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DWINDLING ETHIOPIAN FORESTS: THE 'CARROT' AND 'STICK' DILEMMA

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Introduction

'C*learing*' forests for agriculture, cattle grazing or establishment of villages was regarded as '*maknat*' in Ethiopia until awareness towards the adverse effects of deforestation gradually developed during recent decades. '*Maknat*' is an Amharic term which literally means '*straightening up*'; and in the context of forest clearing, it means '*preparing land for use'*. Such a mindset is contrary to the belief of many communities which give reverence to nature including trees. Traditional beliefs such as '*adbar*'[1] in many parts of Ethiopia, the practice of '*Irecha*'[2] in Oromo tradition and "*guido*"[3] (i.e. cultural forests which serve as places of worship in Sheka, Kafa) are typical concepts of reverence to nature.

The 2005 Report of the UN Commission for Africa states that "More that 70 percent of sub-Saharan Africa's population depends in large measure upon forests and woodlands for livelihoods and 60 percent of Africa's energy demand is met by forests."[4] In light of such dependence of sub-Saharan Africa on forests, the impact of deforestation is indeed severe. "Deforestation removes key sources of food, fuel and medicines for rural poor people as well as degrading biodiversity and wildlife – part of Africa's comparative advantage for tourism and pharmaceuticals."[5]

Although about 35 % of the land cover of Ethiopia was covered with high forests (during the early 1900's), it was reduced to 16% and 3.6 % of the total land area of the country in early 1950s and early 1980s respectively.[6] At pre-

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[1] Large tree under which ceremonies and community assemblies are made. In Shaka Zone (Kafa) , "Deddo" has a similar concept. See *infra*, Tadesse & Masresha note 9, pp. 12, 13

[2] Celebration in October which has elements of reverence to nature

[3] "Cultural Forests, wetlands, riverine forest and waterfalls are traditional religious sites and hence protected by imposing resource and habitat taboos through *guido*." (Tadesse Woldemariam and Masresha Fetene, *Forests of Sheka, Infra*, note 9 p. 12)

[4] *Our Common Interest*, Supra note 42

[5] Ibid

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sent the forest cover of the country is estimated to be 2.3% of the total land-mass of the country.[7] The first section of this article highlights the problem of Ethiopia's dwindling forests at accelerated rate. And sections 2, 3 and 4 forward a brief discussion on the legal regime and the factors behind continued deforestation despite the laws enacted towards forest conservation and development.

1. The magnitude, reasons and effects of deforestation

1.1- Magnitude of the problem

Depletion of forests and their degradation "are a threat to ecosystem diversity and a fundamental influence on the declining standard of living of many households."[8] The steadily declining forest cover of South West Ethiopia, for example, which was in a relatively better state illustrates the magnitude of the problem of deforestation:

> The change in forest cover during the last 30 years is the most severe anthropogenic catastrophe that the country has seen. Reusing (1998) estimated that the closed high forest of South West Ethiopia dropped from a 40% cover between 1971 to 1975 to only (around) 18% by 1997, which is a loss of about 60% (Tadesse *et al.* 2002). Conversion of forestland to other land use types is the major cause of deforestation. Around 235,000 hectares of closed and slightly disturbed forest areas were deforested between 1971 and 1997, a loss of about 10,000 hectares of forest every year (Reusing 1998).[9]

Tadesse and Masresha state that in the woredas of Sheka Zone (in SW Ethiopia) "dense closed forest decreased from about 55,304 hectares in 1987 to 43,424 by 2001. On the other hand, open forest decreased from 46,494 to 35,077 hectares during the same period. Their study in four *kebeles* namely (Uwa, Keja-Chewaka, Welo and Beto which border a tea plantation) indicated that dense cover which was 60% in 1973 declined to 50%, 32% and 20% respectively in the years 1987, 2001 and 2005.[10] The decrease in dense

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[6] EPA (1997) & EFAP (1994) Ethiopia Forest Action Program. Final Report. MoNRDEP. EFAP

[7] Demel Teketay, *Status of Forestry Development, Conservation and Utilization in Ethiopia*, 2000. pp. 37-53, In: Proceedings of the First Meeting of Eastern and North Eastern Node of the African Forestry Research Network (AFORNET) in Kenya 24th -26th May 1999.

[8] Kaba Urgessa, Perceptions of forest cover and tree planting and ownership in Jimma Zone, Ethiopia, http://www.fao.org/docrep/005/y9882e/y9882e04.htm (Accessed: February 22, 2008)

[9] Tadesse Woldemariam and Masresha Fetene, *Forests of Sheka: Ecological, social, legal and economic dimension of recent land use/ land cover changes* --- Overview and Synthesis, (Melca: 2007), pp. 4,5

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forest cover was even worse (about 12.2 % per year) in Gemado kebele mainly owing to expanding coffee plantations. The dense forest cover which was 78% in 1973 has steeply fallen to 43% and 16% respectively in the years 1987 and 2005.[11]

1.2 Major reasons of deforestation in Ethiopia

Ethiopia's '*Policy and Strategy for the Development, Conservation and Utilization of Forests*' states that the increasing demand for farmland, fuel wood, construction, unlawful settlement in forests and unlawful logging which are caused by population growth are grounds for deforestation. The adverse effects stated in the document include depletion of biodiversity, soil erosion, runoffs, land degradation, desertification, droughts and recurrent famine.[12] Kaba Urgessa also attributes the severe deforestation and degradation of Ethiopia's forest cover to "heavy exploitation resulting from an escalating demand for fuelwood and land for cropping and grazing.[13]

Dr. Taddesse and Professor Masresha express their concern regarding "recent changes in institutions, forest cover and religion" that have caused "a significant change in people's perception towards forest resources and resource management."[14] According to Tadesse and Masresha, clan leaders who had traditional roles in the management of forests "had the right to enforce compliance to taboos and restrictions related to the cultural forest. Clan leaders also imposed punishment on people involved in cutting trees." Based on their study on Forests of Sheka Zone, they have criticized the post-1997 transfer of cultural forests into state forests and the allocation of "large forest areas (*Kobo* land), cultural forests (*guido*), burial places, wetlands and riverine forests along the Baro River" to tea plantations."[15] This has allowed the bulldozing of tabooed and respected sites thereby degrading local values, belief systems and feelings of responsibility.[16]

1.3 The need for forest conservation and reforestation

Professor Sebsebe Demissew states the need for conservation of forests on the following grounds:

- *Timber:* "If properly managed, some of the forests could be used

[10] Ibid, p. 9

[11] Ibid, p.10

[12] Policy and Strategy for the Development, Conservation and Utilization of Forests (Ministry of Agriculture and Rural Development, April 2007) N.B- Translated from the Amharic version.

[13] Lisanework, N. & Mesfin, T. 1989. "An ecological study of the vegetation of the Harena forest, Bale." *Sinet: Ethiopian Journal of Science*, 12(1): 63-63. (in kaba Urgessa, *Infra, note 226*)

[14] Tadesse and Masresha, *supra* note 9, pp. 12, 13

[15] Ibid

[16] Ibid

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as a source of timber" through staggering timescale of production so that it can be matched with reforestation.

- *Regulation of water*: "Catchment areas well covered by natural forest provide maximum infiltration of water and a continuous stream flow. Once the forest cover is removed, the natural infiltration capacity of the soil will be impaired, and rain-water will flow on the surface, leading to a higher rate of erosion and the consequent drying up of streams and rivers." Projects associated with rivers, such as, irrigation, hydroelectric projects, etc. "depend on continuous flow of streams and rivers which ultimately depend on the forest cover of the mountains.
- *Conservation of soil fertility*: Soil is intact in forests, and erosion is minimal.
- *Shelter for animals*: Forests are natural "habitats for many wild animals." Deforestation means depriving animals of shelter and in effect cause and accelerate their extinction.
- *Source of economic plants (and biodiversity)*: "Most modern medicines are of plant origin, and a large proportion of the Ethiopian population uses the services of traditional healers who depend entirely on herbal medicine." …
- *Education and recreation*: Present and future generations have the right to learn and discover the species found in forests, (and their aesthetic utility and their significance as centers of recreation and tourism is apparent). [17]

The *first* measure suggested by Sebsebe is the participation of local farmers in forest conservation by involving them in the decision making process when forest areas are made subject to protection. Meanwhile, he notes the need to educate farmers and raise their standard of living in addition to availing them with alternatives such as allowing farmers to plant fast growing trees in the area. *Secondly*, Sebsebe underlines the need to make *inventory* of forests so that sites of timber, firewood, reforestation, etc. can be conducted through appropriate forest management. And *thirdly* he recommends an integrated approach towards forest conservation and reforestation because it is the shared concern of farmers, foresters, agronomists, the public at large and governmental and non-governmental institutions concerned with the conservation of natural resources.[18]

[17] Sebsebe Demissew, "The Floristic Composition of the Menagesha State Forest and the Need to Conserve Such Forests in Ethiopia", *Mountain Research and Development,* Vol. 8 No. 2/3, African Mountains and Highlands (May- Aug., 1988) p. 246

[18] Ibid, p. 147

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2- Waves of deforestation, adverse impacts and the Legal Regime: An Overview

2.1 Waves of deforestation

There has been enhanced awareness about the necessity of effective legal regime since the mid-1960s. Series of Proclamations and Regulations were enacted in 1965 and 1968 that dealt with the conservation, protection and exploitation of state forests,[19] management of protective forests,[20] conservation and utilization of private forests [21] and Regulations which determine power of rangers and forest guards.[22] Before 1974/75, about half of the forestland in Ethiopia was privately owned or claimed, and about half was held by the government. [23] The legal regime until 1974 aimed at the protection of state forests and protected forests (i.e. forests that are protected from human and animal interference for the purpose of protection and development). Moreover, the exploitation of private forests were regulated with a view to balancing utilization with forest protection and development.

