4.2.4. CSOs and PIEL in Ethiopia

The Charities and Societies Proclamation (CSP hereinafter) categorizes societies into three: Ethiopian Charities (Ethiopian Societies),<sup>122</sup> Ethiopian Residents Charities” (or “Ethiopian Residents Societies),<sup>123</sup> and Foreign Charities.<sup>124</sup> The Proclamation excludes Foreign and Ethiopian Resident human rights NGOs from overall human rights advocacy activities of the country namely the advancement of human and democratic rights; the promotion of equality of

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<sup>120</sup> The beneficiaries of such services are : (1) persons who cannot afford to pay, (2) charity organizations, civic organizations, community institutions, (3) persons for whom a court requests legal services, and (4) committees and institutions that work for improving the law, the legal profession and the legal system.

<sup>121</sup> There are recent tendencies of granting licenses to Law School Legal aids. The issue of cost (of litigation) could also be another reason. Regarding the issue of cost of litigation, See *supra* note 79.

<sup>122</sup> “Ethiopian Charities” or “Ethiopian Societies” are those Charities or Societies that are formed under the laws of Ethiopia, all of whose members are Ethiopians, generate income from Ethiopia and wholly controlled by Ethiopians. They may be deemed as Ethiopian Charities or Ethiopian Societies if they use not more than ten percent of their funds which is received from foreign sources. See Article 2(2) of Charities and Societies Proclamation No.621/2009(CSP Proclamation hereinafter).

<sup>123</sup> “Ethiopian Residents Charities” or “Ethiopian Residents Societies” are those Charities or Societies that are formed under the laws of Ethiopia and which consist of members who reside in Ethiopia and who receive more than 10% of their funds from foreign sources. See Article 2(3) CSP Proclamation.

<sup>124</sup> “Foreign Charities”, those Charities that are formed under the laws of foreign countries or which consist of members who are foreign nationals or are controlled by foreign nationals or receive funds from foreign sources. See Article 2(4) of CSP Proclamation.

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nations, nationalities and peoples and that of gender and religion; the promotion of the rights of the disabled and children's rights; the promotion of conflict resolution or reconciliation and the promotion of the efficiency of the justice and law enforcement services.<sup>125</sup> But they are allowed to participate in environmental protection or improvement efforts.<sup>126</sup>

As litigation is a typical case of a human rights activity, foreign and resident charities are not allowed to participate in PIEL. Given the financial and awareness limitations of Ethiopian charities, the exclusion of foreign and resident charities from participating in PIEL may hamper the development of PIEL in particular and environmental protection in general. Regrettably, as will be discussed in the section below the only NGO which pioneered by bringing the first and hitherto the only PIEL with the view to testing the meaning of the Article 11 of Proclamation 300/2002 is in the process of closure<sup>127</sup> as the result of the inconvenience posed by the Charities and Societies Proclamation.

#### 4.2.5 Environmental laws

The right to a clean and healthy environment is recognized as one of the democratic rights of all persons in the FDRE Constitution.<sup>128</sup> As part of the move to realize the right, Article 11 the Pollution Control Proclamation has introduced PIEL as one of the innovative strategies in the Ethiopian legal system, and has thus opened the door for individuals and environmental rights advocacy groups to bring cases before courts. Sub-article one of the provision guarantees any person the right to "lodge a complaint at the Environmental Protection Authority (EPA) or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment" without the need to show any vested interest.<sup>129</sup> A complainant is granted with the same broad right of standing before a court when the EPA or regional environmental agency fails to give a decision within thirty days or when he/she is dissatisfied with the decision.<sup>130</sup>

Similarly, Article 10 of Regulation No.159/2008 which was issued as per Article 20 of the PCP provides that any person without the need to show any vested interest can submit his complaint before the competent environmental organ (the Ministry of Environment, Forest and Climate Change or Regional

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<sup>125</sup> Charities and Societies Proclamation No.621/2009, Art. 14 (5).

<sup>126</sup> *Id.*, Art. 14(2)(b).

<sup>127</sup> Interview (on December 24, 2017) with Ato Wongel Abate Abebe, Executive Director of the APAP and the lawyer who represented APAP, in *APAP v. EPA* case, *infra* note 134..

<sup>128</sup> FDRE Constitution Art. 44.

<sup>129</sup> Environmental Pollution Control Proclamation No.300/2002, (PCP hereinafter), Article 11(1).

<sup>130</sup> *Id.*, Art. 11(2).

