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Environmental Law

Teaching Material

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CHAPTER 1 INTRODUCTION TO ENVIRONMENTAL LAW

1.1 Meaning of "Environment"

A legal definition of the environment helps delineate the scope of the subject, determine the application of legal rules, and establish the extent of liability when harm occurs. The word *environment* is derived from an ancient French word *environner,* meaning to encircle. By broadly applying to surroundings, environment can include the aggregate of natural, social and cultural conditions that influence the life of an individual or community. Thus, environmental problems can be deemed to include such problems as traffic congestion, crime, and noise. Geographically, *environment* can refer to a limited area or encompass the entire planet, including the atmosphere and stratosphere.[1]

Of course, defining an Environment is not an easy task. Most treaties, declarations, codes of conduct, guidelines, etc. don't attempt to define it directly. No doubt this is because it is difficult both to identify and to restrict the scope of such an ambiguous term, which could be used to encompass anything.

Many conventions (like The 1992 Rio Declaration on Environment and Development) avoid the problem, however, no doubt because, as Caldwell remarks 'it is a term that everyone understands and no one is able to define'.[2]

Some other treaties and other instruments define the environment in different ways considering the subject matter they want to address. For example, **the Declaration of the 1972 Stockholm Conference on the Human Environment (UNCHE)** merely referred obliquely to man's environment adding that *'both aspects of man's environment, the natural and man-made, are essential for his well-being and enjoyment of basic human rights.*

The world commission on environment and development (WCED) relied on an even more succinct approach; it remarks that *'the environment is where we live'.*

[1] Judicial Handbook on Environmental Law (UNEP, 2005).
[2] Caldwell, International environmental Policy and Law (1st edn. Durham, NC, 1980), 170.

The 1992 Rio Declaration on Environment and Development refers at many points to environmental needs, environmental protection, and environmental degradation and so on, but nowhere identifies what these include. Interestingly it eschews the term entirely in principle 1, declaring instead that human beings *'are entitled to a healthy and productive life in harmony with nature.'*

The Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment defines the environment as including[3];

> *Natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape*

When we come back to our legal system, the Environmental Protection Organs Establishment Proclamation defines the environment as[4]:

> *The totality of all materials whether in their natural state or modified or changed by human, their external spaces and interactions which affected their quality or quantity and the welfare of human or other living beings, including but not restricted to, land, atmosphere, weather and climate, water, living things, sound, odor, taste, social factors, and aesthetics.*

Finally, it should be kept in mind that any definition of the environment will have the Alice-in-Wonderland-quality of meaning that we want it to mean.

Discussion Questions

What does an environment mean? Discuss your answer in line with different international environmental treaties, Federal and Regional laws? Discuss the phrase "any definition of the environment will have the Alice-in-Wonderland quality of meaning"

[3] The Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment which was done at Lugano, 21 June 1998, Art.2.10

[4] Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002, Neg. Gaz., 9th Year, No. 7, 2(3).

1.2 Introduction to Environmental Law: From International and National Law Perspectives

1.2.1 What is International Environmental Law?

Is Environmental Law a self-contained discipline? Or does it have its own sources and methods of law-making deriving from principles peculiar or exclusive to environmental concerns?

A number of preliminary problems arise in any attempt to identify "international environmental law". Some scholars have avoided the use of the term, arguing that there is no distinct body of international environmental law with its own sources and methods of law-making deriving from principles peculiar or exclusive to environmental concerns. Rather, they stress that such relevant law as does exist originates from the application of general rules and principles of classical or general international law and its sources.

> *Thus international environmental law is nothing more, or less, than the application of international law to environmental problems.*[5]

Whatever the case may be, at this juncture, it should be noted that this over-emphasis on the role of general International law will not have the worsening effect on the environmental problems since the traditional legal order of the environment is essentially *a laissez-faire* system oriented toward the unfettered freedom of states.

The next issue is verifying whether currently there is a body of law more specifically aimed at protecting the environment or not?

While it is unquestionably correct that international environmental law is merely part of international law as a whole, rather than some separate, self-contained discipline, and no serious lawyer would suggest otherwise, the problem with over-emphasizing the role of general international law, as one writer points out, has been that the traditional legal order of the environment is essentially a *laissez-faire* system oriented toward the unfettered freedom of

[5]DUPUY, RGDIP (1997), 873, at 899.

states. Such limitations on freedom of action as do exist have emerged in an *ad hoc* fashion and have been formulated from perspectives other than environmental.[6] To try to overcome these inadequacies, as environmental problems have worsened, it has become necessary to develop a body of law more specifically aimed at the protection of the environment.

A study of contemporary international environmental law thus requires us to consider both this new body of specifically environmental law and the application of general international law to environmental problems. Moreover, international environmental law also includes not only public international law, but also relevant aspects of private international law, and in some instances has borrowed heavily from national law.

Now, taking the above facts for granted, let us proceed to address issues in regard to how to define International Environmental Law.

International Environmental law is thus used simply as a convenient way to encompass the entire corpus of international law, public and private, relevant to environmental issues or problems, in the same way as the use of the terms law of the sea, Human Right law, and International Economic Law is widely accepted.

It is not intended thereby to indicate the existence of some new discipline based exclusively on environmental perspectives and strategies, though these have played an important role in stimulating legal developments in this field, as we shall observe. It has become common practice to refer to international environmental law in this way.

Discussion Questions

Discuss the phrase '*the traditional legal order of the environment is essentially a laissez-faire'.* Is there a body of law more specifically aimed at protecting the environment? What is the effect of the traditional legal order of the environment on the environment itself?

[6] Schneider, World Public Order of the Environment: Towards an Ecological Law and Organization (Toronto, 1979), 30.

1.2.2 What is National Environmental Law?

In the context of the Ethiopian legal system, National environmental law includes the provisions concerning the environment in the 1995 FDRE constitution; different environmental treaties ratified by the House of Representatives according to Art. 9 (4) of our constitution and all laws (federal and regional) concerned with the environment (Forestry, Land, Water use and other sectoral laws).

Discussion Questions

Identify all the constitutional provisions, treaties ratified by Ethiopia, Federal and regional laws concerned with the protection of the environment?

1.2.3 Factors that Gave Rise to Environmental Law: National and International Perspective

At this point before we try to see the evolution of environmental law both at international and national levels; it would be appropriate to see the factors that gave raise to their emergence.

Accordingly, many environmentalists agree that the following factors gave rise to the emergence of environmental law:[7]

First is the existence of an extensive range of environmental problems.

These include atmospheric pollution, marine pollution, global warming and ozone depletion, the danger of nuclear and other extra-hazardous substances and threatened wildlife species. Such problems have an international dimension in two obvious respects.

(1). Pollution generated from within a particular state often has a serious impact upon other countries. The prime example would be acid rain, whereby chemicals emitted from factories rise in the atmosphere and react with water and sunlight to form acids. These are carried in the wind and fall eventually to earth in the rain, often thousands of miles away from the initial polluting event.

(2). The fact that these environmental problems cannot be resolved by states acting individually. Accordingly, co-operation between the polluting and polluted state is necessitated.

[7] Malcolm N.Shaw, International Law :(Cambridge University Press, 2003) at 753-55.

However, the issue becomes more complicated in those cases where it is quite impossible to determine from which country a particular form of environmental pollution has emanated. This would be the case, for example, with ozone depletion.

Second, the question of the relationship between the protection of the environment and the need for economic development is another factor underpinning the evolution of environmental law.
The correct balance between development and environmental protection is now one of the main challenges facing the international community and reflects the competing interests posed by the principle of state sovereignty on the one hand and the need for international co-operation on the other. It also raises the issue as to how far one takes into account the legacy for future generations of activities conducted at the present time or currently planned.

1.2.4 Historical Development of International Environment Law

Throughout history national governments have passed occasional laws to protect human health from environmental contamination. For example, in about 80 AD the Senate of Rome passed legislation to protect the city's supply of clean water for drinking and bathing. In the 14th century England prohibited both the burning of coal in London and the disposal of waste into waterways.

In 1681 the Quaker leader of the English colony of Pennsylvania, William Penn, ordered that one acre of forest be preserved for every five acres cleared for settlement, and, in the following century, Benjamin Franklin led various campaigns to curtail the dumping of waste. In the 19th century, in the midst of the Industrial Revolution, the British government passed regulations to reduce the deleterious effects of coal burning and chemical manufacture on public health and the environment.
Yet, despite this long history of environmental legislation, the field of environmental law is remarkable for its relative youth and its rapid rise to prominence beginning in the late 20th century.
Prior to the 20th century, there were few multilateral or bilateral international environmental agreements. The accords that were reached focused primarily on boundary waters, navigation, and fishing rights along shared waterways and ignored pollution and other ecological issues. In the early 20th century, conventions to protect commercially valuable species were reached,

including the Convention for the Protection of Birds Useful to Agriculture (1902), signed by 12 European governments; the Convention for the Preservation and Protection of Fur Seals (1911), concluded by the United States, Japan, Russia, and the United Kingdom; and the Convention for the Protection of Migratory Birds (1916), adopted by the United States and the United Kingdom (on behalf of Canada) and later extended to Mexico in 1936.

Beginning in the 1960s environmentalism became an important political and intellectual movement in the West. In the United States biologist Rachel Carson's Silent Spring (1962), a passionate and persuasive examination of chlorinated hydrocarbon pesticides and the environmental damage caused by their use, led to a reconsideration of a much broader range of actual and potential environmental hazards. In subsequent decades the U.S. government passed an extraordinary number of environmental laws—including acts addressing solid-waste disposal, air and water pollution, and the protection of endangered species—and created an Environmental Protection Agency to monitor compliance with the laws. These new environmental laws dramatically increased the national government's role in an area previously left primarily to state and local regulation.

In Japan rapid post-World War II reindustrialization was accompanied by the indiscriminate release of industrial chemicals into the human food chain in certain areas. In the city of Mina Mata, for example, large numbers of people suffered mercury poisoning after eating fish that had been contaminated with industrial wastes. By the early 1960s the Japanese government had begun to consider a comprehensive pollution-control policy, and in 1967 Japan enacted the world's first such overarching law, the Basic Law for Environmental Pollution Control. Not until the end of the 20th century was Mina Mata declared mercury-free.

Following the United Nations Conference on the Human Environment, held in Stockholm in 1972, the UN established the United Nations Environment Programme (UNEP) as the world's principal international environmental organization. Although UNEP oversees many modern-day agreements, it has little power to impose or enforce sanctions on non-complying parties.

Nevertheless, a series of important conventions arose directly from the conference, including the London Convention on the Prevention of Pollution by Dumping of Wastes or Other Matter (1972) and the Convention on International Trade in Endangered Species (1973).

Until the Stockholm conference, European countries generally had been slow to enact legal standards for environmental protection though there had been some exceptions, such as the passage of the conservationist Countryside Act in the United Kingdom in 1968. In October 1972, only a few months after the UN conference, the leaders of the European Community (EC) declared that the goal of economic expansion had to be balanced with the need to protect the environment. In the following year the European Commission, the EC's executive branch, produced its first Environmental Action Programme, and since that time European countries have been at the forefront of environmental policy making. In Germany, for example, public attitudes toward environmental protection changed dramatically in the early 1980s when it became known that many German forests were being destroyed by acid rain.

The environmentalist German Green Party, founded in 1980, won representation in the Bundestag (national parliament) for the first time in 1983 and since then has campaigned for stricter environmental regulations. By the end of the 20th century, the party had joined a coalition government and was responsible for developing and implementing Germany's extensive environmental policies. As a group Germany, The Netherlands, and Denmark—the so-called "green troika"—established themselves as leading innovators in environmental law.

During the 1980s the "trans-boundary effects" of environmental pollution in individual countries spurred negotiations on several international environmental conventions. The effects of the 1986 accident at the nuclear power plant at Chernobyl in Ukraine (then part of the Soviet Union) were especially significant. European countries in the pollution's downwind path were forced to adopt measures to restrict their populations' consumption of water, milk, meat, and vegetables. In Austria traces of radiation were found in cow's milk as well as in human breast milk. As a direct result of the Chernobyl disaster, two international agreements—the Convention on Early Notification of a Nuclear Accident and the Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency, both adopted in 1986 were rapidly drafted to ensure

notification and assistance in the event of a nuclear accident. In the following decade a Convention on Nuclear Safety (1994) established incentives for countries to adopt basic standards for the safe operation of land-based nuclear power plants.

There are often conflicting data about the environmental impact of human activities, and scientific uncertainty often has complicated the drafting and implementation of environmental laws and regulations, particularly for international conferences attempting to develop universal standards. Consequently, such laws and regulations usually are designed to be flexible enough to accommodate changes in scientific understanding and technological capacity. The Vienna Convention for the Protection of the Ozone Layer (1985), for example, did not specify the measures that signatory states were required to adopt to protect human health and the environment from the effects of ozone depletion, nor did it mention any of the substances that were thought to damage the ozone layer.

Similarly, the Framework Convention on Climate Change, or Global Warming Convention, adopted by 178 countries meeting in Rio de Janeiro at the 1992 United Nations Conference on Environment and Development (popularly known as the "Earth Summit"), did not set binding targets for reducing the emission of the "greenhouse" gasses thought to cause global warming.

In 1995 the Intergovernmental Panel on Climate Change, which was established by the World Meteorological Organization and UNEP to study changes in the Earth's temperature, concluded, "The balance of evidence suggests a discernible human influence on global climate." Although cited by environmentalists as final proof of the reality of global warming, the report was faulted by some critics for relying on insufficient data, for overstating the environmental impact of global warming, and for using unrealistic models of climate change. Two years later in Kyoto, Japan, a conference of signatories to the Framework Convention on Climate Change adopted the Kyoto Protocol, which featured binding emission targets for developed countries, a system whereby developed countries could obtain credit toward their emission targets by financing energy-efficient projects in less-developed countries (known as "joint implementation"), clean-development mechanisms, and emissions trading.

Discussion Question

Discuss the historical development of environmental law from the international law perspective?

1.2.5 Historical Development of Environmental Law in Ethiopia

One could say environmental issues came to the forefront in Ethiopia at the wake of 1974 and 1984 draught because it was believed that the draught was the result of agricultural degradation or environmental mismanagement.

But, here, it is good to keep in mind that this doesn't mean that there was no environmental management before the above mentioned draught. Rather, there were fragmented environmental management activities in Ethiopia like the establishment of Semen National Park, Awash National Park and other wildlife protections though these were individual cases and nota holistic approach to the problem.

Environmental management was also practiced before the above-mentioned draughts at the community level though it was not reflected in the drafting of the law. It is just like soil preservation methods and others. Usually the practice was Top down Approach rather than bottom up approach.

The other reason for the coming to the forefront of environmental issues (other than the draught)was international pressure from the international community, like the Rio Conference in 1992(since Ethiopia was one of the participants of the conference). Currently, we find a legal basis for national environmental law in our FDRE Constitution.

For example, the FDRE Constitution reads as[8]:

1). All persons have the right to clean and healthy environment.

2). All persons who have been displaced or whose livelihoods have been adversely affected as a result of state programmes have the right to commensurate monetary or alternative means of compensation, including relocation with adequate state assistance.

[8] The Constitution of the Federal Democratic Republic of Ethiopia of 1995, Neg. Gaz., 1st Year No. 1, Art. 44.

Equally **Art.92** of the same constitution further provides that[9]:

1). The government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment.

2). The design and implementation of programmes and projects of development shall not damage or destroy the environment.

3). People have the right to full consultation and to the expression of views in planning and implementation of environmental policies and projects that affect them directly.

4). The government and citizens have the duty to protect the environment.

Discussion Questions

But here the issue is: can citizens oblige the government to carry out its obligations? Are the constitutional provisions operational? If a factory pollutes a drinking water, could the community ask the government and the factory to stop? Who would have a standi (can make a claim)?

Is there any consultation with the public in planning and implementation of environmental policies in your area? Compare the question (Question of participation) with the following quotation,

"Indigenous peoples are the base of what I guess could be called the environmental security system. We are the gatekeepers, of success or failure to husband our resources. For many of us, however, the last few centuries have meant a major loss of control over our lands and waters. We are still the first to know about changes in the environment, but we are now the last to be asked or consulted.

We are the first to detect when the forests are being threatened, as they are under the slash and grab economics of this country. And we are the last to be asked about the future of our forests. We are the first to feel the pollution of our waters, as the Ojibway peoples of my own homelands in northern Ontario will attest. And, of course, we are the last to be consulted about how, when, and where developments should take place in order to assure continuing harmony for the seventh generation.

[9] Id., Art. 92

The most we have learned to expect is to be compensated, always too late and too little. We are seldom asked to help avoid the need for compensation by lending our expertise and our consent to development."

Louis Bruyere

President, Native Council of Canada

WCED Public Hearing, Ottawa, 26-27 May 1986.

What are the responsibilities of Federal and State Governments in protecting the environment? How does the Federal Government supervise the regional Government concerning the environment? Discuss by giving examples.

The Environmental Policy of Ethiopia (EPE) is taken from Vol.II of the Conservation Strategy of Ethiopia (CSE) and is sought to guide all environmental related activities that are undertaken or must be undertaken by the Environmental Protection Authority and other sectors.

The CSE document consists of five volumes:. These are: Vol. I, the Natural Resources Base, Vol. II, Policy and Strategy, Vol. III, Institutional Frame Work, Vol. IV the Action Plan and Vol. V, Compilation of Investment Programmes.

EPE took 10 years to develop. It was approved by the Council of Ministers of the Federal Democratic Republic of Ethiopia on April 2, 1997. It was externally driven by the World Bank. It was consultative in identification of problems with the concerned bodies like investment office and others. Currently every region in Ethiopia has its own Conservation Strategy.

The policy has a Policy Goal, Objectives and Guiding Principles.

The overall policy goal is:

> *To improve and enhance the health and quality of life of all Ethiopians and to promote sustainable social and economic development through the sound management and use of natural, human-made and cultural resources and the*

> *environment as a whole so as to meet the needs of the present generation without compromising the ability of future generations to meet their own needs.* [10]

EPE also has specific policy objectives[11] and key guiding principles[12]. Underlying these broad policy objectives is a number of key principles. Establishing and clearly defining these guiding principles is very important, as they will shape all subsequent policy, strategy and programme formulations and their implementation. Sectorial and cross-sectorial policies and environmental elements of other macro policies will be checked against these principles to ensure consistency.[13]

Discussion Questions

Discuss how EPE has come into the picture and its current application?

Do you think the policy (EPE) only could solve environmental problems in Ethiopia? If not, what do you think should be done? What are the underlying Policy Principles, Objectives (general& specific) and Goal of the EPE?

1.2.6 Levels of Environmental Law

Environmental law exists at many levels and is only partly constituted by international declarations, conventions, and treaties. The bulk of environmental law is statutory—i.e., encompassed in the enactments of legislative bodies—and regulatory—i.e., generated by agencies charged by governments with the protection of the environment.

In addition, many countries have included some right to environmental quality in their national constitutions. Since 1994, for example, environmental protection has been enshrined in the German Grundgesetz ("Basic Law"), which now states that the government must protect for "future generations the natural foundations of life." Similarly, the Chinese constitution guarantees to each citizen a "right to life and health" and requires the state to ensure "the rational use of natural resources and protects rare animals and plants"; the South African constitution

[10] FDRE Environmental Policy, at 3.
[11] Ibid, at 3.
[12] Ibid, at 4.
[13] Ibid, at 4.

recognizes a right to "an environment that is not harmful to health or well-being; and to have the environment protected, for the benefit of present and future generations"; the Bulgarian constitution provides for a "right to a healthy and favorable environment, consistent with stipulated standards and regulations"; and the Chilean constitution contains a "right to live in an environment free from contamination."

Much environmental law also is embodied in the decisions of international, national, and local courts. Some of it is manifested in arbitrated decisions, such as the Trail Smelter arbitration (1941), which enjoined the operation of a smelter located in British Columbia, Canada, near the international border with the U.S. state of Washington and held that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein."

Discussion Questions

Discuss the constitutions of at least three countries concerning the right to live in a clean and healthy environment? Compare them with our constitution concerning their applications? Discuss the levels of environmental law?

1.2.7 The Role of International and National Laws in the Protection of the Environment

A law is society's system for weighing different interests, goals, and values, and for making decisions when conflicting interests cannot be reconciled in other ways. It is based mainly on political decisions and guidelines in the form of legislation and on society's general values or ethical norms. So, a law is formed by the legal system itself, with its own norms and values.

By the legal system it meant, institutions or arenas dominated by lawyers and legal methodology: legal doctrine and education, and legal practice within and outside the courts.[14]

The role of the law in protecting the environment is not fundamentally different in both international and national law. Accordingly,

[14] Hans Chr. Bugge, International environmental Law Teaching Material, (University of Oslo, Faculty of Law, Department of Public International Law, 2002) at 143.

First, it provides mechanisms and procedures for negotiating the necessary rules and standards, settling disputes, and supervising implementation and compliance with treaties and customary rules.

Second, it is concerned with regulating environmental problems, setting common standards and objectives for prevention or mitigation of harm, and providing a flexible rule-making process that allows for easy and regular amendment in the light of technological developmenst and advances in scientific and other knowledge.

Third, reinstatement of or compensation for environmental damage is a more limited but still important function.

It is more limited because only those who suffer damage can secure such redress and also because not all-environmental damage is necessarily capable of reinstatement or has an economically assessable value.

Finally, it benefits or keeps accountable individuals.

1.2.8 Does the Existing Environmental Law Adequately Protect the Environment*?*

This is an important question to which there is no easy or single answer. Whether the protection offered to the environment by both international and national law is adequate in scope and stringency is of course a value judgment, which will depend on the weight given to the whole range of competing social, economic, and political considerations.

As far as measuring the effectiveness of the law in protecting the environment is concerned, much depends on the criteria used.

Effectiveness has multiple meanings:

First, it may mean solving the problem for which the regime was established (for example, avoiding further depletion of the ozone layer);

Second, achievement of goals set out in the constitutive instrument (for example, attaining a set percentage of sculpture emission);

Third, altering behavior pattern (for example, moving from use of fossil fuels to solar or wind energy production);

Finally, enhancing national and international compliance with rules and international agreements.

By way of conclusion we have to keep in mind that the effectiveness of different regulatory and enforcement techniques are largely determined by the nature of the problem. What works in one case may not work in others.

Discussion Questions

Discuss whether the existing environmental law at any level (international, regional, national (Federal &Regional) protects the environment effectively? How do you measure whether the law at any level protects the environment effectively or not? What factors determine the effectiveness of environmental law at any level?

1.3 Foundations of Environmental Law

Law emerges from the cultural traditions and moral and religious values of each society. These traditions and values continue to impact the development of legal norms. In the context of environmental protection, cultures, religions and legal systems throughout the world contain elements that respect and seek to conserve the natural bases of life, maintaining concepts that can enhance and enrich the development of modern environmental law.

1.3.1 Religious Traditions

Beliefs supportive of environmental protection can be found in religious traditions from around the World representatives of Baha'ism, Buddhism, Christianity, Daoism, Hinduism, Islam, Jainism, Judaism, Shintoism, Sikhism, and Zoroastrianism who belong to the Alliance of Religions and Conservation, a non-governmental organization, and have found common ground in religious traditions for stewardship of the earth.

Ancient Buddhist chronicles, dating to the third century B.C. record a sermon on Buddhism in which the son of the Emperor Asoka of India stated that, "the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the

people and all living beings; thou art only the guardian of it."[15] Subsequently, the King initiated a legal system that continued to exist into the eighteenth century providing sanctuaries for wild animals.

Certain passages in the Judeo-Christian texts specify that humans do not own the earth and its resources. The Jewish law provided for conservation of birds (Deut. 22:6-7) protection of trees during wartime (Deut. 20:19), and regulated the disposal of human waste (Deut. 23:13). The Christian tradition allows that man's dominion over nature includes a competence to use and manage the world's resources in the interests of all, being ready to help others in case of necessity. Individual title thus imposes a responsibility and a trust.

In 1983, Muslim experts undertook a study of the relationship between Islam and environmental protection[16]. The results underscored that man is a mere manager of the earth and not a proprietor; a beneficiary and not a disposer. Man has been granted inheritance to manage and utilize the earth for his benefit, and for the fulfillment of his interests. He therefore has to keep, maintain and preserve it honestly, and has to act within the limits dictated by honesty. Each generation is entitled to use nature to the extent that it does not disrupt or upset the interests of future generations. Islamic principles thus envisage the protection and the conservation of basic natural elements, making protection, conservation and development of the environment and natural resources a mandatory religious duty of every Muslim. In a case, the Pakistani Court analyzed the fact that Islamic Law prohibiting unnecessary hunting and killing of birds and animals when a constitutional petition sought an order to ban various hunts under Articles 18 and 199 of the Constitution[17]. The court agreed that unnecessary hunting and killing is against the injunctions of Islam and the Constitution, but found that a blanket prohibition for hunting or killing all animals and birds could not be granted.