There was a wave of deforestation after the 1975 Rural Land Proclamation [24] because it took some years to offer effective protection to forests, and secondly the protection of forests which were previously made through guards of private owners, forest rangers and guards of state forests was considerably loose for some years after nationalization of rural land. "The 1975 land reform nationalized forestland and sawmills which existed mostly in the south (and southwest). The government controlled harvesting of forestland, and in some cases individuals had to secure permits from local peasant associations to cut trees. But this system accelerated the destruction of … forests." [25]

[19] State Forest Proclamation No.225/1965; Protection of State Forests Regulations No. 344/1968 and Exploitation of State Forests Regulations 345/1968

[20] Protective Forest Proclamation No. .227/ 1965; Management of Protective Forests Regulations No. 347/1967

[21] Private Forest Conservation Proclamation (Proc. No. 226/1965); Protection of Private Forests Regulations No. 343/1968; Exploitation of Private Forests Regulations No. 346/1968; Establishment of Community Forests Regulations No.348/1968

[21] Private Forest Conservation Proclamation (Proc. No. 226/1965); Protection of Private Forests Regulations No. 343/1968; Exploitation of Private Forests Regulations No. 346/1968; Establishment of Community Forests Regulations No.348/1968

[22] Power of Rangers Regulations No. 349/1968; Power of Forest Guards Regulations 350/1968

[23] *Infra, note 25.*

[24] Proclamation to Provide for the Public Ownership of Rural Lands (Proclamation No. 31/ 1975)

[25] The Library of Congress Country Studies; CIA World Fact book http://www.photius.com/countries/ethiopia/economy/ethiopia_economy_forestry.html (Accessed: February 15, 2008)

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It was in the midst of such accelerated deforestation that the Forest and Wildlife Conservation and Development Proclamation No. 192/1980 was enacted in 1980. The Proclamation was indeed a significant step towards forest conservation and development. The famine which occurred few years after the Proclamation, was a wake up call to the level of awareness regarding the significance of forest conservation and development in Ethiopia's combat against poverty, recurrent droughts and famine.

During the late 1980's there were efforts to formulate the Conservation Strategy of Ethiopia (CSE). It took "a holistic view of the natural and man-made and cultural resources, and their use and abuse" and it sought "to integrate into a coherent framework of plans, policies and investment related to environmental sustainability."[26] The first phase (1989-1990) involved the drafting of Conceptual Framework of Conservation Strategy of Ethiopia (CSE).[27] The second phase of Conservation Strategy of Ethiopia (CSE, 1990-1995) dealt with policy and institutional framework and action plan. And the third phase (1995-1998) was the "implementation phase to finalize the development of regional state action plans and development programs"[28] mainly aiming at capacity building.

The latter phases of Conservation Strategy of Ethiopia and a stronger legal regime for forest protection and development were necessitated by a wave of illegal logging which (analogous to post 1974/75 events) occurred post 1991/92 during which change of government had created power vacuum in various rural areas until administrative entities and farmers' associations were capable of conducting some control against the wave of deforestation.

The following study by Terefe *et al* indicates the steady decline of forest cover in Western Shewa:

> The highlands of Western Shewa, in the Upper Awash Basin, were … covered with dense forest. The dominant tree species were *Tid* and *Zigba*. Nowadays, however, it has been difficult to find any dense forest in the area at all. Today, there are scattered individual trees of *Tid* and *Zigba* in remote and inaccessible places only.
>
> (According to the study conducted through focus group discussions and interviews) population pressure and the prevailing land use are the major factors. Particularly elders said that during the reign of Haile Selassie, large proportion of the plateau in Western Shoa (Ginchi, Holetta and Addis Alem areas) were covered with dense natural forests. According to elders, it was

[26] FDRE Environmental Policy, Environmental Protection Authority (in collaboration with Ministry of Economic Development and Cooperation (Foreword, 1997)
[27] Ibid
[28] Ibid

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> after 1974 that the area witnessed severe depletion of forest resources. … [T]here was stiff competition among peasants for the purpose of securing agriculture land, and wood for construction and fuel. [29]

The author of this article believes that what the researchers stated as "*stiff competition among peasants*" to secure farmland was aggravated by the widespread practice of availing more land to families with bigger numbers indirectly rewarding households for every child they bring into the family. Moreover, newly wed couples were given land by farmers associations, which indirectly became an incentive towards early marriage and a drive towards bigger families thereby accelerating the momentum of Ethiopia's population growth in a pace unheard of during the preceding decades.

Terefe *et al* stated that there were various efforts during the 1980's "through reforestation programs which (the elders) described as successful" until "another round of destruction was experienced in the area" during the political transition of the early 1990's.[30] In a similar study conducted in the Ghibe-Omo Basin, Mekonnen and Biruk stated that large forestland of the upland area in the Omo-Ghibe Basin was converted into farmland between 1973 to 1994 (MoWR 1996).[31] Based on information from Natural Resource Conservation Office of the Woredas of Bako and Sokuru and Jima Zone, the study noted that the forest in the area was in a very good condition before 25 years and stated that the alarming rate of forest degradation is attributable to primarily agricultural land expansion including sloppy lands and secondly to "the (1994) Forest Proclamation that abolished check points, (which encouraged) cutting of prohibited species for timber production (such as) *Cordia Africana* and *Hagenia abyssinica*."[32]

Mekonnen & Biruk's study revealed that "the forest resources of the *Hammer, Benna* and *Dasenech* Weredas have been reduced significantly since the last ten years."[33] It further indicated that overgrazing, newly introduced crop farming, rapid population growth, absence of an alternative livelihood … are the major causes for deforestation. [34]

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[29] Terefe Abebe, Tsige Gebru, Wondafrash Genet and Yonas Tadesse, "Causes, Consequences and Management Aspects of the 2006 Flooding Hazards in Awash River Basin," in *Ethiopia Between the Sharp Scissors: Climate Change and Environmental Degradation* (Forum for Environment, December 2006) pages 41, 42.

[30] Ibid, p.42

[31] Mekonnen Adinew and Biruk Asfaw, "Food Hazard Assessment in the Ghibe-Omo Basin: The Case of 2006," in "*Ethiopia Between the Sharp Scissors: Climate Change and Environmental Degradation*" (Forum for Environment, December 2006) p. 23

[32] Ibid, p. 24

[33] Ibid

[34] Ibid

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The study conducted by Yonas and Sinework came up with similar findings about the waves of deforestation in eastern Hararge.

> The highlands of eastern Hararge were once covered with dense forests. However, due to the rapid increase in population pressure and the subsequent demand for agricultural land, firewood and wood, forests and woodlands were cleared indiscriminately. … [D]uring the reign of Emperor Haile Selassie I (1930 -1974), the forest cover of the highland part was very dense.
>
> Since forests were owned by landlords, no one was allowed to enter the forest zone let alone cause damage. In fact, the collapse of the imperial rule gave way to massive forest destruction. … . Consequently, the mountain remained devoid of vegetation and this in turn aggravated soil erosion. [35]

Yonas and Sinework stated that "the large-scale mass campaign of undertaking soil conservation and reforestation works supported by food-for-work in *Dengego* highland" conducted in the 1980's "had brought significant improvement n maintaining the soil and forest status of the upland." However, during the late 1980's "settlers turned the forests into farmlands" and "large-scale deforestation and human settlement took place in the forest" especially in 1991 to 1995. And "consequently, the area is devoid of forests."[36] The study shows that these waves of deforestation were mainly attributable to lack of awareness and lack of sense of ownership on the development process, and the transitional periods during changes of government gave impetus for deforestation and the degradation of the environment.[37]

2.2- Deforestation, droughts, flooding and soil erosion

In spite of the meager forest cover in Ethiopia, there is still an imprudent enthusiasm to avail land (with forest and open forest covers) to 'investors.' In terms of short-term benefit, allocation of forest land to cash crop investors might generate public revenue from land lease, production of cash crops and employment opportunities. In many instances, however, such lands slip into the hands of land speculators who seek easy money thereby rendering the *prima facie* advantages imaginary than real. And in terms of long-term benefits, such conversion of forests to modern agriculture, resettlement, etc … clearly brings about further deforestation and environmental degradation which are very closely related with droughts and flooding.