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Environmental Organs) concerning industrial pollution.<sup>131</sup> The competent organ to which the complaint is submitted is duty bound to respond to the complainant within 90 days.<sup>132</sup> Any person dissatisfied with the decision of the competent organ has 30 days to submit a complaint notice to the head of the competent organ who should issue his/her decisions within 30 days.<sup>133</sup>

While it is commendable that PIEL is recognized in both laws, there are various questions that remain unanswered. One of the issues is whether a suit can be filed against an environmental organ whose inaction causes an environmental pollution. In the case between *Action Professionals' Association for the People (APAP) v. the Ethiopian Environmental Authority (APAP v. EPA)*,<sup>134</sup> the plaintiff, a non-governmental organization lodged a complaint on urban pollution to the Federal First Instance Court. It had first lodged its complaint to the EPA as per the requirement of the Article 11 of the Pollution Control Proclamation demanding the latter to take necessary measures to stop the environmental pollution.<sup>135</sup>

Based on various researches and environmental audit reports of the EPA, APAP stated that Akaki and Mojo rivers are being polluted by solid and liquid waste of Addis Ababa and the untreated liquid as well as solid wastes discharged into these rivers by different factories in and around Addis Ababa and Modjo towns.<sup>136</sup> APAP invoked the constitutional right to live in a clean and healthy environment, international human rights instruments and chemical related multilateral environmental agreements ratified by Ethiopia and national legislation, and it argued that these laws and the Pollution Control Proclamation, in particular are clearly violated.<sup>137</sup>

The EPA responded that given the circumstances under which it was working, it has been taking various measures which it deemed necessary such as developing directives, guidelines and standards, on the basis of which it would take measures to realize the environmental rights of everyone in the country.<sup>138</sup>

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<sup>131</sup> Prevention of Industrial Pollution Council of Ministers' Regulation No.159/2008, Article 10(1).

<sup>132</sup> Id., Article 10(2).

<sup>133</sup> Id., Article 10(3).

<sup>134</sup> *Action Professionals Association for the People (APAP) v. the Ethiopian Environmental Authority*, the Federal Democratic Republic of Ethiopia Federal First Instance Court, file No.64902, 1999 E.C.

<sup>135</sup> Statement of Complaint to the Ethiopian Environmental Protection Authority based on Article 11(1) of Proclamation 300/2002, 28/03/98 E.C.

<sup>136</sup> Ibid .

<sup>137</sup> Ibid.

<sup>138</sup> The response given and addressed to APAP by the Ethiopian Environmental Protection Authority to the Complaint lodged by APAP. December 8, 2005. (Unpublished on file with the author).

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It also stated that it has been conducting environmental audits on 35 factories and undertaking research on the pollution of Akaki River. EPA argued that since the ambient quality standards that are necessary for ascertaining the existence of pollution are not yet adopted by the Environmental Council<sup>139</sup>, it is difficult to determine that there indeed is pollution.<sup>140</sup>

Not content with the response of the EPA, APAP filed a case to the court<sup>141</sup> placing the EPA as a sole respondent and prayed for the court to order EPA to take necessary administrative and legislative measures so that the rivers can be protected from all forms of pollutants. The plaintiff also requested the court to establish inspectors to ensure that the defendant is taking the necessary measures.<sup>142</sup>

In its statement of defense, the EPA argued alternatively on two grounds. In its preliminary objection it argued that the plaintiff has no standing to bring a legal action against it as the respondent is not a polluter.<sup>143</sup> It also argued that if it is possible to sue the regulatory organ, the party to the suit should be the concerned regional bureaus and not the EPA as the latter's responsibility is to initiate/recommend the enactment of laws, policies, standards and guidelines which should be approved by either the HPR or the Council of Ministers. On a substantive front, the EPA argued that given the institutional hurdle and other capacity problems, it has been doing its best to discharge its duty of protecting the right to a clean and healthy environment of citizens.<sup>144</sup>

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<sup>139</sup> A supreme body composed of the Prime Minister or his designate (Chairman), members to be designated by the Federal Government, a representative designated by each National Regional State, a representative of the Ethiopian Chamber of Commerce, a representative of local environmental nongovernmental organizations, a representative of the Confederation of Ethiopian Trade Unions, and the Director General of the Authority. It is empowered to review and approve directives, guidelines and environmental standards prepared by the EPA (see Articles: 7-9 of Environmental Protection organs Establishment Proclamation No. 295/2002).

<sup>140</sup> The Federal Democratic Republic of Ethiopia Environmental Protection Authority, Response to Action Professionals' Association for the People, 17/04/1998 E.C., Ref.No.1/AP-GU/1/1.

<sup>141</sup> APAP v. EPA, *supra* note 134.

<sup>142</sup> The plaintiff also requested the Ethiopian Human Rights Commission to present itself as *amicus curiae* during the course of the litigation.

<sup>143</sup> APAP v.EPA, statement of defense, 11/07/1998 Ethiopian Calendar (March 20, 2006)

<sup>144</sup> *Ibid.* Moreover, with regard to the plaintiff's request of the court to have the EPA ordered to clean up the rivers, it contends that it is the obligation of the polluters and not the EPA. It also requested the court to reject the plea of the plaintiff to appoint environmental inspectors as there is no legal ground for such appointment. The EPA stated that it has doubts whether the Proclamation issued to Control pollution in the country in 2002 could be applicable to the facilities established several years before its entry into force.