[15] *The Mahavamsa, or the Great Chronicle of Ceylon,* Chap. 14, quoted in I.C.J., *Case Concerning the Gabçikovo-Nagymaros Project on the Danube,* Sept. 25, 1997, Sep. Op. of Judge C. Weeramantry, n. 44
[16] *Islamic Principles for the Conservation of the Natural Environment* (IUCN Environmental Policy and Law Paper 20, 1983).
[17] *M.D. Tahir v. Provincial Government & Others,* 1995 CLC 1730

1.3.2 Traditional Communities

Many traditional communities, forest dwellers, and subsistence hunting and farming communities have long engaged in sustainable practices and developed unique knowledge about their environments and their resources. Examples include the irrigation practices of the Inca, the forest gardens of the hill country of Sri Lanka and the practices[18]. African traditional wisdom, Melanesian, native Australian, Polynesian, Asian, Amerindian and early European traditions all contain principles relevant to environmental justice and sustainable development. In addition, many traditional societies have a unique relationship with the land, which they view as capable of use only, not ownership. Some view the earth in its entirety as a living organism capable of injury and hurt. Areas or resources may be protected by being designated as sacred or taboo.

Many indigenous people have a special relationship with the land and the environment in which they live. As noted by the UN Special Rapporteur Ms. Fatma Zohra Ksentini: in nearly all indigenous cultures, the land is revered; "Mother Earth" is the core of their culture. The land is the home of the ancestors, the provider of everyday material needs, and the future held in trust for coming generations.

According to the indigenous view, land should not be torn open and exploited–this is a violation of the Earth–nor can it be bought, sold or bartered. Furthermore, indigenous peoples have, over a long period of time, developed successful systems of land use and resource management. These systems, including nomadic pastoralism, shifting cultivation, various forms of agro-forestry, terrace agriculture, hunting, herding and fishing, were for a long time considered inefficient, unproductive and primitive.

However, as world opinion grows more conscious of the environment and particularly of the damage being done to fragile habitats, there has been a corresponding interest in indigenous land-use practices. The notion of sustainability is the essence of both indigenous economies and their cultures.

[18] *Abdikadir Sheikh Hassan and others v. Kenya Wildlife Service* (High Ct. Kenya, Civil Case No. 2059/1996)

At the international level, ILO Convention No.169 on Indigenous Peoples and Article 8 of the Convention on Biological Diversity contain provisions protecting the traditional lifestyles and knowledge of indigenous peoples and local communities National or local laws and policies may protect or may adversely affect marginalized and disadvantaged communities, especially indigenous or tribal communities following traditional life styles. In some instances, indigenous people have been forced from their traditional lands to make way for development projects, or have found that resources have been exploited, including deforestation of their traditional lands. Some indigenous people have seen their traditional lands declared protected areas where they are no longer permitted to live.

Enforcing traditional laws and norms that guarantee or protect the land and resource rights of such communities has been an important means of ensuring environmental protection in some jurisdictions. There are examples of cases where indigenous lands have been protected as public goods with a special protection regime; any alteration of the native territories and of the nearby water resources violates the spirit and the letter of the constitutional laws.[19]

At the same time, the practices of indigenous communities may conflict with modern laws to protect particular areas or species. Indigenous populations often retain the right to continue subsistence hunting of endangered species such as polar bears, seals, and whales captured by traditional means, but quotas on takings and restrictions on commercial use may be imposed. When the use of animals, plants or sites is based upon religious beliefs as well as traditional culture, courts will often be asked to apply constitutional or other legal protections of religious liberty pursuant to which indigenous people may under some circumstances be exempted from the application of environmental laws.

The judiciary in various countries has at times drawn upon its national or cultural heritage to develop and apply principles that enhance environmental justice and sustainable development. The extent to which such considerations can be taken into account is necessarily a function of the

[19] *Raul Arturo Rincon Ardila v. the Republic of Colombia* (Constitutional Court, April 9, 1996) and *Ministerio Publico v Federal Union of Brazil* (Fed. Court, State of Mato Grosso, 1998)

law and jurisprudence of each jurisdiction, but recent national and international case law provides examples where current environmental norms have been interpreted in the light of traditional wisdom[20].

1.4 The Sources and the Law Making Process of Environmental Law

1.4.1 The Sources of Environmental Law

Environmental law, being a relatively new field, is largely contained in written texts, although some common law principles and relevant and customary international law is emerging. Governments protect the environment on the basis of their various constitutional and statutory powers to promote the general welfare, regulate commerce and manage public lands, air and water. National authorities may accept additional duties to protect the environment by entering into bilateral and multilateral treaties containing specific obligations. Promulgation of regulations and permits by administrative authorities is another important source of environmental law. Reporting, monitoring and civil and/or criminal actions to enforce environmental law are critical components of environmental law systems. Some constitutions also contain reference to environmental rights or duties, making these constitutional provisions and their interpretation and application another potentially important source of environmental law. Litigation enforces the laws and regulations by civil or criminal actions. If a constitution contains a right to a specified environmental standard, the provision must be interpreted and applied. Issues may also arise as to the appropriate remedy, which constitutions usually do not specify. Besides defining obligations for regulated entities, statutory provisions may allow individuals to bring suit against an administrative body that abuses its discretion or fails to comply with its mandate, and in some circumstances allow for direct citizen action against the polluters themselves.

1.4.1.1 Sources of National Law

The range of subjects that potentially involve environmental issues has a breadth that extends across virtually the entire field of legal regulation. For example:

[20] The separate opinion of Judge Weeramantry, in the Gabcikovo-Nagymaros Case, and Bulankulama v. The Secretary, Min. of Industrial Development (the Eppawela case).

• Antiquities laws may prohibit looting or unauthorized excavation of protected archaeological or natural sites.

• Regulation of agricultural activities may involve issues of the quality and quantity of water use, as well as limiting recourse to pesticides and fertilizers.

• Public health laws can regulate spraying toxics to eliminate disease vectors such as mosquitoes or raise questions about the safety of vaccines.

• Land use regulation and public trust doctrines may be used for environmental protection.

• Coastal zone management, fisheries and forestry law seek to conserve the resources they regulate.

• Mining and energy laws may regulate the emissions of greenhouse gases and other air pollutants.

• Regulation of industrial activities may establish restrictions on emissions and effluent from industrial operations.

Some environmental cases appear at first glance as consumer protection suits against the manufacturers or sellers of hazardous products. Other cases involve efforts to obtain information about environmental conditions or present actions against government officials and agencies that allegedly have failed to enforce the law. These many topics related to environmental law are regulated by various sources of national law.

A. Constitutional Law

On the national level, many constitutions now contain provisions establishing environmental rights, or set forth governmental duties to protect the environment and the state's natural resources. More than 100 constitutions refer to a right to a clean and healthy environment, impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources. At the same time, references to constitutional environmental rights raise difficult questions of justiciability, remedies, and the scope and content of such rights. It remains to be seen what role constitutional environmental rights might play alongside common law, statutory, and regulatory means for protection of the environment.

Among states of Latin America, Argentina deems the right to environment a subjective right entitling any person to initiate an action for environmental protection. In a case a court reiterated that [21]:

> *The right to live in a healthy and balanced environment is a fundamental attribute of people. Any aggression to the environment ends up becoming a threat to life itself and to the psychological and physical integrity of the person.* **8**

Even where the right to a healthy environment is not expressly provided, other constitutional rights are being interpreted and enforced by courts in an environmental context. The Supreme Court of India was one of the first courts to develop the concept of the right to a healthy environment as part of the right to life guaranteed by the constitution[22]. In a subsequent case, the Court observed that the "right to life guaranteed by article 21 includes the right of enjoyment of pollution-free water and air for full enjoyment of life."[23]

B. Environmental Legislation

Most environmental cases probably appear before judges as part of an effort to enforce statutory or administrative law or as an appeal from administrative decisions, such as denial of a permit or an order to halt emissions.

Legislative texts often establish general environmental policy, supplemented by specific laws and administrative regulations. Broad frameworks of environmental statutes have been adopted in many different countries.

These statutes use common techniques and procedures of environmental protection, including environmental impact and risk assessment, prior licensing, and emission standards. At the same time, they often respond to specific environmental concerns in the particular country, such as the safety and environmental consequences of nuclear power plants, large dams, or extractive

[21] Available at www.eldial.com, *Irazu Margarita v. Copetro S.A.,* Camara Civily Comercial de la Plata, Ruling of 10 May 1993

[22] *Bandhua Mukti Morcha v. Union of India,* 3 SCC 161 (1984) and *Charan Lal Sahu v. Union of India,* AIR 1990 SC 1480 (1991).

[23] *Subhash Kumar v. State of Bihar,* AIR 1991 SC 420, 1991 (1) SCC 598.

industries like oil or coal. In most countries environmental legislation is supplemented and given greater specificity in administrative regulations.

In addition to general framework laws, national laws often regulate a single environmental milieu, or "medium", e.g. water, air, soil, or biological diversity, due to the particular environmental problems facing a given area, political or economic priorities, or the ease of achieving consensus on a specific environmental issue. While such media-specific legislation can often deal more thoroughly with a particular sector than framework legislation, one difficulty with such medium-by-medium regulation is that it can sometimes overlook the interrelated and interdependent nature of the environment. For judges, such laws may present problems of reconciling divergent requirements or establishing priorities among the competing laws. One means to address this is sectoral legislation, which simultaneously addresses all environmental impacts from a particular economic sector, e.g. chemicals or agriculture.

Promulgation of standards for various pollutants is often a critical component of the legal framework for environmental protection. Standards may be expressed in terms of ambient standards, which are often health based and normally embody broad objectives, and performance standards or technology-based standards to achieve those goals. Countries may use permit systems to elaborate the application of broad standards to specific facilities.

Increasingly, as governments are elaborating their legislative and regulatory treatment of key sectors and pollution sources, they are also moving towards a more comprehensive approach to environmental protection that seeks to integrate pollution prevention and control, i.e. protection against pollution of all natural systems necessary to support the biosphere. The focus of "integrated pollution prevention and control" is on eliminating or at least reducing the input of each polluting substance, noting its origin and geographic target. Integrated pollution prevention and control aspires to a "cradle to grave" approach that considers the whole life cycle of substances and products, anticipates the effects of substances and activities on all environmental media, minimizes the quantity and harmfulness of waste, uses a single method such as risk assessment for estimating and comparing environmental problems, and involves complementary use of objectives and limits.

C. Administrative Regulations

Legislation on environmental matters often delegates to administrative agencies regulatory powers, including rule-making, standard-setting and enforcement, to achieve the legislative mandate. In order to achieve environmental protection, many administrative agencies and officers have new powers to obtain information and a wide range of civil enforcement options from orders to injunctions. In many instances citizens have been granted the right to initiate lawsuits to obtain information about the environment or participate in decision making, as well as enforce environmental laws and regulations, including suits against government officials who fail to perform their duties properly. As a consequence, courts and judges increasingly exercise oversight of administrative agencies.

In permit or licensing proceedings, the court is typically asked to determine whether an administrative agency or governing body's licensing decision was consistent with the legal requirements. Frequently, in assessing the consistency of agency action with legal requirements, courts will confine their review to the administrative record of decision – that body of information and facts that was before the agency at the time the decision was made. A court may need to reject an administrative decision by an administrative agency or governing body if it determines that the law has been applied in an arbitrary manner or one that infringes basic rights.

D. Industry Standards and Codes of Conduct

A growing number of guidelines or codes of conduct have been developed within industry, including the World Industry Council for the Environment, the FAO International Code of Conduct on the Distribution and Use of Pesticides, the Responsible Care Initiative of the Chemical Manufacturers Association, the CERES/Valdez Principles, the ICC Business Charter on Sustainable Development, and the Royal Dutch/Shell Group Statement of General Business Principles. Such private regulation may constrain behavior by exercising a moral or practical (sanctioning) influence. Litigants may argue that breach of such codes or industry standards may be evidence of malpractice or negligence, in an effort to deploy a relatively inexpensive means of evaluating conduct in case of a dispute. The 1990 Valdez Principles were adopted by the Coalition for Environmentally Responsible Economies, a group of investors and environmental organizations. The intent was to create corporate self-governance "that will maintain business

practices consistent with the goals of sustaining our fragile environment for future generations, within a culture that respects all life and honors its independence."

With the advent of globalization, international organizations have devoted attention to drafting codes that apply to multinational enterprises. The UN Sub-Commission on Human Rights approved Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, urging that every effort be made so that they become generally known and respected. Although primarily concerned with human rights, the Norms contain a paragraph on corporate responsibilities in the area of environmental protection[24]:

> *Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.*

1.4.1.2 International Law

The relationship between national law and international law varies considerably from one legal system to another. International law is considered the supreme body of law by international tribunals and in international relations among states. Thus, a state may not invoke a provision of its national law to excuse its violation of international law. The law of state responsibility provides that each breach of an international obligation attributable to a state automatically gives rise to a duty to cease the breach and make reparation for any injury caused, irrespective of national law. Within states, international law may be legally binding and applied by courts as a result of one or more means that are usually specified in the constitution. Legal doctrine has developed two theories known as *monism* and *dualism* in an attempt to explain and classify national practice, but the reality is more complex than the theory. Monism posits a unified body of rules, and since international law is the most complete expression of unified law, it

[24] The UN Sub-Commission on Human Rights, E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 12, 2003)

automatically forms part of this body of rules and is hierarchically superior to other law. Dualism sees separate legal orders and looks to each jurisdiction to determine the sources of law and their hierarchy.

In general, the theory of monism and dualism is most relevant to customary (or law not created through written international agreement) international law and even then in limited fashion. Some legal systems require that customary international law be transposed into national law through legislation or executive order before it becomes the law of the land. Other legal systems view international law as automatically part of the legal order and enforceable by judges without legislative action.

The constitutions of Italy, Germany and the Netherlands all have constitutional provisions expressly stipulating that rules of general (or customary) international law are part of the municipal law of the state and enjoys precedence over domestic legislation. Most common law countries consider customary international law to be part of the common law and automatically binding as national law, following Blackstone ("the law of nations, wherever any problem arises which is properly the object of its jurisdiction, is here adopted in its full extent by the common law and is held to be part of the law of the land").

The position of treaties in national law varies even more; some constitutions specify that ratified treaties are automatically the law of the land and must be applied by judges in cases where an issue concerning them arises. Other states, like the United Kingdom, require that a treaty be incorporated by legislation before the judiciary may apply the agreement. English courts have consistently held that a treaty concluded by the UK does not become part of the municipal law except and insofar as it is made so by parliament. Yet a third group of states, like the United States, distinguishes self-executing treaties which judges may apply from non-self executing treaties that require legislative action before judges may enforce them.

When international law has been incorporated and made binding, it may rank at the level of constitutional law or be superior, equal or inferior to legislation, according to the hierarchy of legal sources, generally stipulated in the constitution.

The extent to which norms arising from international law are justiceable in national courts thus necessarily depends on the manner in which these norms are incorporated in the constitutions as well as on the legal system and jurisprudence of each country. Where international law has been incorporated into the national legal system, judges apply the norms and standards when presented with them in an appropriate case[25].

In some instances, the parties may disagree about whether or not a given international norm in fact constitutes law. This may be particularly true with respect to questions of customary law, which requires evidence of consistent state practice, followed in the belief that it is legally required. In such circumstances, the judge will need to make a decision regarding the existence of the purported norm. Precedent exists in several jurisdictions finding particular norms to constitute customary international law[26].

Where international law is not binding as part of domestic law, it may still be considered persuasive in interpreting constitutional or statutory provisions, as may the law of other countries or even the views of commentators. The jurisprudence of international tribunals also can be considered in this context. Judges may also find persuasive the law of other nations, especially those whose legal systems are similar to theirs. In *Andhra Pradesh Pollution Control Board-II v. Prof. M.V. Nayudu & Others* [2001] 4 LRI 657, Sup. Ct. India, the Court referred to the Declaration of the United Nations Water Conference, the International Covenants on Civil and Political and Economic, Social and Cultural Rights, and the Rio Declaration on Environment and Development as persuasive authority in implying a right of access to drinking water as part of the right to life in the Indian Constitution. The Court also made reference to jurisprudence of the European Court of Justice, the European Court of Human Rights and the Inter-American Commission on Human Rights, as well as decisions of national courts of the Philippines, Colombia and South Africa. On occasion, courts have looked to treaties for the meaning of undefined terms in national law. In *Ramiah and Autard v. Minister of the Environment and Quality of Life* (Mar. 7, 1997), the Mauritius Environment Appeal Tribunal looked to the Ramsar

[25] *Raul Arturo Rincon Ardila v. Republic of Colombia,* Constitutional Court, Apr. 9, 1996 (applying the Biodiversity Convention, ILO Convention 169 on Indigenous Peoples and GATT's TRIPs Agreement).

[26] *Vellore Citizens Welfare Forum v. Union of India,* [1996] AIR SC 2715

Convention for a definition of wetlands, although the convention had not yet been ratified by Mauritius. The Ministry of Environment agreed that the Convention provided guidance on the issue.

A court may also take judicial notice of studies done by international organizations as evidence of environmental damage. In *Pedro Flores y Otros v Corporation del Cobre (CODELCO),* a Chilean court of appeals referred to a UNEP study in finding that the coastline in question was one of the most seriously polluted around the Pacific Ocean. *Pedro Flores y Otros v. Corporation del Cobre (CODELCO),* Corte de Appelaciones (June 23, 1988), Rol 12.753.FS641, aff'd Sup. Ct. Chile (ordering disclosure of information, an expert report on the coastline, and an injunction to prevent further pollution).

Some courts have adopted a rule of interpretation that avoids placing the state in breach of a treaty or rule of customary international law, holding that national law should be interpreted and applied in conformity with the state's international obligations. Thus, for example, United States courts adhere to the "Charming Betsy" rule, named after the case in which the Supreme Court announced that courts must interpret and apply statutes consistent with international law, unless it unmistakably appears on the face of a statute that Congress intends to modify or reject an international obligation. *Murray v. Charming Betsy,* 6 U.S. (2 Cranch) 64 (1804). The French Conseil d'Etat also interprets and applies national law in the light of international law. In a case concerning the International Convention on Trade in Endangered Species, the Conseil upheld national law when it found that the Convention clearly permitted the state to adopt stricter measures than those in the Convention. Conseil d'Etat francais, 8 juin 1990, *Societe DACO,* RJE, 1991/2, p. 236.

1.4.2 The Law Making Process: National and International Perspective

1.4.2.1 The Law Making Process of Environmental Law in Ethiopia

A very important point for assessing environmental law (both at regional and International level) is a clear understanding of the law making process from which it derives. Accordingly, for the national environmental law, there is national parliament which is endowed by the constitution of the country with the power to legislate laws which could be relevant to the environment.

Considering the structure of the government of the country at hand there could also be Regional State Councils which are endowed with the same power. Depending on the case there could also be a possibility for courts to make laws. To this effect, this time, as a base for judicial activism, we do have indicative article under Proclamation No 454/2005 which stipulates:

> *Interpretation of low by the Federal Supreme Court rendered by the cassation division with no less than five judges shall be binding on federal as well as regional courts at all levels. The cassation division may, however, render a different legal interpretation some other time.*

To exemplify the above mentioned fact let us cite a provision for discussion from the Constitution of the Federal Democratic Republic of Ethiopia. The constitution under Art. 51(5) stipulates that[27]:

> *It shall enact laws for the utilization and conservation of land and other natural resources, historical sites and objects.*

Art. 52 of the same constitution that talks about the Powers and Functions of States in Sub-Article 2(d) also prescribes as follows:

> *To administer Land and other natural resources in accordance with Federal laws*

Discussion Questions

At this point, in line with Art. 52 Sub-Art.2 (d) you are invited to discuss the meaning of the word "to administer." What does the word exactly mean?

Does it also include legislating laws? Are there any domestic institutions established by law for the protection of the environment? Evaluate their contribution in the protection of the environment?

1.4.2.2 The Law Making Process of International Environmental Law

Concerning International Environmental Law there is no international legislature, comparable to the national parliament, but there are generally accepted sources from which international law

[27] Supra note 5, Art. 51(5).

derives, and a variety of international processes through which new international law is made or existing law changed[28]. Much of international environmental law is the product of an essentially legislative process involving the interplay of international organizations, conferences, diplomacy, codification and progressive development, and international courts, and a relatively subtle interplay of treaties, non-binding declarations or resolutions, and customary international law[29]. Three features have helped to make this law making process both inclusive and relatively rapid[30].

First, international institutions, including the UN and its specialized and regional agencies and programmes, have played a leading role in setting law-making agendas and providing negotiating forums and expertise.

Secondly, following the model of the 3rd UN conference on the law of the sea, the use of consensus negotiating procedures and package deal diplomacy has created a real potential for securing universality and general acceptance of negotiated texts. In a world of nearly two hundred states with disparate interests, and particularly sharp differences on environmental issues between developed and developing states, such techniques have been essential when dealing with global environmental problems. The 1992 Rio Conference on Environment and Development and the negotiation of the conventions on Climate Change and Ozone depletion illustrate particularly well the importance of a process which is capable of securing universal, or near universal, participation and support.

Thirdly, the use of frame work treaties, with regular meetings of the parties, has given the process, at least in its treaty form, a dynamic character, allowing successive protocols, annexes, and related agreements to be negotiated, adding to or revising the initial treaty. These treaties, together with the institutions they create, have become in effect regulatory regimes. They provide a basis for further, progressive action to be taken as scientific knowledge expands and as regulatory priorities evolve or change. As a result, what may begin as a very bare framework treaty, such as the Ozone Convention, could become a complex system of detailed law with its own machinery for ensuring compliance and implementation of the law.

[28] P.W. Birnie & A.E. Boyle, International Law and The Environment (2nd Edition Oxford University Press, at 10).
[29] Ibid.
[30] Ibid.

Above, all these processes are political, involving law-making primarily diplomatic means rather than codification and progressive development by legal experts, although codification and judicial decisions do play a part in affirming the status of customary rules and general principles, leading in some cases to modest evolution in international law. But it is the political process referred to above which represent a real vehicle for law making, which evidently had wide appeal to international community. Moreover, even where, as in the Stockholm and Rio Declarations, the instruments adopted are not formally binding on states, they have in many cases contributed to the development of consistent state practice, or provided evidence of existing law, or of the law-making intention which is necessary for the evolution of new customary international law, or have led to the negotiation of binding treaty commitments.[31]

Discussion Questions

Are there any international institutions in charge of the protection of the environment? How do you evaluate their effectiveness in protecting the environment? How do you compare them with that of domestic institutions in their effectiveness?

1.5 Nature of Environmental Problems, and Damages

1.5.1 Nature of Environmental Problems

The protection and improvement of the human environment is a major issue which affects the well-being of people and their economic development throughout the world. Thus, a point has been reached in history when we must shape our actions throughout the world to maintain the natural cycle of the environment.[32]

This is because within the environment there is dynamic interrelationship between the living form and physical environment. These relationships can be expressed as a natural cycle which provides a continuous circulation of the essential constituents necessary for life. This cycle mainly operates in a balanced state in an undisturbed natural environment;,and as a matter of fact

[31] Ibid.
[32] H.M. Dix, Environmental Pollution, (Published in Chricheter New York Bribana Toronto, 1981), P.8.

the balanced operation of this natural cycle is a fundamental condition to the continued existence and development of life on earth[33]. Human beings should therefore maintain this balance with nature and act according to the law of nature. Otherwise, man will suffer from the results of his interference[34].

It is this very condition that the World Charter for Nature reiterated. It states that mankind is a part of nature and life depends on the Uninterrupted functioning of natural system which ensures the supply of energy and nutrients[35]. That is, lasting benefits from nature depend upon the maintenance of essential ecological processes and life support systems, and upon the diversity of life forms, which have been placed at jeopardy through excessive exploitation and habitat destruction by man.

At this juncture, it is important to take notice of the fact that the environment, including the human competent, is complex and is not yet completely understood. We are part of that system: our actions affect the system and we are in turn affected by it. In spite of this, we do not have a full understanding either of the system or our interactions with it[36]. This calls for putting in place an early warning system and a system of prioritizing risks, since resources to address risks are always limited; and often the damage to the environment are irreversible or even if reversible can be done only at excessive costs[37]. In other words, many of the damages done to the environment may have long term effects or they may involve important synergism in the environment or may not be effectively reversible[38] such that, the greatest danger is that human kind may set off unchecked degradation that will pass a point of no return, making it impossible to restore a healthy environment[39].

[33] Id.
[34] Environment and Heritage, Professional and Topical Issues I and II, Module 1, Distance Education Division, St. Mary's College, 2005, P.81.
[35] The World Charter for Nature, Adopted and Solemnly Proclaimed by the United Nations General Assembly, On 28 Oct. 1982.
[36] J. Weiss, Environmental Change and International Law: New Challenges and Dimensions, (United Nations University Press, 1988), P.15.
[37] The Environmental Policy of Ethiopia, April 1997, 2.3 (f).
[38] Weiss, Supra note 5, P. 17.
[39] Conway W. Henderson, International Relations Conflict and Cooperation at the Turn of the 21st Century, (Published by the MC Graw-Hill Companies, Inc., 1998), P. 431.