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[35] Yonas Tadesse and Sinework Dagnachew, "Flooding at Dire Dawa: A Case Study of the 2006 Flash Flood," in "*Ethiopia Between the Sharp Scissors: Climate Change and Environmental Degradation*" (Forum for Environment, December 2006) p. 55

[36] Ibid, pp. 55, 56

[37] Ibid, p. 56

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The impact of deforestation has been common knowledge and most of its adverse effects do not seem to need discussion. However, there seems to be the need for further awareness (in Ethiopia) about the relationship between deforestation and flooding.

> Different studies reveal that land use changes can increase or decrease the volume of runoff and the rate and timing of flooding. Viessman and Lewis (2003) pointed out that afforestation, owing to its effects on infiltration, increases interception. As a result, forests increase dry season transpiration and reduce dry flow. Deforestation, on the other hand, has the converse effect. It increases quick overland flow and delay in subsurface flow (De Moraes et al, 2006). Due to the latter case, base flow is reduced. Thus, deforestation creates high flood peaks and increases soil erosion. [38]

Such soil erosion obviously creates gullies which grow deeper and wider to the extent that streams which flow into rivers and lakes steadily decrease. Water flow from ever-branching gullies enhance the sedimentation of rivers and land degradation in the lower plains because the water flows initially transport the fertile topsoil of sloppy lands and then carry sand and gravel which will ultimately cover the fertile topsoil of farmlands and shrubs in the lower areas. The 2006 flooding in Fogera Plain is a case in point:

> … A continued sedimentation of the lower *Gumara* and *Ribb* rivers is the result of the rapid erosion that is taking place in upper sites. In those upland sites that have been assessed there are so many gullies … (which) are widening in dimension. ... [R]ainfall of a mild intensity is taking away their soils in a greater proportion than heavier rainfalls used to do when the areas were under vegetation cover. On the other hand, in the down stream areas huge sediment is brought with the flood. It was also confirmed that along the vast plain in *Fogera* and *Libo Kemkem Weredas*, there existed huge fresh deposit of sediments. … [I]n just one rainy season (in 2006), sediment of more than half-meter depth was deposited over an area in *Shaga Mariam* Peasant Association of *Fogera* Woreda. [39]

Wondafrash and Shiferaw noted that "deforestation is the single most responsible factor for the continued soil erosion" in the area.[40] With regard to the progressive worsening of sedimentation, the study indicated that sediments of a bigger size were being deposited on the farmlands during 2006 flooding season. During focus group discussion "it was discovered that, usually over the previous *kiremt* (rainy seasons), only fertile sediments used to be depos-

[38] Wondafrash Genet & Shiferaw Alem, "*The 2006 Flood in Fogera Plain: Causes, Effects and Issues for Effective Management*," in "Ethiopia Between the Sharp Scissors: Climate Change and Environmental Degradation" (Forum for Environment, December 2006) p. 2

[39] Ibid, p. 7

[40] Ibid

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ited when the *Ribb* and *Gumara* rivers inundated their farmlands. … But (in 2006) the rivers brought gravels and sand in huge amount." [41]

The study showed that deforestation leads to rainfall droplets which fall free on land surface with a kinetic energy which causes soil erosion and loss of soil organic matter. Decrease in infiltration of water into the soil would then lead to increase in runoff and flooding.[42] The study further revealed that soil erosion *primarily* creates gullies which affect flow of rivers by increasing or decreasing the gradient of rivers, and which *secondly* cause sedimentation that leads to decrease in the cross sectional area of rivers and the resultant decrease in the discharge of water into the outlet of rivers thereby ending up in flooding.[43]

In the night of August 6th 2006, surge of flooding in Dire Dawa claimed the lives of 256 people and damaged about 5000 houses. [44] Floods chased nearly 36,000 people from the Fogera plains which flooded more that 6,000 hectares of cropland; and "irrigated farms and fertile lands along the Middle Awash river were also hit hard, with some 15,000 people displaced."[45] From August 6th to 13th 2006 "floods in Dasenech and Ngangatorn in South Omo caused more devastation, cutting off 14 villages and destroying whole settlements" during which 364 people died and 3,000 people drowned although the military managed to airlift about 1,300 [46] people out of the flooded villages.

And, in October 2006, at the middle of the night "another flood hit Kelafo, Mustahil and other low-lying villages in Somali region after traveling up to 1,100 kilometers from downpours in the Bale Mountains." This flooding killed "80 people and affected 362,000, including displacing 122,500."[47] These tragic events are indeed nature's wake up calls which are bound to stay looming at the shoulders of our barren mountains and plains while Ethiopia equally remains vulnerable to the opposite catastrophes of periodic droughts.

2.3 The legal regime: 1994 onwards

The preamble of Proclamation 94/1994 [48] (which has now been repealed by Proclamation No. 542/2007) *inter alia*, stated the grave and alarming situation of soil erosion and the need to arrest the expansion of desertification and ecological imbalances as its rationale. The Preamble further related forest development and conservation with the enhancement of sustainable develop-

[41] Ibid, p. 8
[42] Ibid, Figure 6, p. 12
[43] Ibid, Figure 7, p. 13
[44] *Annual Report 2006 Ethiopia*, UN World Food Programme (WFP Ethiopia, Addis Ababa), p 11
[45] Ibid, pp. 11,12
[46] Ibid, p. 12
[47] Ibid
[48] Proclamation to Provide for the Conservation, Development and Utilization of Forests (Proclamation No. 94/1994)

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ment "through the participation of the people and benefit sharing by concerned communities" and by making forest policies to be in harmony with agricultural development and other economic sectors.

Article 3 of Proclamation No.94/1994 enumerates three modalities of ownership (namely: state forest, regional forest and private forest) although state forest could have meant forests under the Federal Government and Regional States. However, Article 3 of the Proclamation currently in force, i.e. Proclamation No. 542/2007 [49] recognizes private forest and state forest as two modes of ownership. According to Article 2/6 of the latter Proclamation state forest is defined as "any protected forest, which is under the ownership of the Federal Government or a Regional State."

Proclamation No. 94/1994 addressed conservation and development of Forests (Part II) and Utilization of Forests (Part III) in addition to which there were miscellaneous issues. The recent Proclamation No. 542/2007 has devoted Part II to the promotion of private forest development (Art. 4) technology (Article 5) and markets (Article 6) along with corresponding stipulations (under Article 7) with regard to obligations of private forest developers. It also devotes Part III (Articles 8 to 11) to the conservation, development and administration of state forests. The legal regimes which regulate private and state forest utilization, development and administration have thus been distinctly formulated.

2.4 Private and state forest

'Private forest' refers to "a forest other than state forest developed by any private person and includes a forest developed by members of a peasant association or by an association organized by private individuals, investors and governmental and non-governmental organizations."[50] The phrase 'by an association organized by private individuals' raises the issue whether forest may be owned by a farmer's association, and if so, whether such ownership can be classified into private ownership.

We can take the issue further, and inquire into whether communities can own forests, because Article 4/3 of Proclamation No. 542/ 2007 provides that:

> "Management plan shall be developed, with the participation of the local community, for forests that have not been designated as protected or productive forests, and such forests shall be given to the community, associations or investors so that they conserve and utilize them in accordance with directives to be issued by the appropriate body."

[49] A Proclamation to Provide for the Development, Conservation and Utilization of Forests (Proclamation No. 542/2007)

[50] Article 2/9 of Proclamation No. 542/ 2007

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The rights embodied in Article 4 Sub-article 3 relate to 'conservation' and 'utilization' of forests that are not designated as protected [51] or productive [52] under the conditions stated in the provision. The interpretation of Article 4 Sub-article 3 in relation with Article 3 (which recognizes state and private forests) suggests two inferences. First, communities will bear the duty to conserve the forest which they can be entitled to utilize. And secondly, such rights do not constitute ownership because community ownership of forest has not been recognized under Article 3 of the Proclamation.

2.5 Promotion of private forest development, conservation and utilization

The former Proclamation (No. 94/1994) had merely embodied a single provision (Article 6) which dealt with conservation and development of private forests, while there was no provision that addressed the issue of utilization. The absence of a provision that dealt with utilization of private forests was apparent because the provision under Part III titled 'Utilization of Forest' had only envisaged utilization of state forests, regional forests and protected forests.

The repealed proclamation did not thus provide incentive to private foresters because Article 6 does not show the benefits gained by private foresters. There can of course, be private foresters, such as NGO's which might develop forests for purely environmental objectives. However, forestation by investors usually has profit motive subject to the environmental consideration of replacement of trees commensurate with periodic harvest of forest products.