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The First Instance Court rejected APAP's application by accepting the preliminary objection of the EPA. The court stated that the cumulative reading of sub-articles one and two of Article 11 of the Pollution Control Proclamation grant standing to anyone to bring such cases against the polluter and not against the EPA.<sup>145</sup> Dissatisfied with the decision, APAP appealed to the Federal High Court<sup>146</sup> only to see that its application was rejected "for lack of legal and factual error" in the lower court's decision.<sup>147</sup> Finally, APAP took the case to the Cassation Division of the Federal Supreme Court which refused to consider the merit of the case, stating that the decisions of the lower courts do not have fundamental error of law.<sup>148</sup>

APAP should be acclaimed for pioneering to bring the first PIEL case in Ethiopia. However, it seems to have missed the fact that not only the Pollution Control Proclamation allows PIEL but also determines against whom the action could be taken. Article 11(1) seems to be clear PIEL before the Ministry is allowed "*against any person allegedly causing actual or potential damage to the environment*".<sup>149</sup> So, a person who can be defendant is an actual or potential polluter. The Ministry or a regional environmental organ can only be a defendant if they are either actual or potential polluters. It should be noted here that the courts did not examine the question whether the EPA's failure to discharge its statutory obligation constitutes committing pollution (by omission or inaction) in the meaning of Article 11 of the PCP.

APAP argued that the use of the term "*may institute a court case*" (under Article 11/2) instead of "*may appeal to court*" clearly shows that a suit could be brought against the EPA if it fails to discharge its duties diligently and effectively.<sup>150</sup> APAP contended that taking the same case to court (with the same relief) is inappropriate if it has been decided by a competent environmental organ. To construe Article 11(2) as allowing the plaintiff to take its case to the first instance jurisdiction of an ordinary court and not by appeal would be superfluous, and would waste time and public resource.<sup>151</sup>

Hence, the need to rescue the provision from sounding superfluous requires a *positive* interpretation which can render the EPA a defendant.<sup>152</sup> But what APAP

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<sup>145</sup> APAP v. EPA, *supra* note 134.

<sup>146</sup> APAP v. EPA, Statement of Appeal to the Federal High Court, 06/12/06 E.C.

<sup>147</sup> APAP v. EPA, Federal High Court, File No. 51052, Judgment rendered on the 12<sup>th</sup> of June 2008.

<sup>148</sup> APAP v. EPA, Federal Supreme Court Cassation division, File No.39779, Decision of 3 December 2008.

<sup>149</sup> Pollution Control Proclamation, *supra* note 129, Art. 10(1).emphasis added.

<sup>150</sup> APAP v. EPA, appeal, *supra* note 134

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

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should have established standing right and the defendants based on Article 11(1) of the PCP. Sub-article 2 is rather meant to design a remedy when an environmental organ fails to render a decision within the given period of time, or where the decision is not satisfactory to the petitioner.

PIL is not just about victory in the courts. It is about the process, and it serves as a mechanism for social criticism and mobilization. It is not about setting legal precedents as a consequence of the judicial process, but has extrajudicial effect, i.e. it has the capacity to raise consciousness, mobilize constituencies, garner political leverage, and develop cultures of accountability and norms of legality.<sup>153</sup> The lesson that public spirited citizens and NGOs gained from APAP vs. EPA did not lie in the loss of substantive goal, but that APAP found the courage, energy, and creativity to resist injustice done against the environment and the victims in the face of overwhelming odds. Seen from this perspective, APAP has done a laudable work as it is the first and hitherto the only NGO to try to use the procedural avenues laid down in the legislation to protect the environment. But the benefits would have been even greater had it not been for the substantive and procedural misunderstanding.<sup>154</sup>

One may suspect that APAP chose to file its complaint against the EPA because identifying polluters would be a daunting task as it requires scientific study. In this regard its choice of the defendant may make sense. However, there was extensive scientific study and APAP had the environmental audit reports of the EPA to identify polluters and bring a legal action against them.<sup>155</sup> According to the lawyer who handled the case, the sole reason they went against the EPA is to see how the courts would interpret Article 11(2) of the PCP.<sup>156</sup> He said that they wanted to see if the executive could be a defendant in the Ethiopia PIEL system.<sup>157</sup> But they could have achieved it by making the EPA a co-defendant along with the polluters. In this sense, for all its pioneering status, the APAP v. EPA case could be viewed as an opportunity dearly missed.

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<sup>153</sup> Helen Hershkoff & A. McCutcheon (2000), "Public Interest Litigation: An International Perspective" in *Many Roads to Justice*. M. McClaymont & S. Golub (eds.), pp. 96-97; See Also J. Lobel (1995), "Losers, Fools & Prophets: Justice as Struggle", 80 *Cornell L. Rev.*, 1331.

<sup>154</sup> Mekete Bekele Tekle (2011), "The Scope of Citizens' Environmental Rights protection Under Ethiopian Law", Michael Faure & Willemien du Plessis (ed.)(2011), *The Balancing of Interests in Environmental Law in Africa*, Pretoria University Law Press, p. 126.

<sup>155</sup> See Statement of Complaint of APAP, *supra* note 135. This was also confirmed by Ato Wongel during interview, *supra* note 127. See also the APAP Policy document, *supra* note 102.

<sup>156</sup> Interview with Ato Wongel, *supra* note 127.