The basis of the emphasis on human acts in environmental protection is, the fact that, we are part of the environment and simultaneously we human beings have a capacity and capability not only to improve but also to destroy and destruct nature[40]. For this reason, if we fail to safeguard the environment from being affected by our activities, there is a fear that[41]:

> *Large scale changes resulting from burgeoning human activity will, in relatively near future, alter fundamentally the terms of human existence and may even affect the possibility for human survival.*

From this stipulation, one can easily infer the fact that environmental danger could possibly jeopardize the very existence of the present generation as well as the future.

The preamble of Tokyo Declaration on Financing Global Environment has succinctly put the inter-relationship and the danger posited in the following manner[42]:

> *Human future is at risk due to wasteful pattern of production and consumption in industrialized countries and pervasive poverty and population growth in developing countries which are primarily leading to the destruction of the earth's ecological base.*

By implication, the Tokyo Declaration reveals that the current environmental problems are caused by factors related to unsustainable use of natural resources, and unprecedented growth of population, and the cumulative effect of these environmental injuries would undoubtedly all living creatures on earth in jeopardy[43]. So that, environmentalists are warning the world community that we have reached an alarming stage, thus we need to take serious measures of rescuing the quality of our environment to make it last long. In short, protecting and conserving the environment becomes a must case for the purpose of sustaining life on earth successfully now and in the future[44].

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[40] Ethiopian Wildlife and Natural History Society, Addis Ababa Environmental Education Project Training Manual, March 2002, P. 124.
[41] Lawrence John, The Global Environment, (Published in Mangrove Law Institution, 1971), P.33.
[42] Tokyo Declaration on Financing Global Environment and Development, Held in Tokyo from 15 to 17 April 1992.
[43] Mekete Tekle, The Right to a Healthy Environment: International and National Perspectives, Nairobi, April 1995, P.68.
[44] Module, Supra note 3, P77.

Having the above facts, the interaction can be a healthy one, with human kind balancing what he takes from the natural environment with what the environment can afford to provide[45]. Since the dawn of the Industrial Revolution, however, human demands placed upon the earth's resource have increased dramatically. Although the technological advancements have improved the sustenance capacity of the earth, many of these technologies have also placed added demands on the earth's limited resources, thereby bringing us closer to the threshold of the capacity of the earth[46].

Now-a-days, it is clear that the mad rat race among nations over the use of natural sources for development is increasingly jeopardizing the quality of the environment. The craze of these states resulted in over extraction of every bit of natural resources, and this unchecked exploitation of natural resource by man disturbed the delicate ecological balance between living and non-living components of the environment[47]. For this very fact, time has reached when we are facing challenges to our intellect and wisdom for saving the humanity from extinction[48].

To save humanity, therefore, everyone should notice that we human beings are at the heart of the search for sustainable development as our very survival depends on a very narrow range of environmental condition. And to this effect resource withdrawal, processing and re-use of the products have all to be synchronized with the ecological cycles in any development plan[49]. This approach unifies protection of the environment and development programs by formulating the concept of sustainable development in the following manner[50].

> *In order to achieve sustainable development environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.*

[45] Henderson, supra note 8, P. 430.
[46] Peter S. Menell and Richard B. Stewart, Environmental Law and Policy, (Published by Little, Brown and Company, 1994). P.11.
[47] P.D. Sharma, Ecology and Environment, (Published by Rakesh Kumar Rastogi, 1998). P.415.
[48] Id., P. 389.
[49] Id.
[50] The Rio Declaration on Environment and Development, Held at Rio de Janeiro from 3 to 14 June 1992, Principle 4.

This concept underlies the need to develop a holistic understanding of the relationship between the environment and the development process[51]. If not, any social and economic development endeavors cannot continue into the future, at least, for two reasons[52]. First, the malfunctioning of such unregulated actions will result in destroying the environmental conditions necessary for the continuation of the activity. And second, the adverse environmental effects resulting from such malfunctioning will cause massive or unacceptable damage to human health and life, and thereby disrupts the normal way of social interaction, peace and regularity of human life.

To have a full picture of environmental problems, it is also noteworthy to take notice of environmental problems arising apart from development activities, which are deliberate actions aimed at destroying the human being and the environment. One of such deliberate acts is the indiscriminate bombardment of cities, towns and countryside areas in effect which renders the civilian population to a military target of a new form of warfare-environmental warfare[53]. In such a situation the irreparable alteration to the environment may threaten the entire population, and it is tantamount to a crime against humanity, perhaps to a greater extent than genocide which may be limited only to a given ethnic minority in a specified area[54]. To avert this situation, we should not postpone our decision to resolve catastrophic disputes peacefully. If we wait too long, it would become impossible to have any opportunity to reconsider our acts[55]. That is, if we cannot take immediate action, the facts will continue as[56]:

> *[W]e are experiencing diseases today for hazards we did not control yesterday. What we do not take care of today will be there for our children to handle tomorrow.*

When we look at the scope of environmental damage, in the past, pollution and environmental degradation have obtained largely on the local level and hence their effects have been isolated in impact. Given the increasing global scale of environmental degradation and ever increasing

[51] Sharma, Supra note 16, P. 331.
[52] Manual, supra note 9, P. 124.
[53] Arthur Westing, Environmental Warfare in Environmental Law, (Bol.15, 1985), P. 645, Cited in Mekete Tekle's Paper, Supra note 12.
[54] Brown Weiss, The Contribution of Human Rights Law to Environmental Protection with special Reference to Global Environmental Change, (Published in Cancado Tridade, 1988), P. 261.
[55] Raymond F. Dashman, Environmental Conservation, (Third Edition, Printed in the United States of America, 1998), P.3.
[56] B. Hydervali, Environmental Law: Some Trends, Vol. 1, P. 73.

volume of pollutants entering the environment, however, their effects are now being felt on regional and global levels[57]. For this very fact, the problems of environmental degradation do concern all countries irrespective of their size, level of development or ideology. This is true because the oceanic world is an interconnected whole[58]. So, no government or society can take the environment for granted and since it is a global problem it can be tackled only with the assistance and cooperation of all[59].

When we bring it under one umbrella, the whole purpose of environmental protection boils down to mean suppressing the unwanted behavior and action of man, and fostering those that would contribute to the maintenance and enhancement of ecological balance to the benefit of the general public, and the continuity and profitability of development activities[60].

Today, environmental problems are serious and imminent threats, which suggest a need for drastic or emergency action[61]. This emanates from the magnitude of man's impact on his environment which necessitated a full scale reconsideration of the relationship between the environment and development programmes[62]. In other words, the fact that human kind is now at a crossroads, that is, either to overwhelm the planet's support capabilities or to return matters around and preserve its life giving qualities for future generations, calls for the reorientation of man's activities with a view not to make the earth a desolate rooming planet[63].

To this effect, therefore, human beings are now being called upon to save the future. The future, it is presumed, lies entirely in their hands; tomorrow can not take thought of itself; it is they, now who have to save tomorrow[64].

[57] Weiss, Supra note 5, P. 22.
[58] P.S. Jaswal and Nishtha Jaswal, Environmental Law: Environmental Protection, Sustainable Development and the Law, (Published by Allahabad law agency, 1999) P.1.
[59] Id., P. 101.
[60] Manual, Supra note 9, P. 124.
[61] Mekete, supra note 12, P. 68
[62] Id.
[63] Henderson, Supra note 8, P. 430
[64] Menell and Stewart, Supra note 15, P. 14.

The above factual situation of environmental problems which reveal the diffused right of human beings to live in a clean and healthy environment, and the pressing need of public participation to save the environment before it reaches no turning point, calls for the reorientation of the law to accommodate public interest litigation. The need for the reorientation of the law emanates from the fact that traditional litigation is designed in a way to enforce the rights of an individual against another, and not to enforce the diffused basic human rights of the public. In other words, the narrow ambit of locus standi permitted entry only to an aggrieved person and not to any member of public at large acting bonafidely. To have a full fledged justice, therefore, the procedural law should be designed with a leeway to accommodate public interest litigation to enable alert citizens and public interest groups redress public wrongs which remained unremedial under the traditional rules of locus standi.

Discussion Questions

- Differentiate what local, regional and global environmental problems are?
- What do we mean by dynamic natural cycle of the environment?
- What is the crux of understanding the nature of environmental problems?

1.5.2 Pollution to Environment as International, Regional and National Concern

The issue we will be discussing under this subtitle would be whether environmental issues are national or international in their concern. Some environmental problems, for example climate change or depletion of the stratospheric ozone layer, are inherently global in character, and affect all states, not necessarily equally, but at least to the extent that impacts are global and global solutions are required. There are also regional environmental problems like air or water pollution and conservation of migratory animals.

Equally there could be also domestic or national problems as well.

There is thus no single sense in which an environmental issue can be described as international, regional or national; rather it could be global, regional, trans-boundary, domestic, or a combination of all or any of these. What must be appreciated, however, is that the law governing these rather different contexts is likely itself to differ, both in the content of any applicable rules, and in the form they take.

Discussion Questions

Discuss why the protection of the environment is the concern of global, regional, trans-boundary, domestic, or a combination of all or any of these concerns by giving relevant examples? Discuss the following Quotation in line with the above subtitle?

"A communications gap has kept environmental, population, and development assistance groups apart for too long, preventing us from being aware of our common interest and realizing our combined power. Fortunately, the gap is closing. We now know that what unites us is vastly more important than what divides us.

We recognize that poverty, environmental degradation and population growth are inextricably related and that none of these fundamental problems can be successfully addressed in isolation. We will succeed or fail together.

Arriving at a commonly accepted definition of sustainable development remains a challenge for all the actors in the development process."

'Making common cause'

1.5.3 The Rationale for the Protection of the Environment

The Question of the need to protect the environment exploded in the late 1960's. Since then it has increasingly become of crucial importance. At present states, international organizations, and individuals feel that it is imperative to take action to preserve the natural and human environment or at least avert its worsening. Before, the problem was not felt for three main reasons:[65]

First, industrial developments had not spawned pollution and damage to the environment on a very large scale. **Second,** States still took a traditional approach to their international dealings: they looked upon them as relations between sovereign entities, each pursuing its self-interest, each eager to take care of its economic, political, and ideological concerns, each reluctant to interfere with other states' management of their space and resources, and unmindful of general or community amenities. **Third,** public opinion was not yet sensitive to the potential dangers of industrial and military developments to a healthy environment.

[65] Antonio Cassese, International Law (Oxford: Oxford University Press, 2001), at 375.

Of course, the question of why we protect the environment is very difficult to answer. Its answer depends on the context. Accordingly, there could be *ethical*, *aesthetic*, or *symbolic* reasons for protecting the environment as opposed to *economic* and *health* reasons. However, almost all justifications for environmental protection are predominantly and in some sense *anthropocentric*.

This is true especially of **the 1972 Stockholm Conference,** which focused explicitly on protecting 'the human environment' and proclaimed[66]:

> *Man is both creature and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, Spiritual, moral and social growth…*

Likewise, **the 1992 Rio Declaration on Environment and Development** asserts that *'Human beings are at the center of concerns for sustainable development'.*

The preamble to **the 1992 Convention on Biological Diversity** evinces the complex mixture of objectives for the protection of the environment, which characterizes much of contemporary international environmental law: Conscious of the intrinsic value of biodiversity and of the ecological, social, economic, scientific, educational, cultural, recreational and aesthetic value of biological diversity and its components, conscious also of the importance of biological diversity for evolution and for maintaining life-sustaining systems of the biosphere (holistic approach to environment protection).

The emergence of individual environmental rights has the strongest anthropocentric motivation, most notable in attempts to develop a new human right to a decent environment. Some advocates assert that such a right is indispensable for the enjoyment of human rights freedoms,[67] but they usually fail to explain how competing environmental, economic, and social priorities can be accommodated in what necessarily becomes a value judgment about what we value most.

A more explicit relativism characterizes most environmental protection measures aimed at protecting human health or safety, including those in which the acceptance of some

[66] The Preamble of the United Nations Declaration on Human Environment, Adopted in Stockholm in June 1972
[67] E.g. Pathak, in Brown Weiss (ed.), Environmental Change and International Law, (Tokyo, 1993), Ch.8.

responsibility for the welfare of future generations is a prominent feature, such as the conventions on nuclear radiation risks or climate change.

1.5.4 Nature of Environmental Damages

1.5.4.1 Problems in Defining Environmental Damages

Defining terms such as environment and environmental damages is important because it is one of the methods used by the legislatures to determine the regime and range of liability in question[68]. In this respect, it means, the broader the definition of damage to the environment is the wider the scope of the compensable damage.

In the case of the Ethiopian legal system, environment is defined to mean[69]:

> *the totality of all materials whether in their natural state or modified or changed by humans, their external spaces and the interactions which affect their quality or quantity and the welfare of human or other living beings, including but not restricted to, land, atmosphere, weather and climate, water, living things, and aesthetics.*

Furthermore, damage to the environment is understood to mean[70]:

> *any condition which is hazardous or potentially hazardous to human health, safety or welfare or to living things created by altering any physical, radioactive, thermal, chemical, biological or other property of any part of the environment in contravention of any condition, limitation or restriction under any relevant law.*

From the above legal provision, we can infer the fact that damage to the environment does not only cover damage to the environment per se, but it also covers damage to private property and consequential losses that arise there from or in connection with. In other words, damage to the environment has two facets, that is, private nuisance and public nuisance.

[68] Edward H.P. Brans, Liability for Damage to Public Natural Resources: Standing, Damage and Damage Assessment, (Published by Kluwer Law Int., 2001) P.9.
[69] Environmental Pollution Control Proclamation, Neg. Gaz., Proclamation No. 300/2002, 9th Year No.12, Art. 2 (6).
[70] Id., Art. 2 (12).

Private nuisance is defined as unlawful and continuing interference with a person's use or enjoyment of land and possibly, physical damage to that property. whereas, public nuisance is a crime as well as a tort, and for any action to lie it must interfere with the use and enjoyment of property by the public in general or by a sufficiently large number of public[71].

Accordingly, a proper classification of damage to the environment is imperative because there is a fundamental difference between the environment-related type of damages [private nuisance], on the one hand, and damage to the environment per se [public nuisance] on the other hand in relation to the scope of the traditional tort law.

In the traditional tort law, it is generally held that, an individual acting privately can not initiate a legal action for a purely public nuisance, unless the damage he incurred is in some way distinguished from that sustained by other members of the general public[72]. In other words, a private individual can have standing only when he has suffered damage over and above that suffered by the public at large, so much so that the scope of the traditional tort law covers only the environment related type of damages which could result in personal injury or pure economic loss.

For the above reason, when damage is done to the environment per se, it does not fit properly in the traditional legal concept of tort law. To have better understanding, this inference could be further consolidated by the following reasons[73]:

First, by the fact that damage to the environment per se affects collective interests rather than individual interests, and incidents that affect such collective interests do not generally speaking, give rise to legal right of standing. That is, the traditional liability rules mainly concern in the protection of individual interests and, in cases of damage to the environment per se, these interests are often only indirectly affected [if at all].

[71] Paul Denham, Law a Modern Introduction, (4th ed., Printed in Great Britain for Hodder and Stoughton Education, 1999), P. 391.
[72] J. Gordon Arbuckle and Nancy S. Bryson, Environmental Law Hand Book, (9th ed, Published by Government Institutes, Inc, 1987), P.10
[73] Brans, Supra note 34, P.13.

The second reason is the very nature of damage to the environment per se. That is, since damage to the environment per se is a separate category of damage, it is not entirely clear if damage to the environment per se should be classified as material or non-material damage [pecuniary or non-pecuniary loss]. And, because under the traditional tort law only certain types of damages are compensable, it becomes questionable whether all aspects of damage to the environment per se fit in the tort law system.

To supplement the gap in the law, which emanate from the limited scope of application of the traditional tort law, it is, therefore, a pressing need to incorporate a liberalized standing and a modern concept of tort law[74]. Corollary, to have a liberalized standing with a legal penetration, forming a new and additional category of damage to the environment per se in the tort law is a prerequisite as it is provided in the following section.

1.5.4.2 Damages Forming New and Additional Category of Damage to the Environment

To achieve a more comprehensives environmental protection a new category of damage should be introduced in addition to and separate from property damage, personal injury and pure economic loss. This category extends traditional tort law to cover damages to the environment per se, that is, it would extend its scope to encompass natural resources that have direct or indirect interest to the public at large[75].

Extending the scope of the liability regime to include both the publicly owned and publicly possessed natural resources, and the publicly owned but privately possessed natural resources that have a particular value to the public has the advantage that the environment is valued as a unity party that is independent from property interests.

In the case of publicly owned but privately possessed natural resources that have a particular value to the public, standing is proposed to be liberalized for the fact that they may support threatened and endangered species, and provide other services to man and nature[76].

[74] Arbuckled and Bryson, Supra note 38, P. 10.
[75] Brans, Supra note 34, P. 14.
[76] Id., P. 12.

Other specific reasons for the liberalization of standing to include certain publicly owned but privately possessed natural resources are the following:

The first reason is the plaintiffs' reluctance to take care about the pollution. In some instances they themselves may also be polluting, and not wish to initiate legal action. They may be economically dependent on their polluting neighbor. And, of course, when they discount the value of winning by the costs of bringing suit and the chances of success, the action may not seem worth undertaking[77]. Consider, for example, that while the polluter might be injuring hundred downstream riparian of ten thousand dollar a year in the aggregate, each riparian separately might be suffering injury only to the extent of a hundred dollars-possibly not enough for any one of them to want to press suit by himself, or even to go to the trouble and cost of securing co-plaintiffs to make it worth everyone's will. This hesitance will be especially likely when the potential plaintiffs consider the burdens the law puts in their way. Furthermore, it becomes troublesome, in that, as a general principle, the traditional tort law does not allow someone who suffered a loss to take into consideration the interest of the general public which might be in the damaged object[78]. The same problem emerges when the private possessor of the public owned natural resource caused damage to it. In this respect, if the damage is not repaired duly, it may have consequence on natural resources that directly or indirectly depend for their survival and productivity on that resource which sustained damage[79].

Second, the merit of the case is decided only to the interest of some one who is competent and willing to establish legal standing. In this case, the system protects only the rights of the property owning human without giving due consideration to public interest, and intrinsic natural values. So, strict adherence to the traditional tort law and traditional standing denies cognizance to the intrinsic value of the environment, and the public interest aspiration[80].

Third, under traditional tort law, even if a plaintiff wins a pollution suit for damages, no money goes to the benefit of the environment itself to repair its damages. This omission has the effect that, at most, the law confronts a polluter with what it takes to make the plaintiff riparian whole;

[77] Christopher Stone, "Should Trees Have Standing? Towards Legal Rights for Natural Objects", (Southern California Press, 1972) P. 460
[78] Brans, Supra note 34, P. 13.
[79] Id., P. 14.
[80] Stone, Supra note 43, P. 46.

this may be far less than the damage to the environment, so that it may not have enough reparcation to force the polluter to desist[81]. For example, it is easy to imagine a polluter whose activities damage a stream to the extent of ten thousand dollars annually, although the aggregate damage to all the riparian plaintiffs who come in to the suit is only three thousand dollars. If three thousand dollars is less than the cost to the polluter of shutting down, or making the requisite technological changes, he might prefer to pay off the damages [that is, the legally cognizable damages] and continue to pollute the stream. Similarly, even if the jurisdiction issues an injunction at the plaintiff's behest, there is nothing to stop the plaintiffs from selling out the natural resource, which is, agreeing to dissolve or not enforce the injunction at some price- somewhere between the plaintiffs' damage and defendant's next best economic alternative. In this case the defendant makes its peace with the plaintiff as best it can. What is meant is a peace between them, and not amongst them and the natural resource.

Forth, the measure of damage is another reason for including certain publicly owned but privately possessed natural resources that have ecological value, and publicly owned natural resources. Application of the traditional measure of damages rule may prevent full restoration of the damaged natural resources[82]. As a general rule, 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. For the above reasons, the benefit of the modern approach of tort law and liberalized standing is that 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.

In general, 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. For this reason, to address the gap, the introduction of public interest litigation which can be initiated by public spirited persons or social service minded members of the public acting bonafidely, not

[81] Id., P. 462.
[82] Brans, Supra note 34, P. 14.

for personal gain or out of political motivation or other oblique consideration, is a pressing need. Furthermore, the law becomes full-fledged where special laws not only specifically provide standing to alert citizens and public interest groups, but also when they bestow them a cause of action to claim compensation for such damage. That is, forming a new and additional category of damage to the environment per se in the tort law is a corollary to the liberalization of standing.

Discussion questions

- Verify whether we have a universal definition of the environment or not.
- Discuss the rationale behind defining what environment is.
- Analyze what environmental related type of damages and damage to the environment per se are.
- Why do we need to form new and additional category of damage to the environment?

1.6 Summary

A legal definition of the environment helps delineate the scope of the subject, determine the application of legal rules, and establish the extent of liability when harm occurs. The word *environment* is derived from an ancient French word *environner,* meaning to encircle. Whatever the case may be, at this juncture, it should be kept in mind that any definition of the environment will have the Alice-in-Wonderland-quality of meaning that we want it to mean.

While it is unquestionably correct that international environmental law is merely part of international law as a whole, rather than some separate, self-contained discipline, and no serious lawyer would suggest otherwise, the problem with over-emphasizing the role of general international law, as one writer points out, has been that the traditional legal order of the environment is essentially a *laissez-faire* system oriented toward the unfettered freedom of states. Such limitations on freedom of action as do exist have emerged in an *ad hoc* fashion and have been formulated from perspectives other than environmental. To try to overcome these inadequacies, as environmental problems have worsened, it has become necessary to develop a body of law more specifically aimed at protection of the environment.

When we come to the context of the Ethiopian legal system, National environmental law includes the provisions concerning the environment in the 1995 FDRE constitution; different environmental treaties ratified by the House of Representatives according to Art. 9 (4) of our constitution; all laws (federal and regional) concerned with the environment (Forestry, Land, Water use and other sectoral laws).

Inspite of different treatment in different instruments, the role of law in protecting the environment is not fundamentally different in both international and national law. But, we have to keep in mind that the effectiveness of different regulatory and enforcement techniques are largely determined by the nature of the problem. That is, what works in one case may not work in others.

When we embark on the foundations of Environmental Law, as it is for any law, it emerges from the cultural traditions, moral and religious values of each society. These traditions and values continue to impact the development of legal norms. In the context of environmental protection, cultures, religions and legal systems throughout the world contain elements that respect and seek to conserve the natural bases of life, maintaining concepts that can enhance and enrich the development of modern environmental law.

As a natural flow of the above points, Environmental Law, being a relatively new field, is largely contained in written texts, although some common law principles are relevant, and customary international law is emerging. Governments protect the environment on the basis of their various constitutional and statutory powers to promote the general welfare, regulate commerce and manage public lands, air and water. National authorities may accept additional duties to protect the environment by entering into bilateral and multilateral treaties containing specific obligations. Promulgation of regulations and permits by administrative authorities is another important source of environmental law. Reporting, monitoring and civil and/or criminal actions to enforce environmental law are critical components of environmental law systems. Some constitutions also contain reference to environmental rights or duties, making these constitutional provisions and their interpretation and application another potentially important source of environmental law. Litigation enforces the laws and regulations by civil or criminal actions.

As to the law making process of Environmental Law, a very important point for assessing environmental law (both at regional and International level) is a clear understanding of the law making process from which it derives. Accordingly, for the national environmental law, there is national parliament which is endowed by the constitution of the country with the power to legislate laws which could be relevant to the environment. Concerning International Environmental Law there is no international legislature, comparable to the national parliament, but there are generally accepted sources from which international law derives, and a variety of international processes through which new international law is made or existing law changed. Much of international environmental law is the product of an essentially legislative process involving the interplay of international organizations, conferences diplomacy, codification and progressive development, and international courts, and a relatively subtle interplay of treaties, non-binding declarations or resolutions, and customary international law.

To understand the nature of environmental problems, and damages, it is important to understand the natural cycle of the environment. Accordingly, we need to grasp that within the environment there exists dynamic cyclic interrelationship between the living form and physical environment. This dynamic cyclic relationship properly operates in a balanced state in an unpolluted natural environment; so that, to maintain the balance it is important to suppress the unwanted behavior of man, and foster those that would contribute to the maintenance and enhancement of ecological balance to the benefit of the general public before we reach no turning point.

In respect to the scope of tort law in relation to the environment, there exists a fundamental difference between the environment-related type of damages and damage to the environment per se. This distinction emanates from the fact that, tort law covers only environmental related type of damages. In order to have a full-fledged tort law, therefore, a new category of damage should be introduced in addition to and separate from environmental-related type of damages, that is, damage to the environment per se which covers the public owned and publicly possessed natural resources, and public owned but privately possessed natural resources that have a particular value to the public.