Proclamation No. 542 / 2007 has indeed rectified this shortcoming and provides for various benefits which include the following:

- Promotion of forest development by providing private individuals, associations, government organizations, NGO's, and business organizations with rural land in areas designated for forest development if they want to develop forest (Article 4/1);
- Providing support with sufficient seeds and seedlings of the tree species that could have economic benefits (Article 4/4);

[51] "*Protected forest* means a forest designated … to be conserved and developed free from human or animal interference for the purpose of water shade management and the conservation of genetic resources, biodiversity and the environment in general as well as for the purpose of training and research." (Article 2/7 of Proclamation 542/2007)

[52] Forest designated for the production of industrial, construction and other forest products (Art. 2/8 of Proclamation 542/2007)

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- Assurance of private ownership of the forest given to private foresters on concession (Article 4/5);
- The right to use and transfer holding rights of forestland (Article 4/6);
- Entitlement to forestry capacity building schemes stipulated under Article 5; and
- Support in the enhancement of marketing skills and opportunities of forest products (Article 6).

The corresponding duties of private foresters are embodied under Article 7 which, *inter alia*, requires them to replace trees when harvested and to protect forests from pest, fire and other hazards.

2.6 The issue of community land-holding in the Ethiopian context

The concept of '*res nullius*' (things never owned) implies a master-owner relationship between humans and the environment. The concept regards natural resources not hitherto 'owned' susceptible to acquisition of ownership. Needless-to-say, there is the instinct of territoriality in all animals and birds. However, the modern concept of ownership requires title deeds as proof of ownership or possession (in the Ethiopian context), and an entire community technically does not have title over lands and forests as long as it does not possess the title deed to that effect. The question thus becomes whether indigenous communities who have lived in a certain area from time immemorial and who consider themselves not only as possessors and owners, but also as integral members of that particular ecosystem do not have ownership and possessory rights over the resources.

According to Article 3 of Proclamation No. 31/1975,[53] all lands are "the collective property of the Ethiopian People." In technical terms, every Ethiopian has around eighty millionth ownership right over every inch of Ethiopian land. This explains why land could only be possessed (*usus* and *fructus*) and not be sold, i.e. disposal (*abusus*) through sale. The Proclamation had recognized four forms of possession: individual farms, co-operative farms, state farms and lands possessed by pastoralist communities. In other words, land was publicly owned while the right to use it and exploit it was allocated under various modalities of possession.

Article 40 Sub-article 3 of the Constitution of the Federal Democratic Republic of Ethiopia provides that "The right of ownership of rural and urban land, as well as all natural resources, is exclusively vested in the *State and in the peoples of Ethiopia.*" The second sentence of the provision reads "Land is a common property of the Nations, Nationalities and Peoples of Ethiopia and

[53] Proclamation to Provide for the Public Ownership of Rural Lands

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shall not be subject to sale or other means of exchange." In effect, the Constitution recognizes co-ownership of land by the state and the people which may lead towards a plausible argument that the word '*people*' seems to apply to local and tribal communities as well.

2.7 Community land holding rights under Proclamation No. 456/2005

The Preamble of Proclamation No. 456/2005 [54] states the need "to sustainably conserve and develop natural resources and pass them over to the coming generation through the development and implementation of a sustainable rural land use …" The Preamble also expresses the necessity of putting "in place legal conditions which are conducive to enhance and strengthen the land use right of farmers to take the necessary conservation measures in areas where mixed farming of crop and animal production is prevalent and where there is a threat of soil erosion and forest degradation."[55] It is to be noted that the Proclamation's Preamble recognizes the existence of tribe based communal land holding system[56] which impliedly seems to envisage the existence of community land holding systems.

The term 'holding' in the Proclamation refers to private holding (Article 2/11), communal holding (Article 2/12), and state holding (Article 2/13) which are proved by 'holding certificate' (Article 2/14) issued by a competent authority as proof of rural land use right. Competent authority as defined under Article 2/17 "means a body established in accordance with the constitution of a region to ensure that a system of rural land administration and utilization is realized in the region."

With regard to ownership, Article 5/3 provides that "Government being the owner of rural land, communal rural land holdings can be changed to private holdings as may be necessary." This clearly indicates that the Proclamation considers only one form of ownership of rural land: i.e. *government ownership*, whereas the Constitution under Article 40/3 bestows ownership of land on the state as a *political-administrative entity* and peoples as a social *collective* which may take the form of nations, nationalities and the Ethiopian people in general. It is to be noted that Article 89/6 of The Constitution provides that "Government has the duty to hold, on behalf of the People, land and other natural resources and to deploy them for their common benefit and development." In other words, the Constitution doesn't entrust ownership to the Government.

[54] Federal Democratic Republic of Ethiopia Rural Land Administration and Use Proclamation No. 456/ 2005, Preamble: paragraph 2

[55] Ibid, paragraph 5

[56] Ibid, paragraph 6

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Article 5/3 of Proclamation No. 456/2005 is thus clearly unconstitutional because it considers the government (not the state) as the owner of rural land and disregards the status of peoples (which by extension seems to include communities) as co-owners of rural land. It is to be noted that the term 'government' has a narrower scope than 'state', and thus Article 5/3 of the Proclamation ought to have been in conformity with Article 40/3 of the FDRE Constitution which recognizes public ownership by the '*state and people*' which is clearly different from mere 'government ownership'.

Moreover, Article 5/3 of Proclamation No. 456/2005 contravenes Articles 13 to 17 of the ILO Convention No. 169 of June 1989.[57] The Convention requires governments to "respect the special importance for the cultures and spiritual values of the peoples concerned" and "their relationship with the lands or territories".[58] It also recognizes "the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy" and safeguards their rights "to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities"[59] such as nomadic peoples and shifting cultivators (Article 14/1). The exercise of these rights over traditional lands (for generations) in effect gives them a territorial status to the community.

Although Ethiopia has not yet ratified the Convention, this right of indigenous peoples is currently in the process of acquiring the status of customary international law. Where the embodiment of a provision in a convention is meant to crystallize principle/s of customary international law, it is binding irrespective of the ratification status of (or being a state party to) the convention. The scope of this article does not, however, allow further discussion over this issue.

Mellese Damtie and Mohammed Abdullahi have discussed the shortcomings of the Proclamation No. 456/2005 in view of its discrepancy with the FDRE Constitution and the ILO Convention of 1989. As they correctly remarked, the Proclamation needs revision in conformity with the FDRE Constitution and international developments.[60]

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[57] Convention (No. 169) concerning Indigenous and Tribal Peoples in independent countries (Adopted on 27 June 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session; *Entry into force* 5 Sept. 1991) http://www.unhchr.ch/html/menu3/b/62.htm Accessed: March 20, 2008

[58] Article 13/1

[59] Article 14/1

[60] Mellese Damtie & Mohammed Abdullahi (Forests of Sheka, 2007) *Legal and Institutional Analysis for Sustainable Use of Forest Resources*: The Case of Sheka Forest in South West Ethiopia, Published by Melca , p. 135

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3-Community land holding: An overview of opportunities and challenges

The Colombian experience of community lands can be stated as good practice:

> "According to official estimates, 81.65% of Colombian indigenous peoples have their territorial occupancy legalized. Recognition by the state adopts the form of the *resguardos*, a legal concept which, to the indigenous peoples, has the meaning of full ownership of land. A total of 469 *resguardos* have been created. … These lands, granted to the indigenous peoples as freeholds, add up to a present day total of approximately 27,954,896 hectares, which is 24.48% of the country's area.[61]

Another good practice as regards legal recognition to community land holding is the Mozambique Land Law No. 19/97 enacted on 1st October 1997. Article 1 defines local community as "a grouping of families and individuals, living in a territorial area that is at the level of a locality or smaller, which seeks to safeguard their common interests through the protection of areas of habitation or agriculture, whether cultivated or lying fallow, forests, places of cultural importance, pastures, water sources and areas for expansion." Land is the property of the State [62] and the right of title holders is the right of land use (*usus*) and benefit (*fructus)* under authorization or through occupancy [63] along with rights to transfer these rights for heirs and upon lease in accordance with the law.

Mozambique's Land Law does not recognize communities as co-owners of land in par with the State. However, it recognizes the right of communities as title holders through occupation of community lands. According to Article 1/7 of Mozambique's Land Law, *occupancy* is a "form of acquisition of the rights of use and benefit of land by national individual persons who have been using the land in good faith for at least ten years or by local communities."