<sup>157</sup> *Ibid*

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## 5. Why isn't PIEL Flourishing?

After nearly a decade and half since its introduction, PIEL is not a developed strategy for the protection and promotion of environmental rights in Ethiopia. It should be noted that liberalized standing may not always ensure procedural justice and a just substantive outcome,<sup>158</sup> as the success or otherwise of PIEL depends on various factors ranging from socio-political, economic as well as cultural traditions and circumstances of a state. The barriers that have impeded the development of PIEL in Ethiopia are briefly examined below.

### 5.1 Barriers caused by the political tradition

The Ethiopian Constitution espouses the principle of separation of powers and attempts to outline the powers of the legislature, the executive and judiciary. Consistent with its political tradition, Ethiopia today is characterized by a very powerful executive and a relatively weak judiciary which does not take initiatives to protect human rights. The judiciary lacks the necessary courage and sufficient legal powers to exercise its duty of checking abuse of power by the other branches of the government particularly the executive. The FDRE Constitution has taken away the counter-majoritarian role of courts by excluding them from reviewing the constitutionality of laws.

Heightened sensitivity and concerted action in the judiciary has been credited for nurturing and facilitating an expanded notion of access to justice and in fostering PIL in South East Asian Countries. The extent to which the courts are willing to exercise their inherent powers with regard to judicial oversight of the administrative agencies may also contribute the development of the PIL. For instance, in the US, in the case of doubt, courts “generally have been very generous in granting standing and attorneys fees to public interest interveners, because they know that Congress wants the respective statutory provisions to be interpreted liberally”.<sup>159</sup>

The concept of judicial activism is nonexistent in the Ethiopian legal system.<sup>160</sup> The people's lack of trust on the independence of the judiciary might have contributed for the slow development of litigation in the public interest.<sup>161</sup>

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<sup>158</sup> It must be noted that PIL does not change the policy of the government: public authorities are free to take the same decision again for any other similar situation. See Jona Razzaque: Participatory Rights in natural Resource Management: The Role of Communities in South Asia in Jonas Ebbesson and Phoebe Okowa (eds.), (2009) *Environmental law And Justice in Context* , Cambridge University Press.

<sup>159</sup> Boyer & Meidinger (1985), Privatizing Regulatory Enforcement, 34 *Buffalo L. Rev.* 833, 839, as cited by Greve, *supra* note 42, p. 231.

<sup>160</sup> See Mekete, *supra* note 151, p. 126.

<sup>161</sup> The 2005 Comprehensive Justice System Reform Program (CJSRP) states low public perception regarding the independence of the judiciary.

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As seen in *APAP v. EPA* case, the courts did not even consider whether EPA's failure to discharge its statutory role constitutes pollution under article 11 of the PCP. Civil Societies and human rights NGOs are reluctant to seek remedies from the courts.<sup>162</sup> This might have a bearing on the NGOs silence from confronting Proclamation No. 621/2009 which threatens their very existence and operation in Ethiopia.<sup>163</sup>

It is probably attributable to the deeply rooted political tradition of reverence to the executive (a power which was for many centuries believed to have descended from God's will as it was articulated by the saying '*Semay ayitares, nigus ayikeses*' ('You cannot plough the sky, nor sue a king')). This political tradition seems to explain lack of judicial control against the executive branch even when the latter fails to deliver constitutional entitlements.

As highlighted earlier, the primary purpose of PIL is making the executive branch accountable for its actions or inactions. But consistent with the Ethiopian political tradition of strong and seemingly untouchable executive, the legislature has half-heartedly introduced an incomplete aspect of PIL which makes it difficult to bring legal action that renders the executive branch a defendant (for its inaction) in public interest litigation. The interpretation of Article 11 of the PCP by the courts in *APAP v. EPA* illustrates the modest level of judicial courage, inquiry, innovation and proactive interpretation against the interests of the powerful executive.

The absence of a strong tradition of public interest lawyering may also be one of the reasons that hinders the development of PIEL in Ethiopia. In this regard, Prempeh argues that "lack of an organized public interest or human rights bar or a tradition of *pro bono* representation" is one of the reasons for the failure of African lawyers to capitalize "upon the liberalization of constitutional standing to seek judicial enforcement of the Constitution".<sup>164</sup> The absence of law firms and a strong and independent bar in Ethiopia may be one of the reasons for the failure of seizing the opportunity created by the liberalization of standing in environmental matters by virtue the Pollution Control Proclamation highlighted above.

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<sup>162</sup> Adem, *supra* note 34, p.410.

<sup>163</sup> Ibid.

<sup>164</sup> HK Prempeh "Marbury in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa" (2005-2006), 80 *Tulane Law Review*, 1239, p. 1297.