Finally, taking into consideration the interconnected oceanic nature of the environment, at present, it is a pressing need to States, international organizations, and individuals feel that it is imperative to take action to preserve the natural and human environment or at least avert its worsening.

1.7 Review Questions

1. Define what environment is, and the importance of defining it.
2. Pin point the factors that gave rise to environmental law.
3. Discuss the role of national and international environmental laws in the protection of environment.
4. Indicate whether the existing environmental laws adequately protect the environment or not.
5. Verify the foundations of environmental law.
6. Provide a blue print in relation to the law making process and sources of environmental law.
7. Discuss the nature and scope of environmental problems.
8. Indicate the rationale behind the protection of environment.
9. Discuss briefly what damage to environment per se and environmental related type of damage is.
10. Pin point whether the traditional tort law is in a position to accommodate both damage to the environment per se, and environmental related type of damages.

CHAPTER 2 BASIC PRINCIPLES OF ENVIRONMENTAL LAW

2.1. Introduction to the Basic Principles of Environmental Law

No legal order can regulate with specific rules any possible conduct of legal subjects. Gaps are bound to exist in the normative network of any community. Hence, the need to resort to general principles, that is, sweeping and rather loose standards of conduct that can be deduced from the various rules by extracting and generalizing some of the most significant common points. [83]

General principles constitute both the backbone of the body of law governing international dealings and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the community.[84]

Normally principles are spelled out by courts, when adjudicating cases that are not entirely regulated by treaty or customary rules.[85] It cannot be denied that by so acting courts fulfill a meritorious function very close to, and almost verging on, the creation of law.

At present, in the world community, two distinct classes of general principles may be relied upon.[86] First, there are general principles of international law, namely those principles which can be inferred or extracted by way of induction and generalization from conventional and customary rule of international law. Second, there are principles that are peculiar to particular branch of international law (the law of the sea, humanitarian law, the law of state responsibility, etc.).

There are a number of principles that are at the core of most environmental protection systems, whether at the international or national level. Familiarity with these principles can offer insight into the purpose and thrust of the various legal mechanisms that have been built upon them. The principles are best understood in the context of the modern ecological era.[87]

[83] Antonio Cassese, International Law, (Oxford University Press, 2001) at 151.
[84] Ibid.
[85]Ibid.
[86]Ibid.
[87] Judicial Handbook on Environmental Law (UNEP Publication, 2005) at 19.

The present ecological era began at the end of the 1960s, after post-World War II reconstruction led to unprecedented global economic development. This development was unequal, accentuating differences in wealth between the countries of the Northern and Southern hemispheres as well as within countries.

It also required unprecedented use of exhaustible natural resources such as clean water, air, flora and fauna, and minerals. As it became clear that limited resources would ultimately become incapable of satisfying the various needs of industrial and developing countries, public opinion increasingly demanded action to protect the quantity and quality of the components of the environment.[88]

Ecological catastrophes such as the 1967 *"black tides"* off the coasts of France, England and Belgium, caused by the grounding of the oil tanker *Torrey Canyon,* and realization that the environment increasingly was threatened, incited governments to take action. In some circumstances, action was taken by individual states to address state-specific problems. In other circumstances, efforts focused on international cooperation, as a means of addressing shared concerns. These international collaborations bear particular attention because they both illustrate and articulate some of the key principles that undergird both national and international environmental law.[89]

A pivotal moment in the development of environmental law came in 1972 when the United Nations General Assembly convoked a world conference on the human environment in Stockholm. This development gave rise to intense and diverse activity, particularly within inter-governmental organizations whose mandate could extend to environmental problems. Numerous national and international non-governmental environmental organizations and various governments also engaged in considerable preparatory work.
The Conference concluded by adopting a Declaration on the Human Environment and an "Action Plan" containing 109 recommendations.[90]

[88]Judicial Handbook on Environmental Law (UNEP Publication, 2005) at 19.
[89] Ibid.
[90] Judicial Handbook on Environmental Law (UNEP Publication, 2005) at 19.

International and national environmental law substantially increased in the two decades after Stockholm. The United Nations reaffirmed and developed the general principles of the Stockholm Declaration in 1982 when the General Assembly adopted the World Charter for Nature. A few principles of customary law concerning environmental relations among states also emerged during this period. Some of them were embraced by the United Nations Environment Program as part of the "Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more states." Approved by UNEP's Governing Council on May 19, 1978, the Principles on Shared Resources reiterated Stockholm Principle 21 in recognizing the sovereign right of states to exploit their own resources coupled with an obligation to ensure that the activities undertaken within the limits of their jurisdiction or under their control do not damage the environment in other states. The UNEP Principles also expressed the obligation of states to notify the latter of plans that can be expected to affect significantly their environment, to enter into consultations with them, and to inform and cooperate in the case of unforeseen situations that could cause harmful effects to the environment. The measures also guaranteed equality of access for nonresidents to administrative and legal procedures in the state originating the harmful conduct, and nondiscrimination in the application of national legislation to polluters, whatever the place of the harmful effects.[91]

In 1992, the United Nations convened a second global meeting, known as the United Nations Conference on Environment and Development (UNCED), which met in Rio de Janeiro from 3 to 14 June 1992. Two texts adopted at UNCED have a general scope: the Declaration on Environment and Development and an action program called Agenda 21. The Declaration reaffirms the Stockholm Declaration of 1972 on which it seeks to build, but its approach and philosophy are very different. The central concept is sustainable development, which integrates development and environmental protection. Principle 4 is important in this regard: it affirms that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. Agenda 21 is the program of action to achieve sustainable development.[92]

[91]Ibid.
[92] Judicial Handbook on Environmental Law (UNEP Publication, 2005) at 20.

In the aftermath of Rio, virtually every major international convention concerning multilateral cooperation includes environmental protection as one of the goals of the states parties. Areas of international law that developed during earlier periods evolved in new directions because of insistence that they take into account environmental considerations. The result has been an infusion of environmental principles and norms into nearly every branch of international law. At the same time, in the decade after the Rio Conference, environmental concerns encountered increasing competition on the international agenda from economic globalization, an emphasis on free trade, and the development crises of poor countries. In addition, mounting evidence could be seen of the disastrous environmental consequences of armed conflict.[93]

Between August 26 and September 4, 2002 the representatives of more than 190 countries met in Johannesburg, South Africa, in order to "reaffirm commitment to the Rio Principles, the full implementation of Agenda 21 and the Programme for the Further Implementation of Agenda 21." At the end of the conference the participating governments adopted a Declaration on Sustainable Development affirming their will to "assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development – economic development, social development and environmental protection – at local, national, regional and global levels."[94]

These decades of legal developments have led to the emergence of the basic principles of environmental protection that are recognized in international and national laws, which have in turn informed the development of environmental law by giving meaning to concepts not yet contained in formal legal instruments. Principles can be foundational (e.g., equality and legal certainty) or technical (e.g., proportionality). The key environmental principles developed over the past several decades are discussed below. They have been reproduced in domestic laws and thus have provided a foundation for many environmental decisions. They are influential in most legal systems, although they sometimes may be applied differently.[95]

[93] Ibid.
[94] Judicial Handbook on Environmental Law (UNEP Publication, 2005) at 20.
[95] Ibid.

2.2. Prevention

Experience and scientific expertise demonstrate that prevention must be the Golden Rule for the environment, for both *ecological* and *economic* reasons. In some instances, it can be impossible to remedy environmental injury once it has occurred: the extinction of a species of fauna or flora, erosion, and the dumping of persistent pollutants into the sea create intractable, even irreversible situations. Even when harm is remediable, the cost of rehabilitation is often very high. In many instances it is impossible to prevent all risk of harm. In such instances, it may be judged that measures should be taken to make the risk *"as small as practically possible"* in order to allow the necessary activities to proceed while protecting the environment and the rights of others[96].

The issue of prevention is complex, owing to the number and diversity of the legal instruments in which it occurs. It can perhaps better be considered an overarching aim that gives rise to a multitude of legal mechanisms, including *prior assessment of environmental harm*, and *licensing or authorizations* that set out the conditions for operation and the remedial consequences for violation of the conditions. *Emission limits* and *other product or process standards, the use of best available techniques (BAT),* and *other similar techniques* can all be seen as applications of prevention.

Prevention is also linked to the notion of *deterrence* and the idea that disincentives *such as penalties and civil liability* will cause actors to take greater care in their behavior to avoid the increased costs, thus preventing pollution from occurring.

In addition to prevention as a generalized goal of domestic environmental laws, the notion of *"pollution prevention"* includes the concept that pollution may be reduced, or prevented, at its source, by changing raw materials or production techniques or technologies. Often "*pollution prevention"* and *"source reduction"* are conceived as a goal of voluntary efforts that complement *"command and control"* or *"end-of-pipe"* environmental regulations that limit the amount of pollution that may be emitted. *Pollution prevention sometimes produces economic benefits for industry in terms of increasing efficiency, reducing waste, and reducing liability.* Governments may engage in strategies or programs to educate the regulated community and

[96] *Solothurn v. Aargau,* Switzerland Bundesgericht (Federal Tribunal), 1 Nov. 2000.

encourage it to implement pollution prevention techniques, in addition to their efforts to promote and enforce compliance with mandatory regulations.

2.3. Precaution

While there is no single agreed formulation of principle of precaution that is used in all contexts, and precaution has not acquired generally accepted status as a legal principle in its own right or as customary international law, there is a basic concept of precaution that animates much of modern environmental protection regimes – the notion that environmental regulators often have to act on the frontiers of knowledge and in the absence of full scientific certainty. Precaution has variously been associated with the ideas that: 1) scientific uncertainty should not be used as a reason not to take action with respect to a particular environmental concern; 2) action should affirmatively be taken with respect to a particular environmental concern; 3) those engaging in a potentially damaging activity should have the burden of establishing the absence of environmental harm; and 4) a State may restrict imports based on a standard involving less than full scientific certainty of environmental harm.

Properly viewed, the concept of precaution operates as part of a science-based approach to regulation, not a substitute for such an approach, and, in practice, the concept is multi-faceted.

The so-called "precautionary approach" is relatively recent, dating from the late 1980s. The Rio Declaration stipulates that [97]:

> *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.*

Because of its many permutations and facets, precaution is at once both useful as a flexible tool or "approach," and difficult to capture in the context of a generally applicable legal "principle" or standard. This being said, it has found reference in a number of judicial cases. An Argentinean court, for example, required immediate suspension of efforts to establish an electricity grid until

[97] The 1992 Rio Declaration, Principle 15

defendant prepared a report with the participation of concerned persons, addressing the impacts and preventive or mitigation measures to avoid the potential negative effects of the electromagnetic field to be created by the project. The court explicitly stated that it was applying the precautionary principle embodied in the law and several international environmental instruments[98].

The European Court of Justice has likewise been influenced by the concept, particularly in respect to environmental risks that pose dangers to human health. The Court held that the European Commission had not committed manifest error when banning the export of beef during the so-called *"mad cow"* crisis[99]. The ECJ said in the NFU case[100]:

> *At the time when the contested decision was adopted, there was great uncertainty as to the risks posed by live animals, bovine meat and derived products. Where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to await the reality and seriousness of those risks to become fully apparent*

In a European Free Trade Association case, the Court held that it was appropriately precautionary to presuppose identification of potentially negative consequences and a comprehensive evaluation of the risk based upon the most recent scientific information. According to the Court, where the insufficient, inconclusive or imprecise nature of relevant scientific conclusions makes it impossible to determine risk or hazard with any certainty, but the likelihood of significant harm persists, the decision to take restrictive measures is justified. The criteria cited by the Court are as follows[101]:

> *Such restrictive measures must be non-discriminatory and objective, and must be applied within the framework of a policy based on the best available scientific*

[98] *Asociacion Coordinadora de Usuarios, Consumidores y Contribuyentes v. ENRE-EDESUR,* Federal Appellate Tribunal of La Plata (2003).

[99] Case C 180/96, *United Kingdom v. Commission,* [1996] ECR I-3903, para. 83; Case T-76/96 R, *National Farmers' Union* (NFU) [1996] ECR II-815, para. 88.
[100] . Id. at para. 63.
[101] Case E-3/00, *EFTA Surveillance Authority v. Norway,* paras.16, 21.

> *knowledge at any given time. The precautionary principle can never justify the adoption of arbitrary decisions, and the pursuit of the objective of 'zero risk' only in the most exceptional circumstances.*

2.4. Polluter Pays

The "polluter pays" principle was originally enunciated by the Organization for Economic Cooperation and Development (OECD) to restrain national public authorities from subsidizing the pollution control costs of private firms. Instead, enterprises should internalize the environmental externalities by bearing the costs of controlling their pollution to the extent required by law.

Historically, pollution control costs have been borne by the community at large, rather than by those who pollute. Community assumption of the costs can be demonstrated using the example of an industry that discharges pollutants into a river. There are at least three possible ways for the community to assume the economic costs of the pollution:

1) The river can remain polluted and rendered unsuitable for certain downstream activities, causing the downstream community to suffer an economic loss;
2) The downstream community can build an adequate water treatment plant at its own cost;
3) The polluter may receive public subsidies for controlling the pollution.

In each case, the affected community bears the cost of the pollution and of the measures designed to eliminate it or to mitigate its effects. The polluter pays principle avoids this result by obliging the polluter to bear the costs of pollution control, to "internalize" them. In most cases the enterprise will in fact incorporate the costs in the price of the products to some degree and pass them on to the consumer.

The polluter pays principle is therefore a method for internalizing externalities. Those who benefit from air made cleaner have a positive externality if they do not pay for the cleanup. Where air is fouled by a producer who bears no cost, it is a negative externality; those who buy the product also are free riders if the fouling is not reflected in the price of the goods. Internalization requires that all the environmental costs be borne by the producer/consumer

instead of the community as a whole. Prices will reflect the full cost if regulatory standards or taxes on the production or product correspond to the true cost of environmental protection and damage. The principle can be applied most easily in a geographic region subject to uniform environmental law, such as a state or a regional economic integration organization. The polluter can be defined as one who directly or indirectly damages the environment or who creates conditions leading to such damage.

Generally, polluters should pay for the cost of pollution control measures, such as the construction and operation of anti-pollution installations, investment in anti-pollution equipment and new processes, so that a necessary environmental quality objective is achieved. *Other means of ensuring the polluter pays principle are through taxes and charges*. Application of the principle may be difficult in practice where *identifying the polluter proves impracticable* because the pollution arises from several simultaneous causes or from several consecutive causes, or where the polluter has become financially insolvent. In such instances, there may be no alternative to community assumption of the costs of remediation.

National courts may define and elaborate on the implications of the polluter pays principle. In *Marlene Beatriz Duran Camacho v. the Republic of Colombia* (Sept. 26, 1996), the Constitutional Court, in reviewing the constitutionality of some environmental legislation, approved provisions that impose a special economic burden on those who contribute to the deterioration of the environment and impose on those who take advantage of natural resources the costs of remedying the negative effects that their actions have on the environment. The Indian Supreme Court has said that once an activity carried on is hazardous or inherently dangerous, the person carrying on that activity is liable to make good the loss caused to any other person by that activity[102].

[102] *Indian Council for Environmental Legal Action v. Union of India,* AIR 1996 SC 1446 (1996), 2 SCR 503, 3 SCC 212 (1996).

2.5. Environmental Justice and Equity[103]

2.5.1. Environmental Justice Generally

In general, environmental justice seeks to ensure that authorities fairly allocate and regulate scarce resources to ensure that the benefits of environmental resources, the costs associated with protecting them, and any degradation that occurs (i.e. all the benefits and burdens) are equitably shared by all members of society. Environmental justice goes beyond traditional environmental protection objectives to consider the equitable distribution of pollution, and, more broadly, the often disproportionate burden borne by the poor and minority groups in respect to environmental harm.

The Supreme Court of India indicated some of the elements of the concept of environmental justice[104]:

> *Public nuisance because of pollutants being discharged by big factories to the detriment of the poorer sections is a challenge to the social justice component of the rule of law. Likewise, the grievous failure of local authorities to provide the basic amenity of public conveniences drives the miserable slum-dwellers to ease in the streets, on the sly for a time, and openly thereafter, because under nature's pressure, bashfulness becomes a luxury and dignity a difficult art. A responsible Municipal Council constituted for the precise purpose of preserving public health and providing better facilities cannot run away from its principal duty by pleading financial inability. Decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies.*

2.5.2. Public Trust

The concept of public trust expresses the idea that the present generation holds the natural resources of the earth in trust for future generations. When applicable as a legal principle, public trust contemplates that certain things, such as *natural resources* and *the exercise of public power*, are held by governments in trust for the citizenry and must be used for the public benefit[105].

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[103] Judicial Handbook on Environmental Law (UNEP Publication, 2005) at 23.
[104] Supreme Court of India, *Ratlam Municipality v. Vardihichand,* AIR 1980 SC 1622.
[105] Gunaratne v. Ceylon Petroleum Corporation, (1996) 1Sri L R 315 (Sri Lanka) and Premachandra and Dodangoda v. Jayawickreme and Bakeer Markar, (1993) 2 Sri L R 294 (Sri Lanka).

In Roman law, certain *res* such as rivers, waterways, the seashore, were classified as *res nullius* or *res communes* and were available for the free use of everyone and rights over them could not be given to individuals. In the common law, the Sovereign could own certain natural resources such as rivers and waterways but it was a restricted ownership and could not be granted to private entities because the Sovereign held the resources in trust for the use of the general public.

In international law, as early as 1893, the United States government argued in the *Behring Sea Fur Seals Case* that[106]:

> *No possessor of property has an absolute title to it – his title is coupled with a trust for the benefit of mankind. . . . Things themselves are not given him, but only the usufruct or increase – he holds the thing in trust for the present and future generations of man.*

In commercial activities in part of a national park, Stein J. said[107]

> *National parks are held by the State in trust for the enjoyment and benefit of its citizens, including future generations. In this instance the public trust is reposed in the Minister, the director and the service. These public officers have a duty to protect and preserve national parks and exercise their functions and powers within the law in order to achieve the objects of the National Parks and Wildlife Act.*

2.6. The Integration Principle

Environmental protection requires that due consideration be given to the potential consequences of environmentally fateful decisions. Various jurisdictions (e.g., the United States and the EU) and business organizations (e.g., the U.S. Chamber of Commerce) have integrated environmental considerations into their decision-making processes, through both environmental-impact-assessment mandates and other provisions.

[106] J.B. Moore, History and Digest of the International Arbitrations to which the United States has been a Party (1989), Vol I, p. 833

[107] *Willoughby City Council v. the Minister,* (1992) 78 LGERA 19, at 27

When we come to our legal system the Environmental Policy of 1997 under 4.1.(a) clearly depicts that one of the basic objectives of the policy is to integrate population planning, resources management, and the rehabilitation of and care for the environment to achieve a sustainability of life style.

Furthermore, the preamble of Environment Impact Assessment Proclamation explicitly stipulates that the integration of environmental, economic, cultural, and social considerations into a decision making process in a manner that promotes sustainable development is a pressing need.

2.7. The Public-Participation Principle

Decisions about environmental protection often formally integrate the views of the public. Generally, government decisions to set environmental standards for specific types of pollution, to permit significant environmentally damaging activities, or to preserve significant resources are made only after the impending decision has been formally and publicly announced and the public has been given the opportunity to influence the decision through written comments or hearings. In many countries citizens may challenge government decisions affecting the environment in court or before administrative bodies. These citizen lawsuits have become an important component of environmental decision making at both the national and the international level.

Public participation in environmental decision-making has been facilitated in Europe and North America by laws that mandate extensive public access to government information on the environment. Similar measures at the international level include the Rio Declaration and the 1998 Arhus Convention, which committed the 40 European signatory states to increase the environmental information available to the public and to enhance the public's ability to participate in government decisions that affect the environment. During the 1990s the Internet became a primary vehicle for disseminating environmental information to the public.

2.8. The Obligation of States Not to Cause Damage to the Environment beyond Their Jurisdiction.

The general substantive obligation inherent in this principle is a duty to prevent, reduce and control trans-frontier environmental harm. However, this obligation is neither absolute nor very precise.

Expressions of this principle are found in binding international instruments. One example- in addition to the ones already mentioned- is the 1982 UN Convention on the Law of the Sea[108]:

> *States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.*

As stated in this article, the obligation of the State does not only comprise activities carried out by or on behalf of the State itself. It also includes actions by any subject under the state's jurisdiction (citizens, companies, municipalities etc). This was stated clearly already in the Trail Smelter case. It means that the State has the obligation to exercise its authority and to take necessary actions, in order to prevent any activity under its jurisdiction from doing harm to other States. To this effect, the State must take adequate measures, issue necessary regulations, carry out control, sanction violations of the law etc.

The principle raises several difficult questions of interpretation.

First, is any damage to the territory or the environment of a neighboring State against international law? Or rather: where does the limit go between legal and illegal State conduct? It is a commonly held view that there is a ''lower threshold'' here, that only ''substantial '' or ''significant '' harm to other States is a violation of international customary law. The Trail Smelter arbitration used the expression '' serious consequences ''.

Secondly, is a significant harm always a violation of international law, regardless of its causes and other circumstances? The general view is that a State has not violated international law if it

[108] The 1982 UN Convention on the Law of the Sea (UNCLOS), Article 194, para. 2.

has exercised ''due diligence'' – that is, if it has acted in good faith and has taken reasonable measures to prevent the damage. ''Abuse'' of rights, intentional or unnecessary harm will always be regarded as violating the ''due diligence'' standard and thus be against international law. Beyond these clear situations, the ''due diligence'' standard implies an appraisal of various relevant factors.

The obligation to exercise ''due diligence'' means that the State must act in a responsible way, with due regard to the interests of other States. It must consider the risks and the possibilities involved, and take reasonable measures to avoid trans-boundary harm. The costs and benefits on the two sides are relevant. The question may be what resources are available on the one side, and what interests are harmed on the other. The economic situation and the capabilities of the polluting country, and the technical solutions available, are also relevant.

This principle is reflected in various ways in international instruments, both ''soft law'' and treaty law. For example, the duties of the state parties according to some of the environmental conventions may be qualified by expressions like ''according to their capabilities'' or ''as far as possible''.

The principle of state liability for trans-frontier environmental damage is generally accepted, as the Trail Smelter arbitration illustrates. But here again, many questions remain open. It is uncertain, for example, exactly what a State may be liable for. May a State claim compensation for the loss of natural beauty, cultural heritage and other similar values which may be important, but difficult to value in monetary terms? It is also unclear to what extent, States may be held liable for acts by private citizens.

The problems of causality are present in international relations, as they are in national compensation law. In the Trail Smelter case the injury was established ''by clear and convincing evidence''. Given the often complex cause-effects relationships of pollution damage in general, and of trans-boundary and global pollution in particular, clear and convincing evidence may be hard to establish. The rules on the burden of proof in such cases are not clear in international law.

Should liability be based on strict liability or on a negligence rule? A common view is that the ''due diligence'' standard applies. This may mean that a State is not liable if it has taken reasonable measures to prevent damage. But for so called ''ultra hazardous'' activities, such as nuclear activities, there is general agreement that a principle of strict liability operates.

The need to develop clearer liability and compensation rules in international environmental law was recognized already at the 1972 Stockholm Conference. Since then, the many complex issues of State responsibility have been discussed generally, i.e. by the International Law Commission.

It should be underlined that there are two distinct problem areas in this field. The ***first*** is the question of a State's responsibility, when it has violated international law. The ***second*** is the question of State liability in cases where the pollution for various reasons is not a violation of international law (for example because the State has showed due diligence), but where a certain compensation to the victim State nevertheless seems reasonable. Since 1978 the subject of ''liability for acts not prohibited by international law '' has been discussed by the International Law Commission. But this is a very controversial issue, and conclusions are still pending.

2.9. States' Obligations to Cooperate, to Inform and to Consult With Other States

International customary law includes several principles of procedural obligations for States in environmental matters. Generally speaking, these principles are reflections of the principles of good neighborliness, and diligence. They have found their way into soft law as well as treaties.

If States have conflicting interests related to an environmental problem such as trans-boundary pollution, States have a general obligation to cooperate in order to find solutions, and if necessary to negotiate in good faith in order to solve conflicts through peaceful means. The principle of cooperation is implicit in the numerous international treaties that have been established over the last decades. It is also expressed through the extensive work done by intergovernmental organizations in the field of environment. Finally, the duty to cooperate is clearly stated in several important declarations and treaties, such as the Rio Declaration (principle 7) and the Law of the Sea Convention (article 197).