The insecurity of communities in the continuity of using a certain land and its resources brings about neglect to its preservation and protection. Moreover, such insecurity causes conflict between neighbouring communities with competing claims. The situation in Afghanistan illustrates this point. "Various terms regarding the loci of rural community life exist in Afghanistan, such as

[61] Roque Roldán Ortega (2000) *Indigenous Peoples of Columbia and the Law*: A Critical Approach to the Study of Past and Present Situations, Translated into English by Efraín Sánchez, ILO supported publication, p. 42

[62] Article 3 of Mozambique's Land Law No. 19/97 of 1st October 1997

[63] Ibid, Article 1/17

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qarya (often translated as 'village'), *quishlaq* (usually meaning settlement) and *montequa* (meaning something like area)."[64] Dr. Stanfield discusses the rangeland tenure of communities in rural Afghanistan. "Rangeland is a public land which cannot be privately (held). Families, clans and tribes, as well as nomadic groups use rangeland for feeding livestock, for gathering fuel, as a source of herbs for medicinal or cooking purposes, and a passage of ways for moving livestock from one place to another."[65]

Such rangelands may eventually become wastelands if communities indiscriminately change them to lands of rain-fed agriculture. A major phenomenon which accompanies such degradation of rangelands "is the increase in conflicts among farming and livestock dependent families for a decreasing supply of adequate rangeland" and decline in the supply of rangeland accompanied by "constant or increasing demand for areas to pasture livestock" inevitably leads to "competition for this increasingly scarce resource."[66]

Stanfield noted that the "main cause of rangeland degradation and resulting social conflicts is the insecurity with which rural people hold and use rangelands."[67] He has identified the following three dimensions of the tenure insecurity:

> "[F]irst, a longstanding history of conflict over rights to rangelands among groups of village residents and nomadic groups; second, differences of opinion about the preservation of rangeland between farming families with access to agricultural land and families without access to agricultural land but with a dependence on livestock; and third, contradictions between governmental agencies (empowered formal law establishing Sate ownership of pasture land) and local communities which , by custom and necessity, use the rangelands.
>
> The turmoil in Afghanistan during the last twenty five years has deepened the gap between formal laws and the facts on the ground. As a result, the Ministry of Agriculture, Irrigation and Livestock (MoAIL) has a new scheme which enables "the transfer of effective management responsibilities for forestry and range resources within defined community geographical areas to communities." The objective of such community based management is to create "value for community members (both in the form of productive resources –timber, firewood, better pasture), and as means of protecting natural resources …"[68]

[64] J. David Stanfield, *Community Land Administration: Focus on Afghanistan*, Terra Institute (October 28, 2007), p. 10

[65] Ibid, p. 13

[66] Ibid

[67] Ibid

[68] Ibid, pp. 13,14

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4- Remarks on problems of forest protection and development

4.1- Some observations on Proclamation No. 542/ 2007: Strengths and Pitfalls

The Ethiopian legal regime indeed gives due focus to forest protection and development although it lacks adequately detailed and easily enforceable Regulations and the requisite institutional framework towards effective and efficient implementation of the legal regime. According to Article 7 of Proclamation No. 542/2007, a private forest owner is required to obtain a prior forest products movement permit before harvesting and transporting forest products.[69] Article 7/2 further imposes duties regarding the replacement of harvested trees, the protection of forest from pest, disease, fire and other hazards, and requires compliance with pertinent directives issued to protect the environment.

Article 9 deals with the conservation, development and administration of state forests with areas of focus such as:

- allocation of the necessary budget, manpower and materials and putting in place administration and management compatible to a given forest's level of development;
- allowing community participation in the development, conservation and benefit sharing;
- preventive and curative measures against pests, disease, disasters (natural or man-made);
- protection from unauthorized acts of settlement, deforestation, mining;
- protection from forest fire; and
- evacuation from forest areas (and settlement in other areas suitable for living) where habitation within a state forest obstructs forest development.

Article 11 of the Proclamation has embodied the modalities of administration of protected forests.[70] And finally, Part IV of the Proclamation titled "Miscellaneous Provisions" deals with prevention of forest fire (Article 12), production and movement of forest products (Article 13), and the prohibitions embodied under Article 14. According to the latter provision, no person can (*inter alia*) do the following acts in state forests (unless he/she obtains written permit from the Ministry of Agriculture and Rural Development or from the appropriate regional body):

- cutting or using endangered indigenous natural trees,
- cutting tree, settlement (temporary or permanent), grazing, hunting, car-

[69] Article 7/1

[70] See definition of 'protected forest' in *Supra* note 51

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rying saws or other tools used for cutting trees,

- keeping bee-hives or extract honey.

Article 14/5 requires prior permit to undertake large-scale farming, mining operations, construction of roads, water drilling, irrigation, dam construction and other similar investment activities. The Proclamation further embodies a penalty clause against violation of the prohibitions highlighted above. According to Article 3 of the Criminal Code of 2004, special laws (of a criminal nature) are regarded as part of Ethiopian criminal law. Thus the penalties stated in Article 20 of Proclamation No. 542/2007 have the same effect as the penalties embodied in the Criminal Code.

According to Article 20, rigorous imprisonment (or imprisonment) [71] which ranges from 1 year to 15 years (and a varying range of fine) may be imposed upon violation of the various prohibitions stated in the Proclamation. For example, the offence of cutting trees or removal or processing or using forest products except pursuant to the Proclamation is punishable with rigorous imprisonment of one to five years and with a fine of Birr 10,000.[72] It is, however, surprising to see that the punishment imposed on the accomplice [73] is more severe than that of the principal offender[74] because Article 20 sub-Article 5 of the Proclamation states that providing "assistance in any form to those who illegally cut forest trees or transport forest products to hide or take away the forest products" is punishable with *5 years imprisonment* (and a fine of Birr 5,000). The basic penalty for the principal offender is one year, while that of the accomplice is five years.

The gravest penalty of ten to fifteen years of rigorous imprisonment is imposed on offenders who cause damage to a forest by setting fire or in any other manner.[75] Moreover, settlement or expansion of farmland in a forest area without permit or any act of construction of any infrastructure in a for-

[71] The words 'rigorous imprisonment' and 'imprisonment' have been used in the various penalty provisions. Whether the drafters have inadvertently used imprisonment to denote 'simple imprisonment' as defined in Article 106 of the 2006 Criminal Code is not clear. The drafters seem to use the words interchangeably without difference in meaning. The issue is briefly discussed below.

[72] Article 20/1 of Proclamation 542/2007

[73] According to Article 37 of the 2004 Criminal Code, an accomplice is a person who intentionally assists a principal offender either before or during the design or the commission of the offence. The assistance may be "by information, advice, supply of means or material aid of any kind."

[74] Article 32 of the 2004 Criminal Code states the types of principal offenders among which the principal material offender is the person who actually commits the offence either directly or through non-human agent (i.e. an animal or natural forces (Art. 32/1/a).

[75] Ibid, Article 20/3

[76] Ibid, Article 20/4

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estland without having the necessary permit is punishable with not less than two years of imprisonment and with fine of Birr 20,000.[76] And , Article 20/6 of the Proclamation provides that 'faults' which do not fall under those stated in Articles 20/1 to 20/5 shall be punishable with six months to five years of imprisonment and with a fine of Birr 30,000. The term '*fault*' seems to mean '*offence*' because 'fault' is a term used in the context of civil wrongs.

The penalty clauses seem to be inconsistent with the 2004 Criminal Code in the use of terminology. The provisions use imprisonment (sub-Articles 1, 4, 5 and 6 of Article 20) while the words 'rigorous imprisonment' are used under sub-Articles 2 and 3. This doesn't seem to be an intentional distinction meant to classify the penalties into 'simple imprisonment' (as defined in Article 106 of the 2004 Criminal Code) and 'rigorous imprisonment' (defined under Article 107).

If the term 'imprisonment' in Articles 20/1, 20/4, 20/5 and 20/6 are interpreted as 'simple imprisonment', the maximum term of imprisonment that can be imposed is 3 years (according to Article 106 of the 2004 Criminal Code) while the ceiling might go up to 25 years if the term 'imprisonment' is interpreted as 'rigorous imprisonment.' In case, on the other hand, the drafters of Article 20 of the Proclamation had thought of the permissibility and non-permissibility of parole (አመክሮ) while they used the words '*imprisonment*' and '*rigorous imprisonment*', both forms of imprisonment are entitled to parole under the 2004 Criminal Code.[77]

In spite of such deficiencies, the penalty clauses of the Proclamation clearly show the focus given to forest protection. The gravity of penalties stipulated in Proclamation No. 542/2007 is indeed greater than the ones embodied in the 2004 Criminal Code for comparable offences. For example, Articles 353 (1/b), 516, 685, 689 [78] of the 2004 Criminal Code impose punishments of *simple imprisonment* (at times as alternative to fine) while Articles 849-852 merely entail *arrest* [79] or fine. Moreover, the Proclamation embodies provi-

[77] See Article 108 (1) third *alinea* of the 2004 Criminal Code.

[78] Intentional violation of provisions concerning exploitation of … forests (Article 353/1/b), propagation of agricultural or forest parasite (Article 516); intentional and unlawful damage in forests by bringing in herds or flocks to pasture (685), intentional damage to forest products (689)

[79] According to Article 106 of the Criminal Code, the range of *simple imprisonment* is ten days to three years (sub-Article 1, *second alinea*) subject to extension of the ceiling to a maximum of five years (sub-Article 1, *third alinea*) where the law so prescribes owing to the gravity of the offence. And Article 747(1) of the Criminal Code provides that the duration of *arrest* shall be from one day to three months.