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## 5.2 Barriers caused by the Ethiopian legal system

In addition to the political, social and economic context, the “nature of the existing legal regime, the independence and prestige of the judicial system”<sup>165</sup> has its own impact on the development and success of PIL. In both common law and continental legal systems, the state has traditionally been the main protector of the public interest. The *Ministère public* and the Attorney General have been the guardians of public interest in the Civil and Common law legal systems respectively.<sup>166</sup> These institutions, in addition to their primary function of prosecution of criminal acts, are tasked with vital “powers in the pursuit of the public interest in civil proceedings”.<sup>167</sup>

However, as “the concept of the public interest expanded equally in both systems with the social problems of our modern civilization”, as a result of which private individuals and groups “also demanded the right to invoke actions and take active part in representation of the new interests”.<sup>168</sup> Consequently, there arose a need to revisit the “state’s monopoly” of public interest litigation and the related doctrines of standing and cause of action. But this erosion of the state monopoly in public interest protection and the expansion in the involvement of private individuals and groups in the public interest did not come at equal pace in both legal systems.

The *first* factor relates to the way the two systems understand the concept of the public interest. In civil law countries, the public interest “has been steadily viewed as a common interest accountable to the state as to the unit of social coexistence, or a private interest which became public in its pursuit by a public official”.<sup>169</sup> Common law countries on the other hand “regard the public interest as an interest separate from that of the state –moreover, an interest which is often in direct conflict with the interest represented by the government”.<sup>170</sup> As the result, “[t]he position of government representatives [*Ministère public* and the Attorney General] in public interest litigation differs in various legal systems

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<sup>165</sup> Hershkoff Sarat & Scheingold (1998), *Cause Lawyering and the Reproduction of Professional Authority: An Introduction in Cause Lawyering: Political Commitments and Professional Responsibilities* (Sarat & Scheingold eds.), cited in Hershkoff *supra* note 7.

<sup>166</sup> V. Langer (1988), “Public interest in Civil Law, Socialist Law, and Common Law Systems: the Role of the Public Prosecutor” (36), *The American Journal of Comparative Law*, 279; See also Lesley K. McAllister (2008), “Revisiting a Promising Institution: Public Law Litigation in the Civil Law World”, *Georgia State University Law Review* 24(3), 663-692.

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Id.*, p. 280.

<sup>170</sup> *Ibid.*

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in a similar fashion as the concept of the public interest itself.<sup>171</sup> Using Professor Griffith's terminology of criminal process models,<sup>172</sup> Langer observes:

the Continental approach represents a Family Model where the citizenry granted its trust to the State's representatives in the pursuit of common interests, while the common-law approach represents a Battle Model where inadequacy of the representation of the public, or even hostility of the government with regard to the true interests of the public is presumed, and preference is given to the representation by a community spokesman.<sup>173</sup>

Hence, an active citizenry that supplements (and at times challenges) the government initiative with regard to protecting the public interest is viewed more important in the Common law legal system than in the Civil law legal system.

The *second* factor emerges from the way the two systems view law and legal process and this is one of the determining factors for the development and flourishing of PIL. It is submitted that “the code-based nature of legal rules justified by strict notions of legislative supremacy can to a certain extent restrict the role of the judge in a civil law system to strictly applying the law as it is given by the legislature”.<sup>174</sup> As the result, the civil law judge has limited role of creative interpretation and discretion which makes judicial activism, one of the fundamental aspects of PIL, almost nonexistent. Compared to the common law, where a judge has a more expansive mandate and disposition to use his common sense and extra legal reasoning in deciding cases, judges in the civil law systems, Apple and Deyling argue, “view themselves less as being in the business of creating law than mere appliers of the law, i.e., a more technical and less active role in the development of the law than their common law counterparts”.<sup>175</sup>

Hence, public perception in the *Ministère Public* as a trusted protector the public interest does not nurture the initiative of private citizens to be substantially engaged in the public interest litigation. Even when they attempt to be involved in public interest litigation, the judiciary is relatively less encouraging. Therefore, the judicial activism aspect of public interest litigation

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<sup>171</sup> Ibid.

<sup>172</sup> Griffith (1970), “Ideology in Criminal Procedure or A Third Model of the Criminal Process”, 79 *Yale L.J.*, 359, p. 361

<sup>173</sup> Id., p. 280-281. See also Antonio Gidi (2003), “Class Actions in Brazil: A Model for Civil Law Countries”, *The American Journal of Comparative Law*, Vol. 51, No. 2, pp. 311- 408.

<sup>174</sup> Yosef, *supra* note 78, p. 21.

<sup>175</sup> J. Apple and R. Deyling (1995), “A Primer on the Civil Law System”, available at <<https://www.fjc.gov/sites/default/files/2012/CivilLaw.pdf>>, p. 37 (Accessed on August 28, 2017).

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is more likely to be successful in common law rather than in civil law systems because of the different roles that judges assume in the respective systems can cause variation in the pace, dynamism and development of PIL.