States also have a duty to inform and consult with other States, if activities within their territory may have effects across the borders. More recently, this duty of information has developed into rules on environmental impact assessment, in a trans-boundary context. This was first expressed as ''soft law '' in UNEP's 1987 Goals and Principles of Environmental Impact Assessment, which provides[109]:

> *When information provided as part of an EIA indicates that the environment within another State is likely to be significantly affected by a proposed activity, the State in which the activity is being planned should, to the extent possible:*
> *a. Notify the potentially affected State of the proposed activity,*
> *b. Transmit to the potentially affected State any relevant information from the EIA, the transmission of which is not prohibited by national laws or regulations; and*
> *c) When it is agreed between the States concerned, enter into timely consultations.*

More recently, the principle has got a detailed and comprehensive expression in the 1991 ECE Convention on Environmental Impact Assessment in a Trans-boundary Context (known as the Espoo Convention). An important principle in this context is the principle of nondiscrimination. This means that environmental effects in another State – or beyond national jurisdiction – should be given the same weight as effects in a State's own territory. This principle may not yet be universally recognized, but it is reflected for example, in the Nordic Environmental Convention from 1974. The non-discriminatory principle may also imply that citizens who are or may be touched by pollution from another State have the same legal rights as the citizens of the polluting State as to, for example, legal standing and right to compensation for damage. Such equal rights for citizens are established between the Nordic countries in the 1974 Nordic Environmental Convention.

In case of an imminent or actual accident, States have a special duty to take emergency actions, and to adequately warn other States. This principle was highlighted in the *Chernobyl case in 1986*. The Soviet Union failed to inform neighboring countries about the nuclear accident. This was widely regarded as a breach of international customary law (although, apparently, no State

[109] UNEP's 1987 Goals and Principles of Environmental Impact Assessment, Principle 12.

forwarded a formal protest). A special treaty on information in case of a nuclear accident was rapidly negotiated after the accident. The fact that States already had such an obligation according to customary international law made it possible to reach agreement on a convention in a very short time.

2.10 Shared Natural Resources, Common Property and Common Heritage of Man Kind

Another group of problems are linked to the management of resources which are either shared between several states, or common in the sense that they are outside the area of national jurisdiction.

The general principle not to cause significant harm outside your territory-principle 21- also applies explicitly to areas beyond national jurisdiction. International law distinguishes between the concepts "common Property" and "Common heritage of mankind".

A. Shared Natural Resources

The concept of *"Shared Natural resources"* is used when one natural resource comes under the jurisdiction of several states. A lake bordered by two or more states, or a river running through the territory of several states are typical examples. It follows from article 63 of the Law of the Sea Convention, that fish stocks occurring within the exclusive economic zones of two or more coastal states are also regarded as shared natural resources.

The concept is, however, unclear and controversial in several ways. It is unclear what resources should be treated as shared. In particular, there is at present not international consensus to include resources such as boarder forests, mountain chains, the atmosphere or biodiversity within natural geographic area. Not every state accepts the concept. Some prefer to see their share of the resources as an ordinary part of their territory and insist on their sovereignty right to exploit this resource, subject only to the obligation not to cause injury to other states.

Regardless of the legal status of the concept, however, it is recognized that the above mentioned principles of cooperation and information apply particularly, in cases where a natural resource is under the jurisdiction of two or more states. In the *Lac Lanoux case* (arbitration 1957) France diverted water under its jurisdiction from a water course shared with Spain. The court stated that Spain had legitimate interest in the matter, and had the right to be consulted. When it comes to a

state's right to exploit such resources, relative to other states' rights, the general principle of *"equitable utilization"* is broadly recognized. This principle is expressed in the 1978 UNEP Principles which state[110].

> *What is meant by "equitable utilization"? It indicates the need to evaluate and to balance the various interests of the states concerned. An appraisal must take place in each individual case. Relevant issues are –probably- geographical and historical conditions, social and economic needs for the states involved, effects of different activities, and potential and alternative uses.*

B. Common Property

Common property refers mainly to the living resources outside national jurisdiction, such as fish stocks and other living resources on the high seas. These resources are in principle free for the legitimate and reasonable use by all states. There is an implicit obligation to take necessary conservation measures, if limitations are needed to keep the catch within the limits of sustainability. The Law of the Sea Convention clearly expresses the general obligation of states to take necessary measures in order to conserve the living resources of the high seas[111].

If the resource becomes scarce, and several states compete to exploit it, the general principle of *equitable exploitation* applies. What is equitable depends on an evaluation of the different interests concerned in each individual case. One factor of importance is the historic use and traditional rights by different states in the area. Another is the importance of the exploitation for the participating states. In the question of allocation of fish stocks, this criterion often means preferential rights to coastal states. These principles and considerations are reflected, for example, in the *Icelandic Fisheries case* between *Iceland* and *The United Kingdom* (ICJ 1974).

It is obvious, however, that the general expressions like "equitable exploitation" or "reasonable use" are too vague to solve by themselves because os the complex problems of rights to living resources, such as rich fish stocks on the high seas and the protection of the marine environment beyond the national jurisdiction in general. Instead it has been necessary to establish special treaties for the proper management of these resources. The Law of the Sea convention, Fisheries

[110] The 1978 UNEP Principles on Conservation and Harmonious Utilization of natural Resources Shared by two or more states

[111] The Law of the Sea Convention, *Articles 117-119*

Convention for the North East and the Northern West Atlantic, and several global conventions on pollution from ships, are some of the many important instruments of binding international law in this area.

It should also be underlined that the development of states' jurisdiction in relation to the marine environment is of greater importance. For example, the establishment of coastal states' exclusive economic zone of up to 200miles strengthens the possibility for a proper protection of the marine environment and sustainable management of the living resources of the sea.

C. Common Heritage of Mankind

The concept of *"common heritage of mankind"* often appears in discussions on environmental problems. It should be underlined that this concept is used in at least two different ways; partly as a general, popular and somewhat vague vision, partly as a precise term of international law.

In a popular meaning, the common heritage of mankind is often used as a term for global environmental resources, such as the Earth's biodiversity, the tropical forests or the atmosphere. The term itself indicates an obligation to manage these resources for the benefit of mankind as a whole, and a need for international control of their exploitation.

In international law, however, the concept has a stricter meaning. It refers to two specific non-living resources outside national jurisdiction: the sea-bed mineral resources and the moon. In principle, all states should share the benefits of these resources, even if they don't take directly part in their exploitation. On this point it is different from the rules pertaining to common property regimes, where only the states that take active part, may benefit from the exploitation of the resources.

The Law of the Sea Convention regulates the utilization of the sea-bed resources outside national jurisdiction. In the Convention this is called "the Area". It simply states: "*The Area and its resources are the common heritage of mankind"*[112]

[112] The Sea Convention, art 136.

The Area's resources belong to mankind as a whole. No state may claim or exercise sovereignty or sovereign rights over any part of the Area or its resources. An International Sea-Bed Authority shall administer these Resources on behalf of mankind.

2.11 The Principle of Sustainable Development.

The concept of *"sustainable development"* had already begun to emerge prior to the UN Conference on Environment and Development in 1992, but its defining role in the evolution of international law and policy on protection of the environment secured near universal endorsement at Rio. Sustainable development informs much of the Rio Declaration, as well as the conventions on climate change and Biological Diversity, and it is central to the elaboration of global environmental responsibility by these and other instruments. Since Rio, sustainable development has been adopted as policy by numerous governments, both at national and regional levels. It has influenced the application and the development of law and policy by international organizations, including FAO, IMO, the World Bank, the WTO; and UNDP; as well as treaty bodies such as the International Tropical Timber Organization and the European Energy Charter.

A. The Concept of Sustainable Development

Agenda 21, the programme of action adopted by the UNCED Conference, refers in its preamble to the need for a' global partnership for sustainable development', and most of its provisions, together with the principles and down in the Rio Declaration on Environment and Development, are intended to promote implementation of the concept. But, as one author has pertinently asked,' can a term which commands such support actually mean anything?' Does this crucial concept have a solid core of meaning or does the content of sustainable development lie mainly in the eye of the beholder? Certain interpretations can be discarded immediately. *Firstly; sustainable development is not to be confused with zero growth.* Economists readily accept that in some cases even zero growth may be unsustainable; zero growth in the output of CFCs will not save the ozone layer, for example. Conversely, growth, if defined in terms of GNP, is not inevitably unsustainable, since GNP is not *per se* a measure of natural resource consumption or of pollution. One environmental economist has put this point succinctly as it is a mere monetary aggregate, GNP does not distinguish between different types of economic activity: it simply records the overall total. It is quite possible for GNP to go up with fewer resources being used

and less pollution being generated, if the content of growth tends away from environmentally-degrading activities.

The switch from coal or oil to gas-fired or nuclear power stations is one example of environmentally friendly growth of this kind, and in general more environmentally efficient use of natural resources or energy is more likely to promote economic growth rather than retard it.

Whatever else it means therefore, sustainable development need not imply a policy of no growth. Nor does the Rio Declaration envisage such an outcome. It firmly reiterates the sovereign right of states to exploit their own resources in accordance with their own environmental and development policies, although subject, as at Stockholm, to a responsibility for trans-boundary environmental protection; it asserts a right to development, albeit so as to meet equitably the needs of present and future generations, and it calls for an 'open international economic system that would lead to economic growth and sustainable development in all countries.'

Much of Agenda 21, and of international environmental law, has been concerned with attaining this integration; clearly, a policy of economic growth which disregards environmental considerations, or vice versa, will not meet the criterion of sustainable development. But to view sustainable development as amounting to a compromise between equally desirable ends fails to explain either the nature of sustainability or of development, and gives us no criteria for determining the parameters and the ultimate objective of this integration of development and environment. Nor does it tell us what the needs of future generations will be.

On one view, sustainable development implies not merely limits on economic activity in the interests of preserving or protecting the environment, but an approach to development which emphasizes the fundamental importance of equity within the economic system. This equity is both intra-generational, in that it seeks to redress the imbalance in wealth and economic development between the developed and developing worlds by giving priority to the needs of the poor, and inter-generational, in seeking a fair allocation of costs and benefits across succeeding

generations. Put simply, development will only be 'sustainable' if it benefits the disadvantaged, without disadvantaging the needs of the future[113].

What is characteristic of all these instruments is their commitment to protecting the interests of future generations (an inherently problematic notion), and of developing countries. The latter benefit more immediately from access to funding and capacity- building through the *Global Environmental Facility* and other sources, from access to the benefits derived from exploitation of their own genetic resources and transfer of technology, and from a recognition that in a system of ' common but differentiated responsibilities' developed countries bear a larger responsibility for ensuring sustainable development 'in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'.

Thus 'sustainable development' is intended to serve not simply the needs of the environment, but entails a reorientation of the world's economic system in which the burdens of environmental protection will fall more heavily on the developed Northern States and the economic benefits will accrue more significantly to the underdeveloped south for the common benefit of all.

A further element of sustainable development, however, is 'a notion of economic welfare which acknowledges non-financial components', in particular the quality of the environment, health, and the preservation of culture and community. We can see some of these concerns in principle 1 of the Rio Declaration, which places human beings' at the centre of concerns for sustainable development', and proclaims their entitlement to ' a healthy and productive life in harmony with nature,' but more especially in such international agreements as the 1972 Convention for the protection of World Cultural and National Heritage, which protects areas like Stonehenge and the Great Barrier Reef .Similarly, the 1991 protocol to the Antarctic Treaty on Environmental protection designates Antarctica a Special Conservation Area, and acknowledges its ' intrinsic value', including its 'wilderness and aesthetic values'. However, the Rio Declaration is somewhat less 'ecocentric' than its 1972 predecessor, and it lacks any express reference to such values, or to conservation of wildlife and habitat.

[113] Rio Declaration, Conventions on Climate Change, and Biodiversity Convention.

Sustainable development is thus not exclusively concerned with narrow economic needs, but encompasses a broader environmental perspective. Defined in these terms, sustainable development has not been an objective of industrialized or developing countries until now, and its implementation requires a considerable departure from earlier global economic policy .This is most obviously true of the USA, where less than 5 per cent of the world's population consumes annually over 30 per cent of global energy output. Developing countries not only have problems securing a more equitable balance of resource consumption, but their control over their own natural resources and environmental policies may be significantly limited by external indebtedness and resulting dependence on short-term resource exploitation, influenced by patterns of international trade within the WTO system. It is in this context that the failure of the present WTO system to take greater account of environmental concerns or of the development interests of developing states may become a structural inhibition on implementation of the policies adopted at Rio in 1992.

Other structural impediments are technological and scientific. We should not assume the capability of scientists to identify all the adverse environmental consequences of economic and industrial activity, whether now or in the future, or to provide technical solutions. Rather, a concept of sustainability must take full account of the limitations of scientific knowledge and prediction in the evaluation of environmental risks.

Sustainable development requires political action if it is to be implemented, and it may be easier to deliver in certain systems than in others. While on the one hand a measure of authoritarian dirigisme may appear superficially attractive if strong environmental controls are required, in reality totalitarian societies such as the Soviet Union, China, or the former communist regimes in Eastern Europe, have proved far less successful in managing their environment and in avoiding environmental disasters than participatory democracies. It is no coincidence that both the Soviet and Hungarian democratic revolutions of the period 1989-91 can be related directly to the environmental consequences of *the Chernobyl accident* and *the Gabcikovo-Nagymaros dam* controversy, nor is it surprising that the *Bhopal disaster* has greatly strengthened the emphasis which Indian courts now place on human rights and public interest litigation in environmental matters. Environmental impact assessment, access to information, and public participation in

national policy formation and domestic environmental governance are for this reason among the more important elements of the Rio Declaration. Thus, sustainable development is as much about processes as about outcomes, and for lawyers this may be the key point to grasp.

The notion of sustainable development is thus inherently complex and its implementation obliges governments to think in somewhat different terms from those to which they have become accustomed. Social, political and economic choices abound: what weight should be given to natural resource exploitation over nature protection to industrial development over the air and water quality, to land-use development over conservation of forests and wetlands, to energy consumption over the risks of climate change, and so on. This may result in wide diversities of policy and interpretation, as different governments and international organizations pursue their own priorities and make their own value judgments, moderated only to some extent by international agreement on such matters as climate change and conservation of biological diversity. Only a few governments, such as New Zealand's, have legislated specifically for sustainable development. But, despite the demands of the Rio Declaration for integration, many other governments approach the matter piecemeal, with inevitable incoherence.

While it is one of the roles of international environmental law to give the concept of sustainable development more concrete content, chiefly through multilateral environmental treaties, this process is still very far from complete. In any event the nature of 'sustainable development' is such that it cannot usefully be defined, at best, international law can only facilitate its implementation in specific situations, such as conservation of high seas fisheries, or trade in elephant ivory, or allocation of shared watercourses and so forth. Sustainable development offers us a unifying concept for the exploitation of natural resources and the integration of environment and development. However, it does not encompass the totality of international environmental law.

B. The Elements of Sustainable Development

Sustainable development contains both substantive and procedural elements. The substantive elements are mainly set out in principles 3-8 and 16 of the Rio Declaration. They include the sustainable utilization of natural resources; the integration of environmental protection and

economic development; the right to development; the pursuit of equitable allocation of resources both within the present generation and between present and future generations (intra-and inter-generational equity), and the internalization of environmental costs through application of the 'polluter pays' principle. None of these concepts is new, but the Rio Declaration brings them together in a more systematic form than hitherto. The principal procedural elements are found in principles 10 and 17 dealing with public participation in decision- making and environmental impact assessment. Again, none of these is new, but never before have had they secured such widespread support across the international community.

2.12 Summary

No legal order can regulate with specific rules any possible conduct of legal subjects. Gaps are bound to exist in the normative network of any community. Hence, the need to resort to general principles, that is, sweeping and rather loose standards of conduct that can be deduced from the various rules by extracting and generalizing some of the most significant common points, so much so that we can safely say that, general principles constitute both the backbone of the body of law governing international dealings and the potent cement that binds together the various and often disparate cogs and wheels of the normative framework of the community.

At present, in the world community, two distinct classes of general principles may be relied upon. First**,** there are general principles of international law, namely those principles which can be inferred or extracted by way of induction and generalization from conventional and customary rule of international law. Second, there are principles that are peculiar to particular branches of international law (the law of the sea, humanitarian law, the law of state responsibility, etc.).

As a means of realization of friendly environment, experience and scientific expertise demonstrate that prevention must be the Golden Rule for the environment, for both *ecological* and *economic* reasons. This is a burning issue because in some instances it can be impossible to remedy environmental injury once it has occurred. To further consolidate the proactive measures, it is also important to relay on the precautionary approach that shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of

full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

As a matter of fact, some times the proactive measure may fail to realize their objective and in such a case it is a must case to take reactive measures. Accordingly, the affected community bears the cost of the pollution and of the measures designed to eliminate it or to mitigate its effects. The polluter-pays-principle avoids this result by obliging the polluter to bear the costs of pollution control, to internalize them. In most cases the enterprise will in fact incorporate the costs in the price of the products to some degree and pass them on to the consumer.
The polluter pays principle is, therefore, a method for internalizing externalities. Those who benefit from air made cleaner have a positive externality if they do not pay for the cleanup. In general, environmental justice seeks to ensure that authorities fairly allocate and regulate scarce resources to ensure that the benefits of environmental resources, the costs associated with protecting them, and any degradation that occurs (i.e. all the benefits and burdens) are equitably shared by all members of society. Environmental justice goes beyond traditional environmental protection objectives to consider the equitable distribution of pollution, and, more broadly, the often disproportionate burden borne by the poor and minority groups in respect to environmental harm.

Once any legal system accommodates both proactive and reactive measures, environmental justice seeks to ensure that authorities fairly allocate and regulate scarce resources to ensure that the benefits of environmental resources, the costs associated with protecting them, and any degradation that occurs (i.e. all the benefits and burdens) are equitably shared by all members of society. Environmental justice goes beyond traditional environmental protection objectives to consider the equitable distribution of pollution, and more broadly, the often disproportionate burden borne by the poor and minority groups in respect to environmental harm.

To maintain the flow of natural cycle, measures are expected to be taken at the international plane in addition to the measures that could possibly be taken by individual states. Accordingly, each and every state has the obligation to exercise due diligence. That is, a state must act in a responsible way, with due regard to the interests of other states. It must consider the risks and

the possibilities involved, and take reasonable measures to avoid trans-boundary harm. The costs and benefits on the two sides are relevant. The question may be what resources are available on the one hand, and what interests are harmed on the other. The economic situation and the capabilities of the polluting country, and the technical solutions available, are also relevant.

To realize the responsibility of states at national and international level, states also have a duty to inform and consult with other states, if activities within their territory may have effects across the borders. More recently, this duty of information has developed into rules on environmental impact assessment, in a trans-boundary context.

Finally, it is a must case to notice that sustainable development is a means to an end for the realization of friendly environment. And, to have a clear picture of the subject matter, sustainable development implies not merely limits on economic activity in the interests of preserving or protecting the environment, but an approach to development which emphasizes the fundamental importance of equity within the economic system. This equity is both intra-generational, in that it seeks to redress the imbalance in wealth and economic development between the developed and developing worlds by giving priority to the needs of the poor, and inter-generational, in seeking a fair allocation of costs and benefits across succeeding generations. Put simply, development will only be 'sustainable' if it benefits the disadvantaged, without disadvantaging the needs of the future.

2.13 Review Questions

1. Indicate how the basic principles of environmental law are reflected under the Ethiopian legal system.
2. Discuss what the polluter pays principle is.
3. Discuss the importance of states' obligation to cooperate, to inform and to consult with other states.
4. Define what sustainable development is.
5. Pinpoint the elements of sustainable development.
6. Discuss what integration principle is.
7. Discuss the role of the precautionary principle in the realization of proactive measures.
8. Discuss shared natural resources, common property, and common heritages of mankind.

9. Discuss the role of public interest litigation in the realization of environmental democracy.
10. Discuss what environmental justice and equity are.

CHAPTER 3 ENVIRONMENTAL RIGHTS

3.1 Introduction to Environmental Rights

Increasingly, environmental protection generally, and the particular role of the courts in implementing such protection, is being given shape by the creation or recognition of various enforceable rights. A growing number of international, constitutional and statutory provisions set forth rights that are relevant to and invoked for environmental protection. In some instances, the provisions guarantee procedures that are designed to provide transparency and democratic governance by allowing interested persons to have information about and input into decisions that affect their environment or redress when that environment is harmed. Such rights are also viewed as instrumental in achieving sound environmental decision-making. Principle 10 of the Rio Declaration on Environment and Development reflects this notion:

> *Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.*

Constitutional provisions may also guarantee a right to an environment of a specified quality, such as safe, healthy, ecologically sound, or clean. The proliferation of such provisions has resulted in an increasing number of cases where judges are asked to enforce the stated rights.
This chapter reviews some of the national and international laws concerning environmental rights and includes some illustrative judicial decisions.

3.2 The Right to Information

Access to environmental information is a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities. It also can assist enterprises in planning for and utilizing the best available techniques and technology. The nature

of environmental deterioration, which often arises only long after a project is completed and can be difficult, if not impossible, to reverse, compels that early and complete data be available to make informed choices. Trans-boundary impacts also produce significant demands for information across borders. Where national law includes a Freedom of Information Act, issues of access to environmental information can arise in court. Furthermore, during litigation a judge may demand production of information by parties or from state authorities

3.2.1 National Law

The right to information is recognized as a right in most domestic jurisdictions either by constitutional provision or by freedom of information legislation that covers most information held by public authorities, including environmental information. Laws requiring Environmental Impact Assessment have this feature by implication, since E.I.A. generally must be made available to the public for comment. Laws recognizing citizens' suits also have provisions enabling citizens to obtain necessary information.

Some countries have gone as far as instituting Pollutant Release and Transfer Registries, which specify toxic emissions and discharges for which facilities are required to publicly disclose.
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3.2.2 International Law

Human rights texts generally contain a right to freedom of information or a corresponding state duty to inform. The right to information is included in the Universal Declaration of Human Rights (Art. 19), the International Covenant on Civil and Political Rights (Art. 19(2)), the Inter-American Declaration of the Rights and Duties of Man (Art. 10), the American Convention on Human Rights (Art. 13), and the African Charter on the Rights and Duties of Peoples (Art. 9). Furthermore, informational rights are widely found in environmental treaties. Broad guarantees of public information are found in regional agreements, including the 1992 Helsinki Convention on the Protection and Use of Trans-boundary Watercourses and International Lakes (Art. 16), the 1992 Espoo Convention on Environmental Impact Assessment in a Trans-boundary Context (Art. 3[8]), and the 1992 Paris Convention on the North-East Atlantic (Art. 9).

The last mentioned requires the contracting parties to ensure that their competent authorities are required to make available relevant information to any natural or legal person, in response to any reasonable request, without the person having to prove an interest, without unreasonable charges and within two months of the request.

The provisions of the Rotterdam *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (Sept. 11, 1998) encourages parties to ensure that information on chemical and pesticide hazards is made available to the public. Art. 15(2) on implementation requires each state party to ensure, "to the extent practicable" that the public has appropriate access to information on chemical handling and accident management and on alternatives that are safer for human health or the environment than the chemicals listed in Annex III to the Convention.

Other treaties require states parties to inform the public of specific environmental hazards. The IAEA *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management* recognizes the importance of informing the public on issues regarding the safety of spent fuel and radioactive waste management. Article 6 and 13, on sitting of proposed facilities, require each state party to take the appropriate steps to ensure that procedures are established and implemented to make information available to members of the public on the safety of any proposed spent fuel management facility or radioactive waste management facility. Similarly, Article 10(1) of the *Convention on Persistent Organic Pollutants* (Stockholm, May 22, 2001) specifies that each Party shall, within its capabilities, promote and facilitate provision to the public of all available information on persistent organic pollutants and ensure that the public has access to public information and that the information is kept up-to-date (Art.10 (1)(b) and (2)).

The states participating in the OSCE have confirmed the right of individuals, groups, and organizations to obtain, publish and distribute information on environmental issues. Conference on Security and Cooperation in Europe, Sofia Meeting on Protection of the Environment (October-November 1989), (CSCE/SEM.36, 2 November 1989), the Ministerial Declaration on Environmentally Sound and Sustainable Development in Asia and the Pacific (Bangkok, 16

October 1990), A/CONF.151/PC/38 affirm that the right of individuals and non-governmental organizations to be informed of environmental problems relevant to them, to have the necessary access to information, and to participate in the formulation and implementation of decisions likely to affect their environment.

The Arab Declaration on Environment and Development and Future Perspectives of September 1991 speaks of the right of individuals and non-governmental organizations to acquire information about environmental issues relevant to them[114].

3.3 Public Participation

Public participation is emphasized throughout international and national environmental law. Public participation is based on the right of those who may be affected to have a say in the determination of their environmental future. Depending on the jurisdiction, this may include foreign citizens and residents. In the EIA context, the public typically incorporates all stakeholders including communities, women, children, indigenous people, non-governmental organizations, other state and non-state institutions.

The EIA report is made available to the public for comment for a specified period and the public is usually allowed to submit written comments. Public hearings may also be held in certain circumstances.