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sions which enable speedy trial in case of flagrant offences (Article 21/1) in addition to which illegally obtained forest products shall be taken and registered as exhibit until judicial decision (Articles 21/2 and 21/3).

4.2- Objective factors involved in the application of Ethiopian forest legal regime

Professors Ann and Robert Seidman noted that "a statute or other rule does not, by itself, constitute an independent, '*efficient*' cause of changed behavior" because "Law or no law, behavioral change, being ubiquitous, will undoubtedly occur." [80] The three crucial questions that can be raised in relation to the critical state of deforestation in Ethiopia are:

- "*why people behave the way they do*" with regard to deforestation,
- whether there are *alternatives for people to act otherwise*, and
- the extent to which *the law can be used* as one of the instruments for *behavioral change* towards reforestation.

Individuals and group of persons "act by making choices within a range of constraints and resources thrown by their social, political, economic and physical environments."[81] And the challenge of every law is the extent to which it can induce behaviors which will positively contribute towards forest conservation, development, reforestation and prudent utilization. "The rule, the implementing agency's expected behavior, and the 'non-legal' factors in the addressee's arena of choice, determined by the constraints and resources in their place-specific, non-legal environment … interact to influence a person's behavior in the face of the law."[82]

The reason why persons involved in deforestation act the way they do is their desire to benefit from forest clearing. Where, for example, a forest is privately owned and effectively guarded, the arena of choice does not allow people to be involved in acts of deforestation. Even under periods of weak law enforcement such as periods of political turmoil, the communities in *Sheka* Zone [83] acted differently than communities in Eastern *Hararge*, Ghibe-Omo Basin, uplands of *Fogera* and Western Shoa [84] because Sheka forest (see note 3, above) has greater significance to the communities in the area while the latter communities related forest clearing with the immediate 'benefits' of additional farmland, *fuelwood,* income from sale of wood, and other material returns.

[80] Ann Seidman, Robert B. Seidman and Nalin Abeyesekere (2001) *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (London: Kluwer Law International) p. 14

[81] Ibid, p.15

[82] Ibid, p. 17

[83] See Section 5.1, paragraph 3

[84] See Section 5.2 above

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However, during times of political transition such as the mid 1970's and the early 1990's the arena of choice of behavior included cutting trees and getting away with it. In places where the community guards against such acts owing to spiritual values or sense of ownership, however, change of governments and periods of weak law enforcement in rural areas would not induce rural dwellers to clear forests for various material benefits.

The question as to whether there are *alternatives* for people to act otherwise raises the issue of the availability of alternative opportunities so that farmers can restrain themselves from clearing land for farming owing to population growth and scarcity of farmlands and grazing grounds. Equally important is the question of whether there is an increasingly growing availability of alternatives to fuelwood.

Legal constraints obviously influence human behavior, but they become effective only where the mechanisms of implementation (by whom, how, etc) are pragmatically and prudently articulated and put in place. Even more so, the addressee of the legislation, as stated earlier, ought to have arenas of alternative/s so that the law can induce *behavioral changes* towards forest protection and development.

Certain behaviors occur irrespective of legal constraints. "Drivers usually stop at ... the intersection between a street and a busy highway, not (only) because the law requires them to do so, but because, if they do not, they may be involved in an accident."[85] On the other hand, "for some behaviors, the law constitutes something close to an 'efficient' cause. In no country do people pay their income taxes solely because a law requires them to do so; nevertheless, without an income tax law, nobody would pay the tax."[86]

In the Ethiopian context, laws on the utilization, protection and development of forests are not, unfortunately, analogues to traffic lights where the impact of violation is apparent and immediate. This is so, because persons responsible for deforestation and environment degradation do not, in most cases, become the immediate victims of their own acts of forest clearing. At times, the persons responsible and the victims may be generations apart. However, involving communities as active participants and beneficiaries of forest protection and development, enhancing popular awareness, and getting local elders, spiritual leaders, etc on board will gradually create a stronger foundation towards the culture of forest preservation and development.

The most crucial factor in this regard is the task of providing alternatives for fuel wood and facilitating alternatives of subsistence which can serve as

[85] Seidman *et al*, *supra* note 89, p. 15 | [86] Ibid

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means of earning a living in lieu of the scramble for more and more farmlands to the detriment of forest cover. This seems possible only if Ethiopia manages to leapfrog towards modern agriculture which can relieve its mountains from farming and grazing, and if sustained development in ICT, tourism, industrial production and services are realized thereby gradually reversing the ratio of Ethiopia's rural and urban dwellers.

Meanwhile, legal prohibitions against deforestation might not be as effective as they ought to be because "conflicts between human needs and wilderness preservation are not inconceivable."[87] As Janna Thomson remarked, human beings "are endowed by nature with certain inalienable needs – like the need for food and shelter – and if the population is big enough, these elementary needs are bound to come into conflict with the goal of preservation, however respectful people are towards nature."[88]

4.3-Institutional issues in the implementation of the Ethiopian forest legal regime

Ann Seidman is of the opinion that laws which are in the passive form and which lack details as to who does what in the implementation process are difficult to apply. [89] Although this statement was made on laws in general, it throws some light with regard to the major problems of ambiguities and overlapping functions in the implementation of the legal regime on forest protection in Ethiopia. Proclamation No. 542/ 2007 clearly lacks details of implementation and its enforcement remains to be difficult until it is reinforced by regulations.

The need to distinctly define the role of federal and regional institutions in the preservation and development of forests is a major area of concern. Mellese and Mohammed noted that "the Federal Government seems to have withdrawn from affairs of forests, except for providing technical and financial assistance, giving technological packages and making policies, laws and guidelines to the Regional states."[90] Based on interviews conducted with experts, they suggest that "the Federal Government should not withdraw … from administering forests, especially those (that are) critical and strategic for maintaining the ecological balance."[91] They support the suggestion of experts that forests which link two or more regional states and those which

[87] Janna L. Thompson *"Preservation and Wilderness and the Good Life"*, in *Environmental Philosophy* (Edited by Robert Eliot and Arran Gare) Open University Press: 1983, p. 102

[88] Ibid

[89] Discussion with Professor Ann W. Seidman, March 24th 2008

[90] Mellese Damtie and Mohammed Abdullahi, *Supra* note 60, p. 160

[91] Ibid

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cross boundaries of regional states must be administered by the Federal Government.[92]

In principle, forest protection is most effective at the grassroots. Accordingly decentralization of forest protection and development is obviously preferable than over-centralization. However, "reports of field studies indicate (that) the rate of deforestation has increased especially in the years after 2001."[93] Mellese and Mohammed state that the decentralization has not effectively devolved to the grassroots with tailoring according to local contexts.[94]

> Decentralization might not be effective if it is made abruptly since it is a complex and dynamic process that includes constant learning and experimentation.
>
> Decentralization needs to be phased in gradually and involves: building consensus through an open, transparent and inclusive process; participatory decision making, institutional, technical and human capacity building; provision of adequate financial resources and incentives … ; tailoring objectives to local contexts and developing the flexibility to adapt to different situations and changing circumstances. [95]

The issue of decentralization cannot be considered to have been addressed until the protection, prudent utilization and development of forests devolves to the grassroots through the crucial task of their active involvement according to local contexts. In due course of awareness enhancement at the grassroots, communities can ultimately realize the adverse effects of deforestation so that they can be involved in the process of reversing the trend of accelerated environmental degradation and desertification.

4.4- Observations on the legal regime of Regional States

Although the Federal laws on Rural Land Use (Proclamation 256/2005) and on Forest Development, Conservation and Utilization (i.e- Proclamation 252/2007) do not recognize community land-holding, Article 3 of Forest Proclamation of Oromia [96] lists three forms of forest resource ownership, namely: state forest, private forest and community forest. Article 6 (sub-Article 1) of the Proclamation provides that "state owned forest (or) patches of forests outside the boundary of state forest may be handed over to organ-

[92] Ibid

[93] Ibid

[94] Ibid, 162

[95] SZA (2004) Decentralization, Federal Systems in Forestry and National Forest Programs: Report of a workshop co-organized by the Governments of Indonesia and Switzerland "The Interlaken Workshop", April 2004, p. 1 (in Mellese Damtie and Mohammed Abdulahi, *Supra* note 60, at161

[96] Proclamation No. 72/2003 (*Megeleta Oromia*, 15/1993)

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ized local community" subject to the conditions stated in the provision. The provision recognizes the right of communities to use forest products sustainably (Art. 6/2/a) and meanwhile requires the community to protect the forest from human encroachment (Art. 6/2/b). Moreover, Oromia Rural Land Use and Administration Proclamation [97] recognizes community rights of access to land under Article 5, Sub-article 4 and defines communal holding under Article 2, Sub-article 5 of Proclamation No. 130/2007.