As Ethiopia's legal regime predominantly belongs to the civil law legal system, one may argue that the development of PIL might have been affected by the legal system. Consistent with the civil law system, important powers in the pursuit of the public interest in civil proceedings are entrusted to the Ministry of Justice, and at present the Federal Attorney General of Ethiopia is entrusted with the power of "enforcing civil interest of ... the public".<sup>176</sup>

Although the speed and intensity of development of PIL might have been affected by the type of the legal system in a country, there is a steady trend toward the convergence of the two legal traditions. For example, the common law /civil law divide in relation to PIL seems to have withered away through time. Hence, the current practice of PIL in the world shows that the divide is no more a defining factor as it is being applicable in and embraced by countries belonging both to the civil and common law legal systems.<sup>177</sup> This can, *inter alia*, be attributed to the synthesis that is being created among the two legal systems<sup>178</sup> and the global recognition of human rights norms and democratic ideals that have caused the proliferation of constitutions with enforceable bills of rights.<sup>179</sup>

### 5.3 Barriers caused by the current system of government

The other factor that may explain the slow pace in the legislative strengthening of PIL could be explained in terms of political will. The beginning of PIL in the US is marked by "calculations of power".<sup>180</sup> PIL increases the frequency and scope of judicial review of agency action and toughens the power of the courts and the hands of outside intervenors in the administrative process.<sup>181</sup> The relaxation of the standing rules in the US has "transferred discretion from administrators to private interests who come to be in a position to decide which lawsuits to bring and which legal standards to enforce" and "has reduced executive control and leadership".<sup>182</sup>

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<sup>176</sup> Federal Attorney General Establishment Proclamation No. 943/2016. Art. 5(4).

<sup>177</sup> Yosef, *supra* note 78, p. 21.

<sup>178</sup> Apple and Deyling, *supra* note 175.

<sup>179</sup> Yosef, *supra* note 78, p. 21

<sup>180</sup> Greve, *supra* note 42, p. 229.

<sup>181</sup> Stewart (1975), "The Reformation of American Administrative Law" 88 *Harv. L. Rev.*, 1667 as cited by Greve *supra* note 42, p. 229.

<sup>182</sup> Karen Orren (1976), "Standing to Sue: Interest Group Conflict in Federal Courts", 70 *American Political Science Review*, 723, 724 as cited by Greve, *supra* note 42, p. 229.

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According to Greve, the separation of power that leads to the relentless struggle for power between the legislative and executive power in the US is the primary reason of the legislative consolidation of PIL in the country.<sup>183</sup> As the result, the legislature has an institutional interest not just “in usurping executive power for itself but also in delegating it to others, including the judiciary and special interest groups”.<sup>184</sup> The legislature which is wary of “imperial presidency” and “runaway bureaucracy” uses judicial adjudication to control government agencies.<sup>185</sup> Partisan politics plays its role in augmenting the legislative’s interest in using judicial control over the executive agencies.<sup>186</sup> Consequently, “the growth and consolidation of the citizen suit [PIL] mechanism fall in a period of American history during which the Congress has been dominated by the Democratic party, and the presidency, with the exception of the Carter years, by the Republicans”.<sup>187</sup>

However, in parliamentary systems like Ethiopia where the executive is elected by the legislature and where the great majority of the laws and policies are initiated by the executive, it is difficult to establish a strong motive for the legislature to use legislative oversight to control the executive. The fact that the parliament and the executive are dominated by the same party, in the Ethiopian context, exacerbates the problem and has effectively made checks and balances inconceivable, and the parliament’s role has been confined to endorsing bills presented to it by the executive rather than meaningfully holding the latter accountable or enacting laws that enhance human rights protection. Although the laws assign responsibilities to the government, they do not provide legal liability that must be activated when the executive does not perform these responsibilities. Why would the legislature restrain the authority of what is after all “its” executive?<sup>188</sup>

It should be noted that having a parliamentary system of government *per se* may not necessarily limit the growth of PIEL. India, who has a parliamentary system of government, has one of the most matured PIL systems in the world. And the development of PIL in England is also very encouraging.<sup>189</sup> But in these

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<sup>183</sup> Greve, *supra* note 42, p. 229.

<sup>184</sup> R. Melnick (1983), “Regulation and the Courts” 18-23, as cited by Greve, *supra* note 42, P. 230.

<sup>185</sup> Greve, *supra* note 42, p. 230.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.*

<sup>188</sup> For more discussion on the issue, *see* Greve, *supra* note 42, p. 230.

<sup>189</sup> In England, long before the emergence of PIL, there was the device of *relator action*. The foundation of this principle is the interest of the Crown as *parents patriae* in upholding the law for the benefit of the general public. It is the interest of the Crown to see the “public bodies discharge their functions properly and that they do not abuse or misuse their powers”. Hence, in both England and India, the weakness of the parliamentary form

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parliamentary systems, there has been a strong tradition of judicial independence.<sup>190</sup> Partly because it belongs to the common law legal tradition where judicial activism is more extensive and partly encouraged by the power vested in it by the Constitution, the judiciary in India can test not only the validity of laws and executive actions but also of constitutional amendments.<sup>191</sup> It is entrusted with the final say on the interpretation of the Constitution and the judges are strong enough to check on the violations of rights by the other branches, and maintain their independence and.