Non-governmental organizations (NGOs) and groups such as trade unions or manufacturers' associations are an organized means of public participation in environmental decision-making. Like individual members of the public, NGOs may compile data, seek to influence legislation, intervene in decisions on licensing or permitting projects, and monitor compliance with environmental laws. With these roles and because of their greater means, expertise, and organized efforts, NGOs often can more effectively assert public rights of information and participation. The importance of NGOs is reflected in the emphasis on their role in recent treaties

[114] *Arab Declaration on Environment and Development and Future Perspectives*, adopted by the Arab Ministerial Conference on Environment and Development (Cairo, September 1991), A/46/632, cited in U.N. Doc E/CN.4/Sub.2/1992/7, 20.

such as the *Desertification Convention,* which speaks in its preamble of "the special role of non-governmental organizations and other major groups in programmes to combat desertification and mitigate the effects of drought."

3.3.1 National Law

In most systems, public participation is provided for, is designed to be meaningful, and is usually legally enforceable. In *Save the Vaal v. the Director of Mineral Development Gauteng Region,* the High Court of South Africa in Witwatersrand Local Division set aside a mining authorization on the basis that the applicant had a right to be heard before the agency took a decision to grant the license[115]. If public comments are unjustifiably disregarded in the final decision, there may be a cause of action to challenge the validity of the decision[116].

3.3.2 International Law

The 1992 *Rio Declaration on Environment and Development,* principle 10, recognizes the need for public participation. Agenda 21, the plan of action adopted at the Rio Conference, calls it "one of the fundamental prerequisites for the achievement of sustainable development." Section III identifies major groups whose participation is needed: women, youth, indigenous and local populations, non-governmental organizations, local authorities, workers, business and industry, scientists, and farmers. It calls for public participation in environmental impact assessment procedures and participation in decisions, particularly those that potentially affect the communities in which individuals and identified groups live and work. It encourages governments to create policies that facilitate a direct exchange of information between the government and the public in environmental issues, suggesting the EIA process as a potential mechanism. In fact, most EIA laws have provision for public participation because this facilitates direct public input into decisions on issues of environment and development.

The *Climate Change Convention,* Article 41(i) obliges Parties to promote public awareness and to "encourage the widest participation in this process including that of non-governmental

[115] Case No. 97021011 (1997).

[116] *Leatch v. National Parks and Wildlife Service and Shoalhaven City Council,* 81 LGERA 270 (1993)

organizations". The *Desertification Convention* recognizes in Art. 3(a) and (c) that there is a need to associate civil society with the action of the State. This treaty is significant in its participatory approach, involving the integrated commitment of all actors – national governments, scientific institutions, local communities and authorities, and non-governmental organizations, as well as international partners, both bilateral and multilateral. The Biodiversity Convention provides for public participation in environmental impact assessment procedures in Article 14(1) (a).

The right to public participation is also widely expressed in human rights instruments. Article 21 of the *Universal Declaration of Human Rights* affirms the right of everyone to take part in governance of his or her country, as does the *American Declaration of the Rights and Duties of Man* (Art. 20) and the African Charter (Art. 13). Article 25 of the *International Covenant on Civil and Political Rights* provides that citizens have the right, without unreasonable restrictions "to take part in the conduct of public affairs, directly or through freely chosen representatives." The *American Convention on Human Rights* contains identical language in Article 23.

3.4 Access to Justice

The right to an effective remedy, meaning access to justice and redress, can be found in both human rights law and in environmental law. The United Nations Covenant on Civil and Political Rights calls for states to provide a remedy whenever rights protected under national or international law have been violated. In the European Convention on Human Rights, Article 13 guarantees a remedy whenever there is a violation of the rights and freedoms contained in the Convention, thus encompassing violations of the right to information. The Inter-American and African regional human rights systems contain a similar guarantee. Environmental instruments frequently proclaim the need for effective remedies. Principle 10 of the Rio Declaration provides that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

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 individuals, groups and

organizations with a recognized legal interest. 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 (Art. 235(2)).

The right to a remedy is not necessarily limited to nationals of a state. Some international agreements contain obligations to grant any injured person a right of access to any administrative or judicial procedures equal to that of nationals or residents. Equal access to national remedies has been considered one way of implementing the polluter pays principle because it tends to expand the scope of polluter accountability.

3.5 Environmental Quality

3.5.1 National Law

National provisions proclaiming a right to environmental quality are fairly prevalent at this juncture. Almost every constitution adopted or revised since 1970, either states the principle that an environment of a specified quality constitutes a human right or imposes environmental duties upon the state. The Constitution of Ukraine states that[117]:

> *[E]very person has the right to a safe and healthy environment and to compensation for damages resulting from the violation of this right.*

State practice is divided over the issue of the justiciability of the right to a safe and healthy environment. Some courts have allowed lawsuits to enforce the right, while others have not. Courts are also divided over whether environmental rights may be implied in constitutional protections when there is no explicit mention of the environment.

3.5.2 International Law

At present, no global human rights treaty proclaims a right to environmental quality, although the *Universal Declaration of Human Rights* and other human rights instruments contain a right to an adequate quality of life and a right to health. It is unclear the extent to which these generally stated rights will ultimately be viewed as including an enforceable right to clean and healthy environment.

[117] The Constitution of the Ukraine, Article 50, adopted 28 June 1996.

Among non-binding instruments, a significant number have included references to environmental rights or a right to an environment of a specified quality. At the United Nations, the Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Reporter on Human Rights and the Environment in 1989, whose final report was delivered in 1994[118].

On the regional level, the 1981 *African Charter on Human and Peoples Rights* was the first international human rights instrument to contain an explicit guarantee of environmental quality. Subsequently, the *Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights* included the right of everyone to live in a healthy environment (Art. 11).

3.6 Summary

A growing number of international, constitutional and statutory provisions set forth rights that are relevant to and invoked for environmental protection. In some instances, the provisions guarantee procedures that are designed to provide transparency and democratic governance by allowing interested persons to have information about and input into decisions that affect their environment or redress when that environment is harmed.

One of the rights is access to environmental information. It is a prerequisite to effective public participation in decision-making and to monitoring governmental and private sector activities. It also can assist enterprises in planning for and utilizing the best available techniques and technology.

Public participation is another right in the environmental arena. It is emphasized throughout international and national environmental law. Public participation is based on the right of those who may be affected to have a say in the determination of their environmental future. Depending on the jurisdiction, this may include foreign citizens and residents. In the EIA context, the public

[118] Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, E/CN.4/Sub.2/1994/9, 6 July 1994.

typically incorporates all stakeholders including communities, women, children, indigenous people, non-governmental organizations, other State and non-State institutions.

Furthermore, we do have the right to an effective remedy; meaning access to justice and redress. It can be found in both human rights law and in environmental law. The United Nations Covenant on Civil and Political Rights calls for states to provide a remedy whenever rights protected under national or international law have been violated. At this point, we have to note that the right to a remedy is not necessarily limited to nationals of a state. Some international agreements contain obligations to grant any injured person a right of access to any administrative or judicial procedures equal to that of nationals or residents. Equal access to national remedies has been considered one way of implementing the polluter-pays-principle because it tends to expand the scope of polluter accountability.

Finally, we do have the right to environmental quality. At this juncture, we can safely say that, it is fairly prevalent. This is true because almost every constitution adopted or revised since 1970, either states the principle that an environment of a specified quality constitutes a human right or imposes environmental duties upon the state.

3.7 Review Questions

1. Briefly discuss what the right to live in a clean and healthy environment is.
2. Discuss the significance of the right to information at national and international perspective in the realization of the right to live in a clean and healthy environment.
3. Pinpoint the importance of public participation at national and international level in relation to environment.
4. Discuss in a nutshell what access to justice is in relation to environmental cases.
5. Discuss what environmental quality is.
6. Discuss how states could realize their obligation not to cause damage to the environment beyond their jurisdiction.
7. Discuss what precautionary principle means at national and international level.

Chapter 4 COMMON LEGAL MECHANISMS OF ENVIRONMENTAL PROTECTION

4.1 Introduction to Common Mechanisms of Environmental Protection

The role of the courts in upholding the rule of law in the environmental arena is very much informed by the regulatory mechanisms that deliver environmental protection. Two primary, common regulatory systems aim to prevent environmental harm by anticipatory action. The first is a system that attempts to establish individualized pollution controls and mitigation measures through environmental impact assessment based on the character of the activity and environment surrounding the facility. The second system relies on a permit or licensing regime that requires adherence to pre-established norms (quotas, bans on the use of certain substances). Sometimes a facility or activity must comply with both types of regulatory regime and will have to apply technology-based controls (which tend to require the optimal level of control achieved at comparable facilities) and/or performance-based measures (which tend to focus on ensuring that pollution emissions will not surpass established limits or result in pollution in excess of an ambient environmental standard).

The variety, complexity and acceptance of these legal mechanisms have increased in recent years through the mutual influence of national and international environmental law. International environmental agreements today usually require states parties to adopt environmental impact or risk assessment procedures, licensing requirement and monitoring protocols. Environmental auditing, product labeling, use of best available techniques and practices and prior informed consent also commonly appear in global and regional instruments. States often enact and implement several techniques and procedures simultaneously in response to treaty mandates as well as to particular threats to the environment, national and local conditions, traditions and cultural norms, and the economic situation specific to each country.

Whether the law establishes an environmental impact assessment procedure or licensing system or relies on economic mechanisms to affect conduct, courts are frequently asked to enforce the law and sanction violations. Many cases may be brought in the first instance in administrative

tribunals, where licenses revocations may be sough or penalties imposed for non-compliance with the terms of the license. Courts may be asked to review the determinations of administrative bodies to grant or deny a permit and in the process may have to review the adequacy of an environmental impact or risk assessment done by the proponent of the activity. Judges often adjudicate prosecutions or appeals from administrative enforcement of prohibitions and restrictions such as the ban on trade in endangered species or in ozone-depleting substances. This section examines the common legal techniques and some court decisions that have involved them.

4.2 Prohibiting and Restricting Activities and Substances

4.2.1 Polluting Activities

If an activity, product or process presents a substantial risk of environmental harm, strict measures can be imposed in an effort to reduce or eliminate the harm. When the likelihood of risk is too great, a complete prohibition can be enacted. Environmental laws often call for restricting or banning hazardous products, processes or activities. Criteria such as toxicity, persistence, and bioaccumulation may serve to determine which substances should be banned or severely restricted.

Long lists of polluting substances whose discharge is prohibited or submitted to prior authorization can raise practical problems in enforcement. A substance such as mercury or cadmium usually is discharged in the environment as a component of many different compounds rather than in its pure form. This may raise difficult issues of proof about the origin of pollution when enforcement action is taken.

4.2.2 Use of Biological Resources

Hunting and collecting restrictions are used to prohibit non-selective means of killing or capturing specimens of wildlife. More generally, protective measures may restrict injury to and destruction or taking of some or all wild plants and animals. The revised African Convention on the Conservation of Nature and Natural Resources, for example, requires adoption of adequate

legislation to regulate hunting, capture and fishing, and to prohibit certain means of hunting and fishing.[119]

Migratory species are also subject to special protection by treaties such as the Bonn Convention on the Conservation of Migratory species of Wild Animals, which is aimed at all the states through which such species transit and in which they spend part of their lives. States parties to the Bonn Convention are obliged to ban or regulate the taking of these animals in cases where the conservation status of such animals-the sum of influences on their long-term distribution and abundance-is unfavorable.

Finally, temporary suspensions and permanent bans on imports and exports are commonly utilized for the protection of wild flora and fauna. The 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora(CITES), for example, uses trade restriction and trade bans as a means of protecting threatened and endangered species. The Convention lists in a first appendix all species threatened with extinction that are or may be affected by trade. Trade in these species is virtually prohibited, requiring prior grant and presentation of export and import permits issued under stringent conditions. Two additional appendices list those species that may become threatened with extinction unless trade is regulated. States have widely implemented these bans and restrictions in practice. Trade regulations also are sued to prohibit or regulate transport and dumping of toxic and dangerous wastes.

4.3 Product and Process Standards

National and international laws sometimes establish standards for products and processes that impact the environment. Standards are prescriptive norms that govern products or processes or set limits on the amount of pollutants or emissions produced. Standards may be set for production processes, emission levels, product characteristics and ambient quality standards for a given environmental milieu.

4.3.1 Process Standards

Process standards specify design requirements or operating procedures applicable to fixed installations such as factories or may designate permissible means and methods of activities like

[119] ASEAN Convention on Biological Diversity (June5, 1992) Art.8.

hunting or fishing. Sometimes, a particular production process or techniques is imposed on operations, such as the installation of purification or filtration systems in production facilities. Process standards often are used to regulate the operations of hazardous activities posing a risk of accidents or other dangers. Process standards frequently establish norms for an entire industry or class of operation, driving similar types of operations to achieve comparable levels of pollution control. In some systems, for example, all types of operations are required to install best available pollution control technology (BACT) as part of their processes. Some governments maintain inventories or clearinghouses of information regarding what constitutes BACT for a given industrial category, which serves as an important reference for industry and licensing officials alike.

Process standards that apply to imported products sometimes pose particular problems as potential barriers to trade under the international trading regime set up by GATT and the WTO. This is true because the very principles of GATT and WTO calls for free trade and free service. In other words, in the international trading regime tariff and non-tariff barriers are considered as impediment to the realization of free trade and service, so much so that we can safely say that it is inevitable that any deviation in whatever form would be subject to a close and suspicious scrutiny by those who principally orchestrate the international trading regime.

Discussion Question

"This time Ethiopia is on accession to WTO, so much so that, it is expected to conform to the demanding principles of WTO."

Discuss this assertion taking into consideration the very orientation of the Ethiopian Environmental Law.

4.3.2 Product Standards

Product standards are used for items that are created or manufactured for sale or distribution. Such standards may regulate:

- The physical or chemical composition of items such as pharmaceuticals or detergents. Examples include regulations that control the sulphur content of fuels or list substances whose presence is forbidden in certain products, for instance, mercury in pesticides.

- The technical performance of products, such as maximum levels of pollutant or noise emissions from motor vehicles or specifications of required product components such as catalytic converters.
- The handling, presentation and packaging of products, particularly those that are toxic. Packaging regulations may focus on waste minimization and safety.
- Labeling requirements are used to ensure that consumers are aware of the contents and the permissible uses of products. Labeling requirements often aim to avoid accidental environmental harm through misuse, spills or improper disposal of the product. The "green" or "ecolabel" is a recent, increasingly popular incentive to environmental protection. It is part of a gradual trend away from "end of the pipe" reactive solutions, which can be extremely costly, toward identifying and avoiding environmental problems before they occur. The new approach requires manufacturers to examine the entire life cycle of products- production, distribution, use and disposal.

To ensure fair economic competition, product standards usually are adopted for an entire industry. As with process standards, standards for new products are frequently drafted to reflect the best available pollution prevention technology, in some cases requiring new products to achieve percentage reduction in pollution potential in comparison with older sources.

4.3.3 Emission Standards

Emission standards specify the quantity or concentration of pollutants that can be emitted in discharges from a specific source. As a general rule, emission standards apply to fixed installations, such as factories or homes; mobile sources of pollution are more often regulated by product standards. Emission standards establish obligations of result, typically leaving the polluter the free choice of means to conform to the norm. Often the environmental sector of the discharge, e.g. groundwater, air soil, is a variant factor. Emission standards may also vary according to the number of polluters and the capacity of the sector to absorb pollutants. Different standards may be imposed in response to particular climatic conditions, for example, persistent fog or inversion layers. Emission standards are the type of standards most commonly required by international agreements and are mandated by several important agreements

Emission standards are based on the assumption that:

- Certain levels of some contaminants will not produce any undesirable effect:
- There is a finite capacity of each environment to accommodate substances without unacceptable consequences (the assimilative capacity) and ;
- The assimilative capacity can be quantified, apportioned to each actor and utilized.

Pollution occurs whenever the effects of the contamination on biological systems can be measured. Emission standards thus most often reflect a political decision about the amount of pollution that is deemed acceptable.

4.3.4 Ambient Quality Standards

Ambient quality standards fix the maximum allowable level of pollution in an environmental sector during normal periods. A quality standard may set the level of mercury permissible in rivers, the level of sulfur dioxide in the air or noise level of airplanes in the proximity of residential areas. Quality standards often vary according to the particular use made of the environmental resource. For example, different water quality standards may be set for drinking water and waters used for bathing and fishing. Quality standard also can vary in geographic scope, covering national or regional zones, or a particular resource, such as a river or lake, but each quality standard establishes base norms against which compliance or deviance are measured.

4.4 Prior Licensing and Permits

Environmental laws frequently mandate government officials to authorize, certify or issue permits or licenses to activities or establishments or that poses threats to the environment or that use natural resources. "Taking permits," for example, regulate the numbers of wild plants or animals that may be appropriated for private use. Norms that regulate environmental milieu, such as air pollution, drinking water, noise, chemicals, and taking of wildlife often call for licensing as part of their regulatory framework. As a result, hazardous installations such as nuclear plants, mines, natural gas or petroleum works are likely to have more stringent licensing requirements than other operations. Where environmentally hazardous products are present, such as industrial chemicals, pesticides or pharmaceuticals, authorizations may be required for the manufacture, marketing importation, exportation or use of the product.

Most licensing controls are not designed to eliminate all pollution or risk of resource depletion, but rather to control serious pollution and to conserve resources as much as possible. Pollution-control licenses represent a middle ground between unregulated industrial practices and absolute prohibition. They provide an addition or alternative to zoning as a means to site installations and to allow experimentation through the granting of temporary licenses.

Judges often face appeals from grants or denials of licenses. In such instances, an initial question is the scope of review to be conducted. Some courts conduct a full review or de novo hearing while others afford considerable deference to administrative agency decisions.

4.4.1 National Law

Most licensing systems operate on the basis of a list, or an inventory of activities necessitating a license because of their foreseeable potential harm to the environment. The decision- making process for granting a license may be exercised by central authorities, regional or local bodies. The decision is typically based on information supplied by the applicant, including a description of the planned activities, sometimes accompanied by maps and plans of the installation and its surroundings, a study of accident risks, and a disproportion of possible anti-pollution or anti-nuisance measures. In many cases, an environmental impact assessment will form part of the application procedure. Public information is normally required, including the display of notices and/or publication in the press, followed by public hearings and expert testimony. In general, the costs of the procedure are born by the public authorities, but in some jurisdictions, costs are payable by the applicant.

An essential condition for initial and continuing authorization in most licensing regimes is compliance with certain environmental standards, which are typically written into or incorporated by reference in licenses. These conditions are reviewed periodically and may require, for example, the use of the best available techniques; compliance with obligations under international and law relating to environmental protection; compliance with the limits or requirements and achievement of quality standards or objectives prescribed by legislation; imposition of emission limits; and a requirement of advance notification of any proposed change in the operations of the activity or process.

Once a license is granted, it creates legal rights and obligations and typically can only be cancelled after an investigation, a fair hearing and a decision based on relevant data, evidence and facts.

When we closely scrutinize the Ethiopian Legal System, Article 3 of the Environmental Assessment Proclamation No 299/2002 clearly stipulates that:

> *Without authorization from the Authority or from the relevant regional environmental agency, no person shall commence implementation of any project that requires environmental impact assessment.*

Furthermore, it clearly depicts that:

> *Any licensing agency shall, prior to issuing an investment permit or a trade or an operating license for any project, ensure that the Authority or the relevant regional environmental agency has authorized its implementation.*

Finally to realize continuous follow up Article 11 of the same Proclamation provides that:

> *If an unforeseen fact of serious implication is realized after the submission of an environmental impact study report, the Authority or the relevant regional environmental agency may, as may be appropriate, order the environmental impact assessment to be revised or to be redone in order to address the implication.*

In a nutshell, from the very reading of the above provisions we can infer the very fact that to realize friendly environment the concerned authorities are expected to take both proactive and reactive measures.

4.4.2 International Law

Numerous international treaties oblige their states parties to license potentially harmful activities, e.g. Oslo Convention for the Prevention of Marine Pollution by dumping from Ships and Aircraft; Paris Convention for the Prevention of Marine Pollution from Land- Based Sources; CITES; Basel Convention on Hazardous Waste; Bamako Convention on Hazardous Waste in

Africa; London Dumping Convention; MARPOL; UNCLOS and the various regional seas agreements; Whaling Convention; African Convention on the Conservation of Nature and Natural Resources; and the ASEAN on the Conservation of Nature and Natural Resources.

International requirements for licensing are increasing as part of the strong trend towards transparency attending the trans-boundary movement and use of substances, products and activities that might have a negative impact on the environment. In international trade, the delivery of export licenses and permits is often subject to the prior authorization of the importing state. Such consent is required by the Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes (1989). The 1998 Convention on Prior Informed Consent, derived from non-binding principles established by UNEP and FAO, extends the system of double authorization to hazardous substances and products other than wastes. It also represents a step towards inter-state recognition of national permits in international commerce. Such a practice is already found in the acceptance by other states of flag state certification that marine vessels conform to international legal standards. The 1977 International Convention for the Safety of Fishing vessels was one of the first to establish that certificates issued by one party according to the provisions of the Convention shall be accepted by other parties as having the same validity as one issued by them. (Art.4). In 1989, the OECD similarly mandated the mutual recognition of data on chemical hazards provided by states that assure that test data have been generated in accordance with good laboratory practices.

4.5 Prior Informed Consent

Prior informed consent (PIC) is a procedural mechanism utilized in advance of activities in order to avoid potential conflict and reduce the risks of environmental or social harm. Internationally, prior informed consent requires obtaining and disseminating the decisions of importing countries on whether they wish to receive shipments of restricted or banned products after they have been fully informed about the hazards posed by the products. In most instances, the products to which the procedure applies are those that are posed by the products. In national law, judicially enforceable PIC procedures may apply to foreign products seeking entry into the county or mediate access to a state's biological resources, in order to obtain disclosure of potential benefits

arising from the entry or access. Some national laws require the prior informed consent of indigenous and local communities before their resources can be accessed.

4.6 Environmental Impact Assessment and Monitoring

Environmental impact assessment (EIA) is 'a procedure for evaluating the likely impact of a proposed activity on the environment.' The object of an EIA is to provide decision-makers with information about possible environmental effects when deciding whether to authorize the activity to proceed. It is fundamental to any regulatory system which seeks to prevent or minimize environmental harm, or to promote sustainable development. Monitoring is a process whereby states 'observe, measure, evaluate and analyze, by recognized scientific methods, the risks or effects' of pollution or environmental harm. Unlike prior EIA, monitoring is generally undertaken after the project has begun; its purpose is to check initial EIA predictions and determine whether further measures are needed in order to abate or avoid pollution or environmental harm.

Since its adoption in the US National Environmental policy Act of 1969, EIA has become an important tool of environmental management in national law. The value of an effective EIA is that it provides an opportunity for public scrutiny and participation in decision-making, it may introduce elements of independence and impartiality, and, ideally, it will facilitate better informed judgments when balancing environmental and development needs. At an international level it alerts governments and international organizations to the likelihood of trans-boundary harm.

Without the benefit of an EIA the duty to notify and consult other states in cases of trans-boundary risk will in many cases be meaningless. EIA also contributes to the implementation of national polices on sustainable development and precautionary action. Although the US experience shows that the process can be cumbersome, expensive, and can cause delays, when done properly EIA should help the governments to foresee and avoid international environmental disasters or harmful consequence for which they might otherwise be held legally responsible.

A very large number of states now make some provision for EIA. The most sophisticated legislation is found in the USA, Canada, and the European Union, but the practice is increasingly common in Eastern Europe and in a significant number of developing states, particularly in Asia. Although there are differences in the frequency and sophistication with which EIA is used across this range of jurisdictions, there has been a worldwide sharing of methodology and the basic features of most schemes are very similar. Environmental impact assessment is so well established in national practice that it might be regarded as a general principle of law or even a requirement of customary law for states to conduct an EIA in accordance with the consensus expressed in the 1992 Rio Declaration on Environment and Development. It is formulated in the broadest of terms[120]:

> *Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent national authority.*

This would appear to entail a process focused on impacts on the domestic and trans-boundary environment and sustainable development, and probably also on global environmental impacts such as climate change and loss of biological diversity, albeit in highly qualified terms. The practice of a number of international lending agencies supports this broad interpretation of principle 17. The World Bank's Environmental Assessment Directive was first issued in 1989, since when Bank-funded projects have routinely been screened for their potential domestic, trans-boundary and global environmental impacts.

These assessments are meant to ensure that 'development options are environmentally sound and sustainable' and that 'any environmental consequences are recognized early in the project cycle and taken account of in project design.'