Tigray National State Rural Land Use Proclamation No. 23/1989 (Eth. Cal) [98] recognizes the right of farmers to own trees which they have planted on the plots that are under their possession (Art. 10/1), and meanwhile Article 10/2 of the Proclamation prohibits plantation of trees such as eucalyptus trees (apparently owing to their adverse effects on soil fertility and underground waters). The possessor of land is required to care for the trees on the land (Article 10/5) and is prohibited from cutting the types of trees stated under Article 10 sub-Article 3.

Article 4 of the SNNPR Forest Proclamation[99] resembles the Federal proclamations in having failed to recognize community holding of forests. It is to be noted that Article 9 of the Proclamation does not maintain balance between the utilization of forest products with the corresponding duty of preservation and development. The provision embodies stipulations as to how state forests can be put into use, and it does not give due focus to their conservation and development.

The positive aspects of the SNNPR Rural Land Use Proclamation [100] include the recognition of community possession (under Article 16) and reserved and protected lands (Article 19). However, Article 21 of the Proclamation evokes concern. The provision is titled 'Improving the impact of population pressure on the land' but rather allows "settlement on unoccupied lands of the region based on the study and will of the community." Resettlement programs are indeed extremely rare measures of emergency which should not be positively articulated in laws in the name of improving impact of population pressure. In fact, resettlements (which are options of a lesser evil under extreme situations of necessity) cause (rather than alleviate) pressure on forests and wild life as has been clearly observed through experience.

[97] Proclamation No. 56/2002 has been amended by Proclamation No. 130/2007

[98] *Negarit Gazet*a (Proclamation N0. 23/ 1989 Eth.; 6th Year No. 23, Mekele)

[99] Southern Nations, Nationalities and Peoples' Regional Government Proclamation Issued to Determine Forest Management, Development and Utilization (Proclamation No. 77/ 2004) *Debub Negarit Gazeta*, 9th Year No. 10

[100] SNNP Regional State Rural Land Administration and Utilization Proclamation (Proclamation No. 53/2003) Debub Negarit Gazeta, 8th Year No. 2

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Community responsibilities which solely focus on protection and development of forests do not usually serve their purpose. This is so, because such legal regimes and policies fail to motivate communities and are unable to create a sense of ownership. Nor does community forest-land holding, by its own, become fruitful if the rights of utilization are not accompanied by restrictions against sale of community forest-lands, and unless conservation and development schemes for sustainable use are put in place.

4.4– Lessons from the legal regime of the 1960's

The State Forest Proclamation (Proclamation No. 225 of 1965), Private Forest Conservation Proclamation (Proclamation No. 226 of 1965) and Protective Forests Proclamation (Proclamation No. 227 of 1965)[101] were enacted on the same date, i.e. 27th of August 1965. This explains the basic factor behind the harmony and consistency in the proclamations and the holistic approach which was taken in the research, policy formulation, drafting, deliberations and promulgation process.

The Preambles of the Proclamations 225/1965 and Proclamation 226/1975 expressed the need to protect, conserve, develop and utilize "in accordance with modern scientific principles so as to promote the economic development of (Ethiopia) and to ensure a continuous supply of forest produces *for the benefit of the present and succeeding generations* …" Moreover, the Preambles of these two proclamations and Proclamation No. 226/1965 stated that conservation of forests is necessary for soil protection against erosion, deflation and desiccation. The Preambles further stated the role of forests in balancing the water regime and preserving the beauty and fertility of Ethiopia.

To this end, Article 6 of Proclamation No. 225/1965 unequivocally stipulated that "*No state forest shall be alienated, either in whole or in part*." This seemed to prohibit the alienation of state forests to agriculture, investment and other endeavours through various forms of allocation. It is indeed a principle that can *á fortiori* (for a stronger reason) be used at present because our forests need even greater protection that they did in the mid-1960s.

There is a similar lesson we can learn from Article 5 of the Private Forest Conservation Proclamation (Proclamation No. 226/1965) because it clearly prohibited the removal, utilization, processing or destruction of any forest product from private forests for commercial purposes unless the private forest owner obtains a permit from the authority stated in the Proclamation. The grounds that justify the denial of forest exploitation permit were clearly listed under Article 5 (e) thereby delimiting the discretionary power of the regulat-

[101] *Supra*, notes 19 to 22

HeinOnline -- 2 Mizan L. Rev. 280 2008

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ing authority. The reasons for the denial of forest exploitation permit were required to be stated in writing and no such denial could be made "except in cases where maintenance of the forest in question (was) necessary for:

i. conservation of the soil and its protection from erosion, deflation and desiccation;
ii. the protection and continued existence of springs and water-courses;
iii. protection of sand-hills and sea-shores from sea erosion or the spreading of sand;
iv. purposes of national defence; or
v. purposes of public health.

In contrast, Article 7 of Proclamation No. 542/ 2007 merely requires private forest owners to "notify the body found around the forest and obtain forest products movement permit prior to harvesting and transporting the product from place to place." While Proclamation 226/1965 had required prior *permit by an authority* before exploitation, the current Proclamation only requires *notification by the forest owner* thereby giving more power to forest owners in harvesting private forest products. Nor does the current Proclamation distinguish between privately owned natural forests and planted forests while Article 5 (a) of Proclamation 226/1965 was clearly stringent in the exploitation of privately owned natural forests.

Another important lesson which we can learn from the legal regime of the 1960s is the issuance of nine Regulations in 1968 which were meant to facilitate the effective enforcement of the three Proclamations enacted in 1965. Analogous to the proclamations, these Regulations were issued on the same date (30th September 1968), and this signals their horizontal synchrony and harmony. The Regulations were the following:

a) Regulations issued pursuant to the Private Forest Conservation and Protective Forests Proclamations of 1965 (Legal Notice No. 343/1968);
b) Regulations issued pursuant to the State Forest and Protective Forests Proclamations of 1965 (Legal Notice No. 344/1968);
c) Regulations issued pursuant to the State Forest Proclamation No. 225 of 1965 (Legal Notice No. 345/1968);
d) Regulations issued pursuant to the Private Forests Conservation Proclamation No. 226 of 1965 (Legal Notice No. 346/1968);
e) Regulations issued pursuant to the Protective Forests Proclamation No. 227 of 1965 (Legal Notice No. 347/1968);
f) Regulations issued pursuant to the Private Forests Conservation Proclamation No. 226 of 1965 (Legal Notice No. 348/1968 which regulated *community forests*);

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g) Regulations issued pursuant to the State Forests Proclamation No. 225 of 1965 (Legal Notice No. 349/1968) which established Forest Ranger Service and defined the powers and duties of Forest Rangers;
h) Regulations issued pursuant to the State Forests Proclamation No. 225 of 1965 (Legal Notice No. 350/1968) which established Forest Guard Service and defined duties of Forest Guards; and
i) Regulations issued pursuant to the State Forest and Private Forests Conservation Proclamation of 1965 (Legal Notice No. 351/1968) which required commercial end-users of forest products to submit annual reports regarding the particulars stated in Article 4 of the Regulations.

Legal Notices 343/1968 and 344/1968 dealt with protection of forests against fire, forest insects, and other threatening damages including grazing. Issues related with utilization of forests and marketing were addressed in Legal Notices 345/1968 and 346/1968. It is indeed surprising that Legal Notice No. 348/1968 unequivocally recognized community forests while our current legal regime is reluctant (or at least ambiguous) in this regard.

Article 4 of Legal Notice 348/1968 had enabled the establishment of *Community Forest Commission* which included the "Woreda governor, head of the Agricultural Section in the area, local school director, local elders, the forest commissioner of the respective province and the representative of the Ministry of National Community Development." Although this seems more of a bureaucratic apparatus than a community-based structure, it is exemplary with regard to its objective and basic theme. Moreover, the Regulations had the pitfalls of less focus on the utilization side of community forests. Yet, the fact that the Regulations came under the Private Forests Conservation Proclamation clearly implies the right of communities to exploit such forests subject to the conditions attached thereof.

Legal Notice 349/1968 dealt with the establishment of "a forest ranger service for the protection of forests and the implementation of forestry laws and regulations."[102] According to Article 5 of the Regulations, Forest Rangers were entrusted with the duties and powers to, *inter alia*, "mark forest trees suitable for exploitation," ensure the observance of laws regarding cutting permits, "issue *certificate of origin for forest products* being utilized, removed or possessed,... supervise the execution of afforestation and reforestation schemes, … report general forest conditions …", and take over possession of illegally possessed forest products as well as the vehicle or animals on which they are loaded. Although '*certificate of origin*' has been mentioned in Article 15 (2/b) of Proclamation No. 542/2007, it clearly deserves more

[102] Legal Notice 349/ 1968, Article 4

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emphasis in upcoming Directives to be issued by the Ministry of Agriculture and Rural Development. Article 15 (2) of the Proclamation fails to state the party who issues *certificate of origin,* and this is a vital point that ought to be addressed in the Directives to be issued by the Ministry.