But in countries like Ethiopia where the judiciary has never truly been a third branch of the government (while the executive an all controlling branch), the likelihood of the judiciary emerging as a protector of the public interest against other branches is very minimal. This problem is partly caused and compounded by the fact that Ethiopia belongs, predominantly, to the civil law legal system where the judges have a very small room for judicial activism. As has been seen above, the judiciary is stripped of some of its inherent powers.<sup>192</sup> The current system of government thus exacerbates the already existing problems of the judiciary, and impediments against the flourishing of PIL through legal development and implementation may partially be explained in terms of the system of government in place under the FDRE Constitution.

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of government in promoting PIL has been compensated in many ways. *See* K. Surendra Mohan (1984), "Public Interest Litigation and Locus Standi", *523 Cochin University Law Review*, available at:

<http://dspace.cusat.ac.in/jspui/bitstream/123456789/10995/1/Public%20Interest%20Litigation%20and%20Locus%20Standi.PDF>, last visited on 2/12/2017. *See also* McCormick, C. (2014). "Public Interest Litigation in the United Kingdom: Enemy of the State", *King's Inns Student Law Review* 4, 133-148.

<sup>190</sup> Pritam Kumar Ghosh (2013) , "Judicial Activism and Public Interest Litigation in India", *Galgotias Journal of Legal Studies*, 2013 GJLS Vol.1, No.1. p. 82. It is said that an: "independent judiciary armed with the power of judicial review was the constitutional device chosen to achieve" the Constitutional objectives of India. The role of the executive in the appointment of the judges of the high and supreme courts in India is limited compared to that of Ethiopia. For more discussion on the judicial appointment in India, *see* Soaham Bajpai "Judicial Appointments in India: Judicial Approach" , available at: <https://www.gnlu.ac.in/bc/JUDICIAL%20APPOINTMENTS%20IN%20INDIA-%20JUDICIAL%20APPROACH.pdf> (Last visited: 18/12/2017.)

<sup>191</sup> *Ibid.*

<sup>192</sup> *See* for instance , Article 62(1) of the FDRE Constitution, Proclamations 250/2001 and 251/2001 as discussed above . For an elaborate discussion on the impact of separation of powers on the independence of the judiciary, *see* Assefa Fiseha (2011), "Separation of powers and its implications for the judiciary in Ethiopia", *Journal of Eastern African Studies*, Vol. 5, Iss. 4, 2011; Muluken Berhanu , "Independence of the Judiciary in Parliamentary Democracy: The Ethiopian Experience", unpublished, available at [http://repository.smuc.edu.et/bitstream/123456789/2419/1/procewedings\\_of\\_the\\_third\\_student\\_research\\_forum.61-76.pdf](http://repository.smuc.edu.et/bitstream/123456789/2419/1/procewedings_of_the_third_student_research_forum.61-76.pdf)

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#### 5.4. Barriers related to lack of access to information and awareness

Access to accurate, timely, reliable and usable environmental information is one of the prerequisites for environmental protection. The Rio Declaration on Environment and Development stresses the importance of access to information for the protection of the environment.<sup>193</sup> Effective access to meaningful information opens the way for empowering citizens to exercise a measure of control over resources and institutions and is viewed as an important step in the democratization of environmental decision-making.<sup>194</sup> Access to government information is a *sine qua non* to enable citizens and NGOs to exercise their role in PIEL meaningfully. Access to information enhances public scrutiny of the environmental impacts of industrial activities, executive actions (or inactions) and developmental endeavors; and this in turn acts as a 'vital discipline' for environmental protection agencies.<sup>195</sup>

Access to environmental information is constitutionally guaranteed in Ethiopia.<sup>196</sup> It is also provided for in the Environmental Policy<sup>197</sup>, the 2008 Freedom of Mass Media and Access to Information Proclamation (FMMAI)<sup>198</sup> and other mainstream environmental legislation.<sup>199</sup> However, the practical availability and disclosure of environmental information is inadequate. This is exacerbated by the absence of administrative law that governs and ensures the transparency of the procedures through which government entities exercise their power. The MEFCC is empowered to establish a central information system and promotes efficiency in environmental data collection, management and use and prepare a periodic report on the state of the country's environment.<sup>200</sup> It is

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<sup>193</sup> Rio Declaration *supra* note 93, Principle 10.

<sup>194</sup> Yenehun Birlie (2011), "The Right to Know: The Legal and Policy Foundation for Access to Environmental Information in Ethiopia", Unpublished, LLM thesis, University of Alabama.

<sup>195</sup> Jeremy Rowan-Robinson *et al.*, (1996), "Public Access to Environmental Information: A Means to What End?" 8 *J. Env'tl. L.* 19, at 20, as cited by William A. Wilcox, (2001) "Access to Environmental Information in the United States and the United Kingdom", 23 *LYLAICLR* 121, pp.194-200.

<sup>196</sup> Article 29 of the FDRE Constitution.

<sup>197</sup> FDRE (1997), *Environmental Policy of Ethiopia*.

<sup>198</sup> FDRE, Freedom of the Mass Media and Access to Information proclamation, No.590/2008 (hereafter FMMAI).

<sup>199</sup> PCP, *supra*, note 129, Environmental Impact Assessment Proclamation No. 299/2002, Negarit Gazette, 9thYear No. 11, art. 15(1&2); Environmental Protection Authority (2003), Environmental Impact Assessment Procedural Guideline Series 1. *See* Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia, Proclamation No. 916/2015, Article 309/1(L &O).