According to the Environmental Impact Assessment Proclamation;[121]

> *Environmental Impact Assessment means the methodology of identifying and evaluating in advance any effect, be it positive or negative, which results from the implementation of a proposed project or public instrument*

[120] The 1992 Rio Declaration on Environment and Development, Principle 17.
[121] Environmental Impact Assessment Proclamation No. 299/2002, Art. 2(3)

Not every proposed activity is subject to assessment, only those that may be or are likely to cause a stated level of harm to the environment. The threshold differs in the many treaty references to EIA, with some referring to "measurable" effects, others "appreciable" or "significant" harm. The most frequently stated formulation requires a comprehensive EIA where the extent, nature, or location of a proposed activity is such that it is likely to significantly affect the environment.

The requirement to conduct EIA may be based upon:

1. Lists of categories of activities that by their nature are likely to have significant effects
2. Lists of areas that are of special importance or sensitivity (such as national parks) where the impact of any activity within or affecting such areas must be assessed
3. Lists of categories of resources or environmental problems which are of special concern
4. An initial environmental evaluation of all activities, with a quick and informal assessment to determine whether the effects are likely to be significant
5. Defined and listed criteria, which make an impact "significant".

Where courts undertake review of authorizations based upon EIAS, they generally do so in the light of the purposes for which EISA are done. An appellate court in France expressed these objectives and the consequences of failing to fulfill them as follows:[122]

> *An EIA has as its objectives, first to give the possibility to the public to usefully make known its observations on the project in a public inquiry, then to allow the administrative authority to properly evaluate the effects of the project on the environment, as well as the effectiveness of the proposed measures to eliminate or reduce them or to provide compensation for them. The EIA should not contain inexactness, omissions or gaps susceptible to vitiate the procedures, which would result in the illegality of the decision of authorization.*

Many questions arise and must be considered in establishing or judicially reviewing an environmental impact assessment procedure:

[122] Court administrative d'appel de Nancy, 4 Nov. 1993, S.A. Union francaise des petroles, R.J.E 1994/1, P. 72.

- What range of impacts must be discussed? Threats to the health of living organisms and to environmental media (air, water soil) are usually included. The EIA procedure may also require assessment of social and cultural impacts, broadly defining the "environment" that must be assessed.
- What severity of impacts must be discussed? The law can demand assessment of everything from the " worst case scenario" or "all possible environmental consequences" to "reassembly foreseeable" impacts or" probable adverse effects"
- What degree of certainty is required? Environmental impacts may be predicted by "credible scientific evidence", may be " not unreasonably speculative"
- How should magnitude and probability of harm (risk) be evaluated? Consider, for example, whether in normal circumstances a pesticide known to cause 10 extra cancers a year is safer than a pesticide that has a five percent chance of causing one hundred extra cancers annually and a 95 percent chance of causing none.

4.7 Land Use Regulation

Land use controls play a major role in environmental law for both urban and rural areas, through zoning physical planning and the creating of protected areas. Zoning helps distribute activities harmful to the environment in order to limit potential damage and allows application of different legal rules from zone to zone for more effective protection. Zoning can also help implement the concept of environmental justice by ensuring that the benefits and burdens of resource use are shared throughout society. The broader approach of physical planning merges provisions for infrastructure and town and country planning in order to integrate conservation of the environment into social and economic development. Generally, once a planning scheme for the relevant land and water areas is approved by the state or local government, special procedure must be used to obtain exceptions.

4.7.1 National and International Regulations

Planning procedures may classify a city, a region or the entire territory of a country into broad land use categories such as residential, industrial, agricultural, forest, or nature conservation.

Designed geographical areas may be given special legal protection for nature conservation, including national parks, reserves, and sanctuaries.[123]

On a national level, land use planning and zoning regulations are normally expressed in negative terms, as prohibitions or restrictions on any undesirable utilization or change in utilization of the area. Modern planning also may encourage and promote economic land uses that are considered beneficial or compatible with protection schemes and the numerous levels of government involved land use regulations can become extremely complex.

4.7.2 Land Use Regulations and Property Rights

Judges may face claims that zoning regulations or other land use limitations imposed to protect the environment amount to a taking or expropriation of property that are illegal unless undertaken:

- For a public purpose;
- In a non-discriminatory manner;
- With a hearing that accords with due process; and
- With fair compensation.

In addition to zoning restrictions, laws and regulations to protect other species may conflict with uses of property. Endangered species legislation aims to protect such species by prohibiting any taking of an endangered species through human action or any destruction or adverse modification of critical habitats. The laws or administrative regulations will usually define in detail the term" taking" (Including to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect) and include any intentional or negligent act or omission which creates the likelihood of injury to wildlife, including disruption of breeding or feeding. The protection of habitat obviously places potentially great limits on land uses that might have an imminent prohibited impact on endangered species. Timber companies harvesting trees on private land could fall within this prohibition, which is usually interpreted broadly to achieve the legislative goal of affording strict protection to species threatened with extinction. In assessing whether there is a likelihood of jeopardy to endangered species or adverse habitat modification, the best scientific

[123] The 1968 African Convention on the Conservation of Nature and Natural Resources and the comparable Asian Agreement of 1985.

and commercial data available should be used. If a violation is found, the law normally imposes criminal responsibility, with substantial fines, injunctions and prison terms provided. Some statutes allow citizen enforcement as well as administrative action or criminal prosecutions. Given the irreversible nature of the harm that results from species extinction, serious penalties are typically assessed, despite the fact that some landowners may not easily determine whether land use development will have a detrimental effect on an endangered species.

4.8 Summary

The role of the courts in upholding the rule of law in the environmental arena is very much informed by the regulatory mechanisms that deliver environmental protection. Two primary, common regulatory systems aim to prevent environmental harm by anticipatory action. The first is a system that attempts to establish individualized pollution controls and mitigation measures through environmental impact assessment based on the character of the activity and environment surrounding the facility. The second system relies on a permit or licensing regime that requires adherence to per-established norms (quotas, bans on the use of certain substances).

The variety, complexity and acceptance of these legal mechanisms have increased in recent years through the mutual influence of national and international environmental law.

This time, the long lists of polluting substances whose discharge is prohibited or submitted to prior authorization can raise practical problems in enforcement. A substance such as mercury or cadmium usually is discharged in the environment as a component of many different compounds rather than in its pure form. This may raise difficult issues of proof about the origin of pollution when enforcement action is taken.

On the international arena, temporary suspensions and permanent bans on imports and exports are commonly utilized for the protection of wild flora and fauna. The 1973 Convention on International Trade in Endangered species of Wild Fauna and Flora(CITES), for example, uses trade restriction and trade bans as a means of protecting threatened and endangered species.

Nowadays national and international laws establish standards for products and processes that impact the environment. Generally, standards are prescriptive norms that govern products or processes or set limits on the amount of pollutants or emissions produced. Standards may be set for production processes, emission levels, product characteristics and ambient quality standards for a given environmental milieu.

To realize clean and healthy environment, environmental laws frequently mandate government officials to authorize, certify or issue permits or licenses to activities or establishments or that poses threats to the environment or that use natural resources.

When we come to the Prior informed consent (PIC), it is a procedural mechanism utilized in advance of activities in order to avoid potential conflict and reduce the risks of environmental or social harm. Internationally, prior informed consent requires obtaining and disseminating the decisions of importing countries on whether they wish to receive shipments of restricted or banned products after they have been fully informed about the hazards posed by the products.

Environmental impact assessment (EIA) is 'a procedure for evaluating the likely impact of a proposed activity on the environment.' The object of an EIA is to provide decision-makers with information about possible environmental effects when deciding whether to authorize the activity to proceed. It is fundamental to any regulatory system which seeks to prevent or minimize environmental harm, or to promote sustainable development.

Finally, it is important to note that, land use controls play a major role in environmental law for both urban and rural areas, through zoning physical planning and the creating of protected areas. In this regard, zoning is expected to distribute activities harmful to the environment in order to limit a potential damage and allows application of different legal rules from zone to zone for more effective protection. So much so that, zoning would be expected to help the implementation of the concept of environmental justice by ensuring that the benefits and burdens of resource use are shared throughout society.

4.9 Review Questions

1. Discuss what prohibiting and restricting activities and substances are.
2. Discuss what process standard and product standard are.
3. Discuss what emission standard and ambient quality standard are.
4. Verify the rationale behind having prior licensing and permits in the very protection of the environment.
5. Discuss the importance of prior informed consent.
6. Discuss what land use regulation and property rights are.
7. Discuss what environmental impact assessment is on the basis of Environmental Impact Assessment Proclamation No 299/2002.
8. Discuss what environmental impact assessment is in relation to precautionary principle.

CHAPTER 5 THE LEGAL FRAMEWORK OF ENVIRONMENTAL PROCEEDING

5.1. Different Facets of Legal Personality and Standing in Relation to Environmental Proceeding

5.1.1. Legal Personality and Standing; the Environment as a Legal Entity in Itself

In case of legal personality in relation to environmental proceeding, one of the fundamental distinctions that can be made in the world view that people have is, whether they focus on human beings, anthropocentrism, or on other entities, ecocentrism. The world view someone has can have a major influence on how he deals with bioethical dilemmas[124]. That is, whether legal personality should be bestowed to the environment as a separate legal entity or not depends on the type of theory which orient the legal system of a country, so much so that, before we embark on the concept of legal standing in relation to environmental proceeding in Ethiopia, at this juncture, it is important to have a clear picture on the environmental theories that could shape or orient a legal system in favor of one or the other.

To start with the Anthropocentric Theory, it refers the relationship between human beings and the environment, as a relationship in which environment is valuable only to the extent to which they can be used and exploited by human beings. This view considers nature as an instrument [as merely a means] instead of having any intrinsic values in its own self [an end in itself]. This essentially shows that, environmental concern according to this theory is, addressing the interest of human beings by pointing out the direct link between harm done to the environment and harm done to the human community[125].

From the above points, we can inter the fact that anthropocentric view considers humans and nature as separate, and human beings placed in the center; such that, the environment being instrumental to the interest of man, legal personality can be bestowed only to human beings

[124] Fumi Maekawa and Darryl Marcer, Anthropocentric, Ecocentric, and Biocentric Views Among Students in Japan, Eubios Ethics Institute), P.1. [www2.unescobkk.org/eubios/ABC4/abc4327.htm-18k]s

[125] Beyond Dinner, The Anthropocentric _ Econcentric Debate by Healther -Noel Schwartz, P1.[http://members.aol.com/Thrywoman/AED.html.]

where and when their interest is at stake. In other words, they deny legal personality to the environment because they consider it as contingent/ accessory to the human element.

In contradistinction to the anthropocentric view, ecocentric is justified by the deontological[126] argument. It has been held that morality cannot be a matter of self-interest or prudential calculation but is rather a deontological obligation that we owe to others even at the possibility of a net cost to ourselves[127]. According to this theory the well-being and flourishing of all life forms on earth have value in themselves. Man has no right to reduce the diversity and richness of nature which has an intrinsic value. This theory fundamentally rejects separation of human beings from nature. It considers man as intimately connected and as such part of the natural environment[128]. Thus, proponents of the ecocentric view seek a fundamental shift in consciousness from human domination of nature to a perception of human and non-human life as of having equal intrinsic value. For the above very reasons, this theory acknowledges the conferring of legal personality to each distinct part of the environment to exercise their own right at their own behest.

Concerning legal personality in relation to environmental proceeding, the extension for good and sufficient reasons, of the conception of personality beyond the class of human beings is one of the most noteworthy features of legal imagination[129]. In this respect, a movement to confer rights on to some new entity is bound to sound odd. This is partly because until a non-legal entity is bestowed with legal personality and receives its rights, we cannot appreciate it as having its own interest as anything but as a thing for the use of us, that is, those of us who are holding then the legal personality[130].

[126] Paul Edward (ed.), The Encyclopedia of Philosophy, (Volume 2, the Macmillan comp. and the Free Press, New York, 1967), P.343 [In current usage, its meaning is more specific: A deontological theory of ethics is one which holds that at least some acts are morally obligatory regardless of their consequences for human weal or woe.]

[127] Anthony D. Amato and Sudhirk Chopra, "Whales: Their Emergence and Right to Life, (AJIL, vol. 85, 191), P.28.

[128] Dinner, Supra note 156, P.2.

[129] George Whitecross Paton, Text Book of Jurisprudence, (Clarendon Press, 1964), P. 349.

[130] Christopher Stone, "Should Trees Have Standing? Towards Legal Rights for Natural Objects," (Southern California press, 1972), P.455

In line with the above argument, in some legal systems animals have been regarded as having legal personality. A typical example in this respect is the case entertained in Germany, during the Middle Ages, in which a cock was tried for contumacious crowing[131].

When we come back to the legal orientation of the Ethiopian environmental law, it sounds haphazard and thus ambiguous; while the right to live in a clean and healthy environment under Art.44 of the constitution is entrenched under chapter three, part two of the constitution which provides for group rights as a fundamental rights and freedoms, thereby bringing into the forefront the anthropocentric approach, the environmental policy recognizes that the species and their variants have the right to continue existing, and are, or may be, useful now and/or for generations to come[132]. In this respect even in the policy stipulation there is confusion in that, the first line clearly shows that the approach is ecocentric; whereas the second refers to anthropocentric approach for it refers to utility aspect of the environment. Furthermore, the Biological Diversity Convention of 1992, which Ethiopia has ratified and which recognizes the intrinsic value of the environment, including ecosystem and species or its components which in turn led to the issue of awarding rights to subjects other than man, shifts the position of the law once more to the ecocentric approach[133]. To uphold the right of the environment, the Draft Bio-safety proclamation may also show the trend of the law in that it entitles any person, group of persons, or any private or state organization to bring a claim in the name or on behalf of the environment[134]. Thus, the Ethiopian environmental law to a degree falls in line with the above declared international norm whereas part of the same law holds the contrary position, that is, that of anthropocentric approach. As a result, it is creating confusion between the law and the policy, and also in the policy itself which furthermore brings the question. Shouldn't laws be reflective of policies or vice-versa.

In spite of the above wavering in the law, with the increasing awareness of the interconnectedness of human beings with the environment, and of the intrinsic value that has to be attached to the latter through international instruments like the BioDiversity convention to

[131] Paton, Supra note 160, P. 349.
[132] The Environmental Pcoity of Ethiopia, April 1997, 2.3 [q]
[133] Biological Diversity Convention Ratification Proclamation, Proclamation No. 98/1994 Neg. Gaz., Year 53 No.88.
[134] Draft Biosafety Proclamation. Art 10 (e).

which Ethiopia is a party, and the environmental policy which Ethiopia has enacted, it is unlikely that the recognition of a right to a clean and healthy environment for human being under the constitution will have as its corollary the denial of rights to the environment as a legal entity in itself. Here, the recognition of the right to a clean and healthy environment to human beings does not necessarily imply the exclusion of recognition of right to the environment per se as a legal entity in itself. In fact, it should be taken as a corollary position which would have a paramount importance.

On the basis of the above logic, the writers favor striking the balance between the interests of human beings on the one hand, and that of the environment on the other. To this effect, the researcher favors bestowing legal personality to the environment so long as it does not go against the rights of human beings whose interests are maintained by the exercise of personal and citizen standing.

Discussion questions

- What do we mean by legal personality, and standing?
- Discuss what ecocentric and anthropocentric theories are?
- Discuss what we mean by intrinsic value to environment.
- Verify whether the orientation of our legal system bestows legal personality to the environment or not.

5.1.2. Legal Personality and Standing vis-à-vis the Future Generations

Before we embark on the legal personality of future generations, it is important to have a fair picture on intergenerational equity. Intergenerational equity exists only when there is sustainable development, that is, when the development in any form meets the needs of the present generation without compromising the ability of the future generations to meet their own needs[135]. The inherent idea behind this principle is that we need to impose certain limitations on the development and use of technology as well as on the interest and capacity of consumption of the present day generation.

[135] Report of the world Commission on Environment and Development [The Brudtland report] our Common Future 43 (1987).

In intergenerational equity there are two elements. The first is, preserving natural systems for future generations so that the human species can perpetuate itself at the same quality of life and standard of living as the present generation. This objective is different from efficiency and sustainability, because it considers the quality of life in the future, not just the amount of yield that crosses to the present generation. The second is preserving area of national significance due to their aesthetic appeal, historic attributes, or ecological significance for the use and enjoyment of future generations[136].

In line with the above chain of reasoning, many environmental problems require that costs or sacrifices be incurred today in order to prevent risk of harm occurring in the future or to preserve environmental amenities for future enjoyment. The problems raise the question of how we should balance present costs against future benefits. Where the harms to be avoided or advantages to be preserved are quite long run in nature, the problem involves the sacrifices to be incurred by one generation for the sake of its successors[137]. In this scenario we may question, on what private rational consideration, after all, should we make sacrifices now to ease the lot of generations whom we will never see? There is only one possible answer to this question. That is, addressing the problem by upgrading our capacity to form a collective bond of identity with that of future generations[138].

In this regard, to protect the interest of future generations a number of international instruments recognize international equity. One of these instruments is the Rio Declaration which states that the right to development must be fulfilled so as to equitably meet development and environmental needs of present and future generations[139]. Furthermore, the International Court of Justice in the legality of nuclear weapons case stated that the use of nuclear weapons would be serious danger to future generations. In that, the ionized radiation has the potential to damage

[136] J. Wiallian Futrel, Environmental Law from Resource to Recovery, (Published by west publishing co., 1993), P. 122.
[137] Peter S. Menell and Richard B. Stewar, Environmental Law and Policy, (Published by Littele Brown Company, 1994), P. 204.
[138] Dinner, Supra note 156, P.123.
[139] The Rio Declaration on Environment and Development, Held at Rio de Janeiro from 3 to 14 June 1992, Principle 3.

future environment, food and marine ecosystems and to cause genetic defects and illness in future generations[140].

Having the above points in mind, we can infer the fact that the principle of intergenerational equity is potentially the most useful concept with respect to the question of standing.

The utility of this principle is illustrated in a recent case by the supreme court of Philippines, which is regarded by many environmentalists as having worldwide significance[141]. In this case, forty four minors and the Philippine Ecological Network brought an action calling on the defendant to cancel all logging permits in the country, in the context of surveys showing that only 850, 000 hectares of virgin old growth rainforest were left in the country. The novel aspect of the case relates to the fact that the petitioners asserted that they represented their generation as well as generations yet un-borne. The court in upholding the petition went on to state as follows:

> *We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthy ecosystem is concerned.*

On the basis of this ruling, the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generation to come. Thus, this ruling can serve as a bench mark in any legal system in reflecting that every generation has a responsibility to the next to preserve the rhythm and harmony for the full enjoyment of a balanced and healthful environment.

When we come to the Ethiopian situation, intergenerational equity is clearly stipulated in different legal instruments. In the FDRE constitution, it is implicitly provided under the principle of sustainable development[142]. Under the Environmental policy, it is explicitly provided by

[140] International Court of Justice in the Legality of Nuclear Weapons Case, 1996, ICJ Rep. 4.
[141] Minors Oposa V. Secretary of the Department of Environmental and Natural Resources. [G. R. No. 101083, July 30, 1993].
[142] The Constitution of the Federal Democratic Republic of Ethiopia of 1995, Neg. Gaz.,1st Year No.1,Art. 43(1).

recognizing the right of species and their variants to continue existing/and are / or may be useful now and/or for generations to come[143]. Furthermore, the policy calls for the existence of a system which ensures uninterrupted continuing access to the same specie(s) of land and resource which creates a conducive condition for sustainable natural resource management[144].

In line with the constitutional and Environmental policy cognizance of intergenerational equity, the Environmental Law of Ethiopia defines protection of the environment to mean sustaining of the essential characteristic of nature and enhancing the capacity of natural resources base with a view to safeguarding the interest of the present generation without compromising the opportunity of the future generations[145].

On the basis of the above legal elements, it is tenable to infer the fact that intergenerational equity is recognized under the Ethiopian legal system, so much so that, it is possible to argue that there is a lee-way to entertain the interest of future generations by bestowing them legal personality to have standing before a court of law.

Preparing the ground for the same approach, the 1995 constitution under Art 37 (2) (b) entitles associations to stand for their objectives. More articulate is the Draft Bio-safety proclamation which incorporated a legal provision that allows any person, group of persons, or any private or state organization to bring a claim and seek redress in respect of the breach of environmental laws in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings'[146].

Discussion Questions

- What do we mean by intra and inter generational equity?
- What do we mean by sustainable development?
- Verify the lee ways by which we could protect the interest of the future

[143] The Environmental Policy of Ethiopia, Art 2.3 (q).

[144] Id., 2(3) (k).

[145] Proclamation., Infra note 211, Art 2 (6).

[146] Procl. Supra note 165, Art. 10(b).

generation.

- What is the significance of upgrading our capacity to form collective bond of identity with the future generation?

5.2. Liberalization of Standing in Environmental Proceeding that Led to Public interest Litigation

In order to further protect the environment it has been proposed to grant individuals a personal or subjective right to a clean and healthy environment. Under the traditional tort law, individual citizens have a right to sue only if their own personal interest is infringed[147]. For this very reason, no one has in principle, standing to sue for and claim damages if harm done to the environment per se is considered only as infringement of collective interest. Hence, to enable alert citizens and public interest groups to initiate legal action when damage is done to the environment per se, it is important to award them a personal right to a clean and healthy environment. If the law orients in this approach, an infringement of this right would entitle any individual to file a legal claim against the responsible party in order to protect his interest to live in a clean and healthy environment and may be even to seek monetary compensation for the damage done, without having to show the specific personal damage that such an individual has sustained.

Many national constitutions acknowledge the right to live in a clean and healthy environment. The FDRE constitution, for instance, stipulates that the government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment[148]. Furthermore, it does provide individuals with a personal right to a clean and healthy environment[149]. It also brings the government and citizens together as having the duty to protect the environment[150]. In line with the constitutional provisions, the Environmental Pollution Control Proclamation also provides that the protection of the environment, in general, and the safeguarding of human health and

[147] Civ. Proc. Infra note 199, Art. 33 (2), and Civ. Code, Infra note 46, Arts. 2090 and ff.
[148] Const., Supra note 173, Art. 92 (1).
[149] Id, Art, 44 (1).
[150] Id, Art 92(4) Cum 91(2)

well-being, as well as the maintaining of the biota and the aesthetic value of nature in particular, is the duty and responsibility of all[151].

An advantage of the introduction of such a new fundamental personal right and duty would be that it will provide access to justice for citizens in cases where damage is caused [or threatened to be caused] to the environment in general. And, according to the above legal provisions, to have a full-fledged legal standing the general or collective interest to live in a clean and healthy environment could as well become a personal interest.

Having the above legal grounds, this researcher believes that, even though the 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[152], personal action would certainly help in implementing and enforcing environmental laws and could be vital in cases where the government is unwilling to claim damages for injury to the environment.

Discussion Questions

- What is the significance of bestowing personal right and citizen standing to live in a clean and healthy environment?
- Who has the first standing to protect the environment? Why?
- Verify whether the right to live in a clean and healthy environment is alienable or not? Discuss this issue in relation to the principle of estoppels.

Widespread access to justice is more likely to result in equal justice. Of course, inequalities will always exist. That is, those with power and resources will always have bigger effect on governmental and private decisions than those lacking power and resource. But this inequality is magnified where access to courts and administrative tribunals is restricted, because restrictions are less likely to affect powerful economic interests[153].

[151] Environmental Pollution Control Proclamation, Proclamation No.300/2002, Neg. Gaz., 9th Year , No.12, the Preamble.
[152]Const., Supra note 173, Art. 89
[153]John E. Bonine, Standing to Sue: The First step in Access to Justice, (University of Oregon, 1999), P2.www.elaw.org/assets/pdf/us.windener.law.rev.jb.pdf.]

For the above very reason, the battle over standing to sue is about whether all citizens have access to justice or not. In this respect, if democracy is for all, if the rule of law is for all, and if justice is for all then standing should be for all as well[154].

When we consider the Ethiopian legal system, the FDRE constitution under article 9(2) provides that international instruments ratified by Ethiopia are an integral part of the law of the land[155]. As Ethiopia has ratified all the major international human rights instruments, which recognized the right of access to justice and equality before the law as fundamental rights, we can say that the provisions on these instruments on the right of access to justice form part of the laws of Ethiopia.

In line with the above international legal instruments ratified by Ethiopia, the FDRE constitution states that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law[156].

Furthermore, the FDRE constitution under article 37 provides that[157].

> *1. Everyone 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.*
>
> *2. The decision or judgment referred under sub-article 1 of this article may also be sought by:*
>
> *B. Any group or person who is a member of, or represents a group with similar interests.*

The provision of Art 37 (2) (b) is open to interpretation. It can be construed in several different ways. For our case, however, the following construction seems appropriate:

> *The decision or judgment referred under sub-article 1 of this article may also be sought by any group or person who represents a group with similar interests.*

[154] Id.
[155] Const., Supra note 173, Art. 9(2).
[156] Id., Art. 25.
[157] Id Art. 37.

According to this construction the FDRE constitution provides for the right of access to justice which can be invoked by individuals and groups, thereby providing for citizen suits and public interest litigation which can well be availed by environmental activists, NGO's and individuals to enforce environmental rights as far as the procedural aspect of the right in question is concerned.