The scheme of forest protection was reinforced by Legal Notice 350/1968 which brought about the establishment of Forest Guard Service which had the duty of guarding and protecting state forests and ensuring "that the removal, utilization, processing and possession of forest products, whether from a State forest or a private forest is carried out in accordance with forestry laws and regulations."[103] Article 15/1 of Proclamation No. 542/2007 also embodies stipulations regarding Forest Guards, and the issue here becomes putting the law into practice through human and budgetary resources.

Furthermore, there is a major good practice we can learn from the Forestry Regulations issued in 1968 with regard to the reporting obligations of commercial end-users of forest products. Article 4 of Legal Notice 351/1968 (that was known as Trade of Saw Logs and Veneer Logs Regulations) provided that:

> Every person operating a sawmill, veneer mill, plywood factory, or any plant processing forest products, whether from a state forest or private forest shall annually but not later than thirty (30) days after the 30th of Sene of each year, submit to the Ministry a report which shall include all information as to:
> 1) the ownership of the plant;
> 2) location, capacity and mechanical description of the plant; and
> 3) The volume of production per year.

The Annex to Legal Notice 351/1968 embodied a schedule of data that was required to be reported by traders and businesses engaged in saw logs, veneer logs, plywood factories and other plants processing forest products. Such data could apparently be tallied with transactions (including purchases of forest products) submitted for tax purposes thereby enabling the effective regulation of forest utilization, protection and development.

Daily observation clearly shows a very wide gap between Ethiopia's forestry laws and the day-to-day reality. Only few cases are brought to courts although the magnitude of deforestation in nearly all parts of Ethiopia is very high. A major factor in this regard seems to be focus of the legal framework on post-offence legal measures rather than preventive schemes that target at rendering the commission of such offences difficult, if not impossible. For example, a case in *Wolmera Woreda*, *Suba kebele* indicates that the suspect

[103] Legal Notice 350/1968, Article 5

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was arrested while trimming logs after having cut *Tid* tree from *Menagesha Suba* state forest on Nehassie 6th 1997 (Eth. Cal) after midnight (1:30 am.).[104] The accused was released because two prosecution witnesses stated different places as the venue for the commission of the offence.

Illegal cutting of trees can hardly be verified by witnesses thereby rendering sole reliance on legal sanctions largely ineffective. Moreover, potential witnesses are usually neighbours or relatives of the suspect thereby rendering it difficult to obtain evidence. The legal regime is thus required to incorporate mechanisms such as *inventory* of forests (as suggested by Professor Sebsibe, *supra* note 18), empowerment of rural elders and local representatives in forests protection and development and putting in place effective guarding and inspection institutional framework. In other words, Ethiopia's forestry laws should go beyond dealing with the effects, and institutionalize a wider framework of systematic prevention and cure which can be simultaneously undertaken along with the efforts toward deterrence.

Concluding remarks

The *Statement of Forest Principles* adopted at the 1992 United Nations Conference on Environment and Development (UNCED), Brazil, (Rio de Janeiro)[105] and the current global concern regarding climate change offer a conducive setting to Ethiopia's efforts toward forest protection and development. Unfortunately, however, there is a very wide gap between what Ethiopian laws on forest protection require and the facts on the ground. This gap is not only attributable to the gaps in the law, absence of effective regulations and an efficient institutional framework but also to the highly formalistic aspects of law enforcement mechanisms.

[104] Appendix 1 (File No. 0-02917), in Worku Endale's LL.B Thesis: " *The Practice and Oromia's Proclamation No. 72/2003: The Case of Forest Protection in Wolmera Woreda*" (SMUC Faculty of Law, July 2008) Unpublished

[105] The UNCED collection is a set of documents produced by the United Nations Conference on Environment and Development, also known as the Earth Summit, and various preparatory activities that led to the conference. UNCED took place from 3-14 June 1992 in Rio de Janeiro, Brazil. Delegations from 178 countries, heads of state of more than 100 countries, and representatives of more than 1,000 non-governmental organizations or NGOs attended the meetings. Four preparatory committees or "prepcoms" met in the two years prior to UNCED to produce the texts of major UNCED agreements. (One of the five major agreements associated with UNCED was…) The Statement of Forest Principles - a non-binding agreement on development, preservation, and management of the Earth's remaining forests;(http://www.ciesin.org/datasets/unced/unced.html, Accessed: February 8, 2008)

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There is thus much to be done towards the effective implementation of the laws and empowerment of local communities in forest utilization, preservation and development. Community participation in forest utilization, conservation and development, and secondly, reversal of the rural-urban dweller ratio in Ethiopia through economic development (far beyond oxen-driven plough and rain-fed agriculture) seem to determine the fate of our forests which have dwindled from 35 (or 40)% to 2.3% of Ethiopia's land cover.

Poverty, according to Sengupta, has at least two dimensions. "The first is income poverty, which relates to what percentage of a country's population subsists below a minimum level of income or consumption. The second is the capability of the poor to come out of poverty in a sustainable manner by having increased access to facilities like health, education, housing and nutrition."[106] As long as the predominantly one-way traffic in global trade, imprudent government policies, weak work ethic, low productivity, etc. make it difficult for least developed countries to come out of poverty, the problems of deforestation and desertification are bound to continue. Moreover, incidences of imprudent allocation of forest lands to 'investors' who clear (already depleted) forests will indeed accelerate the process.

Many Sub-Saharan African countries (including Ethiopia) are tied in the chicken-egg cycle of poverty, wars, population growth, instability and marginalized roles in a steadily globalizing economy. In addition to the imminent need to address the normative, institutional and implementation gaps that are attributable to the legal regime, Ethiopia's combat against deforestation can hardly be effective if it fails to simultaneously address the corresponding problems of poverty and population growth (unmatched by enhanced development). As population increases, more and more land is deforested and over-farmed. … The vicious cycle exacerbates the effects of Ethiopia's droughts, leading to severe and ever more frequent crisis."[107]

Demographic factors "such as rapid population growth … exacerbate the severe state of underdevelopment."[108] Ethiopia's population "increased fourfold between 1900 and 1988. At the beginning of the present century the crude rate of natural increase was estimated at 0.3% per annum" and the total population of Ethiopia "was estimated at 11.8 million. It took 60 years for this to double to 23.6 million in 1960" while it took only 28 years for the

[106] Arjun Sengupta, "On the Theory and Practice of the Right to Development" in *Reflections on the Right to Development*, Sage Publications: New Delhi, 2005, p.98

[107] Sahlu Wolde & Charles Teller (April 2005) *Population, Development, and Environment in Ethiopia*, Woodrow Wilson International Center for Scholars

[108] *National Population Policy of Ethiopia* (Addis Ababa, April 1993), p. 23

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1960 population figure "to double to 47.3 million in 1988."[109] And within twenty years from 1988, Ethiopia's population has now gone beyond 80 million.

Apparently, mountainous and substantially sloppy parts of Ethiopia are not conducive to modern agriculture. With modern agriculture, our mountains can be relieved from parceled settlements and overgrazing. Moreover, some of the villages in many *woredas* can develop into towns thereby leading to a gradual reversal of the rural-urban population. Modern agriculture can, for example, be accompanied by the unconditional prohibition of allocating land which is covered by forests. Current rural land holders can meanwhile be encouraged to form share companies by contributing their land holding rights and teaming up with investors towards modernizing agriculture.

*

Needless-to-say, *sticks* scare while '*carrots*' motivate. In spite of legal sanctions against deforestation, every extra Birr obtained through illegal cutting of trees for market or the increasingly growing need for fuel-wood, farmland and grazing lands are steadily accelerating the pace of deforestation in Ethiopia. Pursuits of many 'investors' for (speculative as opposed to entrepreneurial) profit are further exacerbating the pace of deforestation. Moreover, there is another 'carrot' on the horizon, i.e. the potential for plantation of agro -fuels (or bio-fuels) which, if imprudently overdone, can lead to barren monocultures thereby adversely affecting biodiversity in addition to pushing up food prices because agricultural products will be used not only for food, but also as raw materials for fuel-producing ethanol factories.

With all these 'carrots' in the field, the effective implementation of the legal regime on forest protection and development is bound to stay largely weak unless focus is given to the *roots* and the *stem* of the *problem tree* (such as population growth and pre-industrial agriculture) while simultaneously using *legal sanctions* and proactive prevention through *community empowerment* as complementary means of combating the problem. To date, the 'carrots' seemed to have pushed behaviour towards steadily increasing deforestation. On the contrary, the recent shortage of power supply was *Nature's* 'stick' attributable mainly to watershed deforestation and the resultant siltation of our dams, shortage of *Belg rains* and enhanced evaporation due to global warming. The longer we fail to take note of *Mother Nature's wake up calls,* not only would series of nature's upcoming '*sticks*' hit us hard, but would also deny us the 'carrots' which are bound to dwindle directly proportional to the slow pace in forest protection and development. ■

[109] Ibid, p. 1

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