<sup>200</sup> Proclamation No. 916/2015, *Ibid.*

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expected to be the information hub concerning the environment. But it lacks the capacity to effectively discharge this duty.

Another concern relates to public unawareness about public interest environmental litigation, and regarding the right to a clean and healthy environment, and the right to environmental information and. Adequate awareness in this regard has a reciprocal cause and effect relationship with the effective assertion of these rights in the court of law when they are violated.<sup>201</sup> Many judges also lack environmental sensitivity and have misconceptions about the relationship between environmental protection and development.<sup>202</sup> My interviews with the concerned personnel of the Ministry<sup>203</sup>, Addis Ababa Environmental Protection Authority<sup>204</sup> and Oromia Land and Environmental Protection Bureau<sup>205</sup> reveal that public unawareness about PIEL opportunities is one of the main reasons for the inadequate utilization of PIEL opportunities. The MEFCC is responsible to “promote and provide non-formal environmental education programs, and cooperate with the competent organs with a view to integrating environmental concerns in the regular educational curricula”.<sup>206</sup> Accordingly, the Ministry has been engaging in some awareness raising activities by using platforms such as the media.<sup>207</sup> But given the gravity of the problem, much remains to be done.<sup>208</sup>

The role of the media in environmental awareness raising and in the realization of the right to environmental information is pivotal. It informs and educates the public about environmental problems, probable solutions and precautionary measures. It can also expose the failures of environmental agencies and individual environmental offences against whom PIEL could be brought by NGOs and bona fide citizens.<sup>209</sup> The Environmental Policy of Ethiopia recognizes the important role that can be played by the mass media, and it states the need “to effectively use them in creating and promoting environmental awareness in view of the physical problems of access and

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<sup>201</sup> Interview with Ato Wondwosen Tadesse an environmental law expert at the Ministry of Environment, Forestry and Climate Change, January 17, 2017, *See also Mekete supra* note 154

<sup>202</sup> *See Mekete supra* note 154.

<sup>203</sup> Interview with Ato Wondiwosen *supra* note 201.

<sup>204</sup> Interview with an employee at Addis Ababa EPA, who prefers to remain unnamed, Decemeber 2016.

<sup>205</sup> Interview with an employee at Oromia Land and Environmental Protection Bureau who prefers to remain unnamed, December 2016.

<sup>206</sup> Definition of Powers and Duties of the Executive Organs of the Federal Democratic Republic of Ethiopia Proclamation No. 916/2015, Art. 309(1)(p).

<sup>207</sup> Interview with Wondwosen , *supra* note 201 .

<sup>208</sup> *Ibid.*

<sup>209</sup> Yenehun , *supra* note 194, p. 34.

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communications ...”.<sup>210</sup> Practically however, the private media is weak, the public media is gravely supervised by the government, self-censored and the media in general seems to put its priority elsewhere such as on the entertainment and other less politically sensitive areas rather than human rights issues.

It is indeed very difficult for private media to criticize and uncover the environmental impacts of mega projects that are undertaken by the government. Nor would the government media (that claims to be informed by the principle of “developmental journalism”), dare to reveal the environmental flaws of various mega government projects or even private industries. This problem is, as stated above, compounded by the exclusion of the foreign and resident CSOs from human rights advocacy activities. The government’s deep distrust of and restrictions against the media has made it very difficult to promote environmental democracy based on accountability and engagement of citizens. Hence, lack of environmental information and low level of awareness about the environment are among the root causes for the dormant and stunted features of PIEL in Ethiopia.

## Conclusion

Resilience to environmental hazards and problems is at its lowest in countries like Ethiopia where the majority of citizens live under the poverty line (i.e., minimum level of the necessities for livelihood). It is such citizens who ultimately shoulder the impact and the ill-effects of national and international environmental woes. The challenge is further exacerbated by their unawareness of the law and their rights. This environmental injustice is aggravated by gaps in access to legal experts, PIEL and a responsive judiciary.

In a country where the government is the main actor of developmental activities, the role of community participation in various forms in balancing the tension between development and environmental protection is crucial. PIEL is one of the avenues for the participation of communities in the decision making process because it enables representatives, interest groups, bona fide individuals and human rights NGOs to challenge the decisions of government agencies’ and polluters in the court of law. PIEL is a very useful instrument in injecting an informed, participatory and transparent approach to the processes of sustainable development, and to governmental and private sector actions that affect the environment in the course of waste disposal and using resources as inputs.

However, after 15 years of legislative recognition, PIEL in Ethiopia is yet a dormant and stunted tool in environmental protection. Fundamental issues such as judicial activism, legal culture, political will, the role and perception of the

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<sup>210</sup> Environmental Policy *supra* note 197, section 4.7(d).

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public towards law, judicial process and justice, the type of legal system, the perception and behavior of the government towards civil society and gaps in environmental information are among the root causes that should be addressed so that PIEL in Ethiopia can attain the height that it deserves. \_\_\_\_\_ ■

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