The article [37 (2) (b)], therefore, ensures that the door is wide open for the public to satisfy its needs of access to justice. What this means is that the constitution is in favor of broad, social-issue-oriented employment of the law and its institutions rather than a narrow legalistic approach that makes the law distant from the everyday concern of the society and difficult to access[158].

In this way the constitution would work for making the law and the court truly people's law and people's court rather than merely lawyers' law and lawyers' court. Beyond the traditional issues the law and the courts would interest themselves and actively engage in broad social issues, such as ensuring a clean and healthy environment[159].

Accordingly, by stressing the importance of compliance with duties and not only rights, this expansion of the ability to sue will paradoxically build a stronger framework for the protection of individual rights, such as the right to live in a clean and healthy environment.

Discussion Questions

- What do we mean by justiciable matters?
- What is the importance of liberalizing standing?
- Discuss Article 37 of the FDRE Constitution vis-à-vis the traditional, and public interest litigation.

National and international standards to a clean and healthy environment are ultimately implemented at the local level, and it is, therefore, important that citizens and other persons are granted effective access to local and national legal administrative bodies to ensure that national

[158]Fasil Nahum, Constitution for Nation of Nations: the Ethiopian Prospect, (The Red sea Press, Inc., 1997), P. 150.
[159] Id.

or international standards are enforced. In this regard, access to justice requires at least four elements[160]:

a. the legal rights of citizens and other persons to live in a clean and healthy environment under national and international legal systems;
b. those legal rights must be recognized by the grant of standing to institute proceedings at the national level;
c. Legal and administrative bodies must be established at the national level to allow proceeding to be brought; and
d. access to such bodies should not be subject to inappropriate barriers such as prohibitive costs and cumbersome rules.

In line with the above stated conditions of access to justice, principle 10 of the 1992 Rio Declaration and Agenda 21 to which Ethiopia is party supports a role for individuals in enforcing national laws and obligations before national courts and tribunals[161].

According to principle 10 of Rio Declaration environmental issues are best handled with the participation of all concerned citizens at all levels. At the nation level, each individual shall have appropriate access to information concerning the environment that is held by public authorities and the opportunity to participate in the decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy should, likewise be provided for.

In a similar manner to the Rio Declaration, the Environmental Policy of Ethiopia calls for the development of effective method of popular participation in the planning and implementation of environment and resource use and management projects and programmes[162]. Furthermore, it calls for the development of necessary legislation, training and financial support to empower local communities so that they may acquire the ability to prevent the manipulated imposition of

[160] Konrad Ginther, Sustainable Development and Good Governance (Martinus Nijhoff Publishers, 1995), P. 197.

[161] Rio Declaration., Supra note 170, Principle 10.

[162] Env't Policy, Supra note 174, 2.2 (h)

external decisions in the name of participation, and to ensure genuine grassroots decisions in resources and environmental management[163].

Ethiopia has, therefore, international and national responsibility to reduce environmental problems. To this effect, the FDRE constitution has embodied one of the third generation human right catalogue of which one reads as follows[164].

All persons have the right to a clean and healthy environment.

This right to a clean and healthy environment falls into the category of fundamental rights and freedoms of chapter three of the constitution. From this fact, one can argue that the right to a clean and healthy environment is a right which the government has the obligation to respect as per article 10 (2) of the constitution. Likewise, individuals are entitled to the use of this right as well as to bear the obligations that arise there from. Accordingly, any concession made by any one in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any such fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. This helps every one not to forgo his precious personal freedoms on promise of transitory or immediate benefits

In respect to the right of access to justice through courts of law, it is clearly spelled out under the 1995 constitution, where it is specifically provided that every person has the right to bring justiciable matter to and to obtain a decision or judgment by, a court of law or any other competent body with judicial power[165]. This right of access to justice is further consolidated by the basic principles and objectives of the constitution which provides[166]:

> *All federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of fundamental rights and freedoms.*

[163] Id.
[164] Const., Supra note 173, Art. 44
[165] Id., Art. 37(1)
[166] Id., Art. 13. [Chapter 10 Articles 85-92 Principles and Objectives. These Provisions are by and large useful for Interpretation of the Constitution and other laws in light of these rules.]

Nonetheless, that all constitutional disputes are to be investigated by the Council of Constitutional Inquiry and then decided by the House of Federation may sound anomalous with the above provision. So, query how the courts can discharge the duty imposed on them by the constitution if doing the same would call for constitutional interpretation. In this regard, when we read Article 13 of the constitution in tandem with Art 83 of same, we can not arrive at the conclusion that the courts in Ethiopia can wholly enforce the right in question without supplemental legislation or the scrutiny of the House of Federation.

In addition to the above constitutional pitfalls, legislative provisions also precluded public interest groups from initiating a case on behalf of the marginalized or under-served communities, whose rights have been violated. The proclamation that defines the powers and responsibilities of the Constitutional Inquiry [a judicial body that has jurisdiction over a case involving constitutional matters] states that only the person who alleges that his /her constitutional rights have been violated may initiate a case to the Constitutional Inquiry[167]. Likewise, the civil procedure code of Ethiopia asserts that no party may be a plaintiff in a suit unless he/she has a vested interest in the suit[168]. Similarly, under the tort law of Ethiopia, before a plaintiff can recover compensation in tort, he must show that he/she has suffered damage[169]. In respect to dispute involving class action, the civil procedure code provides that groups can litigate their case through a representative who must be among the persons having the same interest in the suit[170].

Therefore, on the basis of the above legal provisions, one can initiate a suit in the Constitutional Inquiry or in the regular courts only if he/she has vested interest in the case. But, when Article 37(2) is read vis-à-vis these provisions the entire objective of this particular provision seems to collapse unless due measure is taken to make the above cited procedural laws to come in line with the letter and spirit of this article [171].

[167] Const., Supra note 173, Art. 84(2).
[168] The Civil Procedure Code of Ethiopia, Decree No. 52 of 1965, Neg. Gaz., 25th Year, No. 3, Art. 32(2).
[169] Civil Code of the Empire of Ethiopia of 1960, Neg. Gaz., 19th Year, No. 2. Arts. 2102(2) and 1790.
[170] Civ. Proc., Supra note 199, Art. 38.
[171] A Proclamation to Provide for the Establishment of the Federal Negarit Gazeta 1995, Neg. Gaz., 1st Year No.3, Art. 2(3).

When we proceed to international legal instruments, under the FDRE legal system, international human rights instruments which are ratified by Ethiopia are considered as integral part of the law of the land. In spite of this, judges in the court of law could not apply them because the proclamation that established the Federal Official Gazette requires them to take judicial notice of laws only when these laws are published in the official gazette, while the full text of nearly all the ratified international instruments are not published in the official gazette. When we scrutinize this contradiction in light to Article 13 of the constitution, however, it may not be more than apparent contradiction which could be reconciled by the court of laws through constructive interpretation unless there is timidity and reluctance on their side.

In addition to the above stated facts, Ethiopia is a Federal State with a parliamentary form of government and with a constitution and proclamations that appear to limit full judicial interpretation of the constitution on the one hand, and with a judiciary that seems to be timid, that is, reluctant to exercise judicial activism on the other. So, we can safely say that the dilemma still persists on in that Courts and the Constitutional Inquiry are strictly applying these controversial legislations against their clearly set constitutional obligations while it is their duty and responsibility to enforce the human rights and fundamental freedoms of persons recognized by the constitution.

The problem becomes acute when it is seen in particular with the Federal structure of the government, for in Federalism the issue of constitutionality, hierarchy and harmony of laws becomes indispensable. Here, the issue of counter checking of whether the laws [legislations and treaties] are consistent with the constitution, and whether state laws are so, become vitally important issues. To this effect laws must be checked by an organization whose independence is constitutionally and structurally assured. And, in this regard, the need to award to the judiciary such competence would therefore become apparent; for we find that no state structure suitable for this position is to be found other than courts.

When we come back to the environmental proceeding, it is the exception to the rule. That is, it has specific provision that allows public interest litigation in disputes concerning the

environment[172]. Except in this area, and Article 37 (2) of the constitution, public interest litigation is in effect not stipulated and recommended by other legislations.

According to the recently enacted environmental law[173]:

> *Any person shall have, without the need to show any vested interest, the right to lodge a complaint at the authority or the relevant regional environmental agency against any person allegedly causing actual or potential damage to the environment.*

On the basis of this provision, the central question for citizen standing is whether a sufficient public injury had taken place as has been alleged to support the claim that the petition was brought in the public interest. So, the citizen suit provision should be read as doing away with the necessity for the normal injury in fact standing allegation.

Accordingly, we can infer the fact that restrictive view of locus standi and person aggrieved has been supplemented by representative standing and citizen standing. Thus, any public spirited person dedicated to public cause has standing to bring a common cause before a court of law.

As to the question of the scope of the liberalization of standing, the trend is highlighted in the Draft Bio-Safety Proclamation as follows[174]:

> *Any person, group of persons, or any private or state organization may be entitled to bring a claim and seek redress in respect of the breach or threatened breach of any provision of environmental law:*
>
> *a. in that person's or group of person's interest;*
>
> *b. in the interest of , or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;*
>
> *c. in the interest of, or on behalf of , a group or class of persons whose interest are affected;*
>
> *d. in the public interest; and*
>
> *e. in the interest of protecting the environment or biological diversity.*

[172] Procl., Supra note 182, Art. 11(1).
[173] Id.
[174] Procl., Supra note 165, art. 35(10).

To have a full fledged public interest litigation, therefore, this kind of stipulation or a more amplified version should therefore be inserted in the civil procedure code along with Article 33 [which requires vested interest] and Article 38 [which requires membership of a class to bring class action].

To facilitate public interest litigation on the basis of the liberalization of standing, the Draft Bio-Safety Proclamation further provides that no cost shall be awarded against any of the above persons who fail in any action as aforementioned if the action was instituted reasonably out of concern for the public interest or in the interest of protecting human health, biological diversity and in general the environment[175]. To alleviate the burden, public interest groups who initiate public interest litigation in cases when bad faith is invoked by the defendant, the burden of proving that an action was not instituted out of public interest or in the interest of protecting human health, biological diversity and in general the environment rests on the person claiming this[176].

In respect to the format, the public interest litigation form of pleading should be on the basis of art 80 (2) cum. the statement of claim Form No. 36 [first schedule] of the civil procedure code of Ethiopia[177]. This Form is, as all forms of pleading are, required to be followed as near as may be. We follow this format because it entitles public nuisance. It alleges no harm to the plaintiff, but a nuisance to the pubic of the kind contemplated by article 782 (1) of the penal code[178].

Discussion questions

- Discuss the scope of standing in relation to environmental proceeding?
- Pinpoint the rationale behind liberalizing standing in relation to environmental proceeding?
- Provide a blue print as to how any person could enforce his right to live in a clean and healthy environment in case when there is actual or potential damage to the environment.

[175]Id., Art 11
[176] Id., Art 12.
[177] Civ. Proc., Supra note199, Art. 80 (2) cum. the Statement of Claim Forum No. 36 [first Schedule].
[178] Penal Code of the Empire of Ethiopia, Proclamation No. 158 of 1957, Neg. Gaz., 16th Year, No.1 Art. 782(1).

5.3. Citizen Standing in Cases of Environmental Authorities' Inaction or Abuse: Judicial Review

Where a concerned citizen [or voluntary organization] sues, not as a representative of others but in his or her own right as a member of the citizenry to whom a public duty is owned, it is termed as citizen standing[179].

In environmental proceeding, one of the forces that impelled the liberalization of standing stemmed from the need to check the abuse of environmental authorities in a modern welfare state.

In Ethiopia, the objective of environmental authorities is to formulate policies, strategies, laws and stakeholders, which foster social and economic development in a manner that enhances the welfare of humans and the safety of the environment sustainable, and to spearhead in ensuring the effectiveness of their implementation[180]. In line with this, it has also the duty to coordinate measures, to ensure that the environment objectives provided under the constitution and the basic principles set out in the Environmental policy of Ethiopia are realized[181]. On the basis of the above objectives and duties of the environmental authorities, we can infer the fact that the authorities are vested with enormous regulatory powers.

In spite of the above regulatory powers vested to the Environmental Authorities, however, they could delay, miss deadlines, convert mandatory standards to discretionary ones, create loopholes, water down strict statutes, in the regulatory process, or simply refuse to use their enforcement powers when faced with blatant violations[182]. In such cases, if environmental authority acting illegally causes a specific legal injury to a person or a specific group of persons, a private action for redress would lie under the traditional doctrine of standing[183]. At times, however, the injury arising may be diffused, for example, where environmental authorities inaction threatens to harm

[179] Sampat Jain, Public Interest Litigation, (Deep and Deep Publication [p] LTD, 2002) P. 27.
[180] Environmental Protection Organs Establishment Proclamation, Proclamation No. 295/2002, Neg. Gaz., 9th Year, No. 7, Art. 5.
[181] Id., Art. 6.
[182] Futrel, Supra note 167, P. 34.
[183] Civ. Proc., Supra note 199, art. 33 (2)

the environment. In such cases, the restrictive traditional doctrine precludes relief and renders the environmental authority's inaction or abuse immune from judicial scrutiny[184].

To curb instances of such environmental authorities lawlessness with diffused impacts, therefore, the House of Peoples Representatives expanded the standing in environmental proceeding to enable every citizen to challenge such environmental authorities inaction or abuse in the interest of the public, though the citizen has not yet sustained personal injury[185].

In this case, though citizen suit provisions are drawn cautiously, they represent a substantial qualification of two of the more durable dogmas of public law. The first is that prosecution and enforcement is solely the business of public officials and the perpetrators. The second, the corollary of the first, is that regulatory and enforcement priorities are left to the authorities with little or no interference from outsiders, particularly the courts[186]. In this respect, while the Environmental Pollution Control Proclamation by no means has discarded the notion of public control of public prosecution, the novel fashioning of citizen suit provision recognizes that compliance with environmental laws is the business of an alert community as well as of trained specialists.

The Environmental pollution control proclamation, which is the first and prototype for citizen suit, provides that[187].

> *[w] here the authority or regional environmental agency fail to give a decision within thirty days or when the person who has lodged the complaint is dissatisfied with decision, he may institute a court case within sixty days from the date the decision was given or the deadline for decision has elapsed.*

The article proposes to grant public interest groups a secondary right of standing. Only in cases where the public authorities do not act at all, or not properly, do alert citizens or public interest groups have the right to take legal action. Alert citizens or public interest groups thus must

[184] Id.
[185] Procl., Supra note 28, Art. 11(1) and (2).
[186] William H. Rodgers., Hand Book on Environmental Law, (West Publishing co., 1977), P. 75.
[187] Procl., Supra note 28, Art 11(2).

respect the waiting period of thirty days during which the environmental authorities have the exclusive right to take action and decide on the necessity of restoration measures and the extent of measures. In other words, the notice provisions are intended to afford the authority an opportunity to do its job, it is not to frustrate the citizen actions with procedural trickery, and should be construed flexibly and realistically to advance the essential purpose. In cases of urgent situations, however, there is a legal ground to grant such public spirited individuals the right to directly ask a court for an injunction in order to prevent significant damage or avoid further damage to the environment[188].

In case of judicial review, when the person who has lodged the complaint is dissatisfied with the decision, it seems that public interest groups are not only granted the right to challenge the decision of the public authorities not to recover damage, but they may also challenge any relevant decision, including the one regarding the selection of the most appropriate restoration alternative if they can make a plausible case that the selected alternative is inappropriate. The latter might be the case if the selected restoration alternative is inadequate to fully restore at a reasonable price the damaged natural resources, or if a full restoration would take too long[189].

In line with the above points, a vital issue that needs to be understood by any individual or group considering bringing a judicial review is timing. The rule is that an application for judicial review in environmental proceeding must be brought promptly and in any event within sixty days from the date the decision was given or the deadline for decision has elapsed[190]. The justification behind this limitation of period could be because of the fact that judicial review is usually aimed at stopping decisions before they are put into effect rather than when it is too late and the harm has already been caused[191]. According to this researcher, since the right to a clean and healthy environment is one of the fundamental rights,[192] the court should have discretion to extend the period of limitation when there is a good reason for delay. Even if this is the case, however, since the discretion is with the court, it may be difficult to the plaintiff to persuade the

[188] Civ. Proc., Supra note 199, Art, 154 (1).
[189] Edward H.P. Brans, Liability for Damage to Public Natural resources: Standing, Damage and Damage Assessment, (Published by Kluwer, Law Int., 2001), P.49.
[190] Procl., Supra note 182, Art. 11(2).
[191] Martyn Day, Environmental Action: A Citizens' Guide, (Published by Pluto Press, 1988), P. 185.
[192] Const., Supra note 173, Art. 44.

court to agree to extend the time in cases where a third party has been prejudiced by the delay. For the above reason, the plaintiff is advised to conform to the primary duty that the application must be made promptly.

In legal standing in relation to environmental proceeding, the next issue that needs due consideration is identifying the plaintiff/s that could initiate legal action when damage is caused to the environment. When damage is done to the environment under the FDRE legal system, a number of persons[193] have legal standing, so that it is pertinent to scrutinize whether they could become joinder plaintiffs or not in the legal action. In legal action, joint plaintiffs' means nothing but plaintiffs of more than one who seek to file suit against the same defendant or defendants. On the basis of the civil procedure of the FDRE, persons are entitled to join as plaintiffs if two conditions are satisfied[194]: [1] the right to relief must arise from the same transaction or series of transactions, whether jointly, severally or in the alternative, and [2] if such persons brought separate actions, a common question of law or fact would arise. In environmental proceeding the right to a clean and healthy environment is collective as well as personal right, and the right to bring legal action is without the need to show any vested interest. Furthermore, legal personality in environmental proceeding is multifaceted in that it bestows legal personality to the future generations, and to the environment as a separate legal entity. So, at the time when the two conditions set in the civil procedure are fulfilled, they should be allowed to form joinder of plaintiffs to bring legal action against the same defendant/s.

The corollary to the identification of the plaintiff/s is the identification of the responsible party, that is, the defendant/s. As it has already stated, in judicial review in relation to environmental proceeding, the complaint is that the environmental authority either allows that harmful or polluting activity to be carried out or does not prevent the pollutant/s from continuing. In this respect, we can see at least two parties for the pollution of the environment; these are the pollutant/s, and the environmental authority. For this reason, it is important to scrutinize whether there is a ground or not for joinder of defendants.

[193] Proclamation., Supra note 182, Art. 2(10).
[194] Civ. Proc., Supra note 199, Art. 35.

According to the concept of joinder of defendants, one plaintiff [or plaintiffs entitled to join] is/are allowed to sue more than one defendant. In the Ethiopian legal system, the civil procedure code sets forth the general rule for joinder of defendants as follows[195]:

> *All persons against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, may be joined as defendants where, if separate suits were brought against such persons, any common question of law or fact would arise.*

In this provision there is only one condition for joinder of defendant, that is, a common question of law or fact. In line with this requirement of joinder of defendants, in public interest litigation in relation to environmental proceeding, it is fairly easy to pinpoint the existence of common a question of law or fact that would make the environmental authority and the polluter/s joinder defendants. For the above strong reason, we can bring legal action against them jointly. At this juncture, however, it is important to take notice that[196].

> *It shall not be necessary that every defendant be interested as to all the relief claimed in any suit against him.*

That is, the plaintiff/s could seek some relief against one defendant and different or alternative relief against others. The point is, therefore, the plaintiff may join all defendants if there is any common question of law or fact irrespective of the difference in the type of relief claimed from each defendant. In other words, the plaintiff does not have to claim the same relief against all defendants, and the court will enter a judgment against each defendant to the extent that he may be found liable to the plaintiff/s. Accordingly, the relief claimed against one defendant may be inconsistent with that claimed against the other defendants. So that, the environmental authority or the polluter/s have no ground for objection from being joinder defendants on the basis of the fact that they may not be liable for all or the same relief the plaintiff claims.

Following the identification of the parties to a suit, the next issue that should be addressed is the question of material jurisdiction in environmental proceeding. In the Ethiopian legal system, the

[195]Id., Art. 36(1).
[196]Id., Art. 36 (6).

civil procedure code provides that a suit the subject matter of which cannot be expressed in terms of money shall be entertained by the Federal First Instance Court having local jurisdiction[197]. The same procedure applies in environmental proceeding since the subject matter of the suit in environmental proceeding may not be expressed in terms of money.

Before the researcher winds up the discussion, to have a full fledged understanding of this topic, it is also important to say a few words in respect to the principle of res judicata. According to this principle, if a state acts properly in its capacity[198] in addressing the damage to the environment, the private parties do not have an interest that is distinct from the interest on behalf of whom the state is acting, so that they are legally bound [res judicata] by the decision of the court on the state's claim for damages. In this case, only those losses which the government did not settle and receive damages should be recoverable without being hampered by the principle of res judicata.

For further information, in case where the claim to damage to the environment is initiated by public interest groups, the law provides as follows[199].

> *Where persons litigate in good faith in respect of public or private rights claimed in common for themselves and others, all persons interested in such rights shall be deemed to claim under the person so litigating.*

Accontrario reading of the provision implies that, if the previous proceeding was not bonafide public interest litigation, the rule of res judicata will not operate and the subsequent proceeding would not be barred by res judicata.

Discussion Questions

- Who has the first standing to protect the environment? Why?
- What would be the legal remedy in case when the party who has first standing failed to protect the environment?
- What do we mean by exhaustion of administrative remedies?

[197] Id., Art. 18.
[198] Procl., Supra note 182, Art. 11.
[199] . Civ. Proc., Supra note 199, Art. 5.

5.4. Citizen Standing to Challenge the Constitutionality of Environmental Laws

In Ethiopia, the power of interpreting the constitution is entrusted to the House of Federation[200]. Article 62 (2) of the FDRE constitution authorizes the House of Federation to establish the Council of Constitution Inquiry. Besides, as per Article 83 of the same, all constitutional disputes have to be submitted to the House by the Council of Constitutional Inquiry. That is, the council of constitutional inquiry after making the necessary investigation of the case is required to submit its recommendation to the House of Federation for a final decision[201].

Since issues of constitutionality are to be finally decided only by the House of Federation upon the recommendation of the council, any constitutional dispute relating to administrative acts can only be decided by the House of Federation, and consequently the litigant is not expected to exhaust any administrative and regular court remedy in such cases. Where substantial constitutional issue is raised over an action of administrative authorities, the case must be taken to the House of Federation. Since administrative officials and regular courts are not empowered to decide upon constitutional disputes, there is no remedy available before administrative officials and regular courts.

Thus, a person challenging the constitutionality of an administrative action is not required to proceed to administrative officials and regular courts. That is, he should be excused from exhausting administrative and regular court remedies, and he can directly take his case to the House of Federation if he proves that he is an interested party. At this juncture, it is important to raise the question of what interested party stands for? In this respect, the phrase "interested party" may have different meanings in different contexts. In case of issues of constitutionality of administrative acts in relation to the environment, however, it is important to read Articles 83 and 84 in tandem with Articles 44(1) and 92 (4) of the constitution, and Art. 11 of the Environmental pollution control proclamation to address the question to whom an interested party stands for[202]. When we read the above legal provisions in conjunction, they imply that every one has the right to live in a clean and healthy environment, and the duty to protect the environment. So, everyone is presumed to have vested interest when damage is done to the

[200] Const., Supra note173, Art. 83(1).
[201] Id., Art. 84 (1).
[202] Id., Arts. 83, 84, 44 (1), 92 (2), and Supra note 182, Art. 11.

environment due to unconstitutional acts of administrative organs, so that any alert citizen or public interest group challenging the constitutionality of environmental authority's action in relation to the environment can directly take his case to the House of Federation without exhausting any administrative and regular court remedies.

Discussion Questions

- What would be the legal remedy in case when there is dispute between the environmental laws enacted by the concerned party and the FDRE Constitution?
- Who could be the interested party in such a dispute?

5.5. Citizen Standing Before International Courts and Tribunals

The doctrine of exhaustion of local remedies is a principle applicable at an international level, which is closely related in its function with the doctrine of exhaustion of administrative remedies applicable at the domestic level. This doctrine provides that before an aggrieved person brings an international claim against his state, the injured citizen should have exhausted all the domestic administrative and judicial remedies available within the state that is alleged to have injured him. Hence, a claim will not be admissible on the international plane unless the person concerned has exhausted the effective and adequate legal remedies available to him within the state which is alleged to be the author of the injurious act[203].

The principle of exhaustion of local remedies is a method which gives states the first opportunity to resolve their own internal problems in accordance with their domestic legal procedures before they proceed to accept international standards. For this reason, it is a well established principle of General International law, and an important working procedure of International Human Rights courts[204].

In relation to the environmental proceeding, the doctrine of exhaustion of local remedies seems to have connection with the principle of permanent sovereignty which states that every state has

[203] Ian Browine, Principles of Public International Law, (2nd ed], Clarendon Press, Oxford, 1973), P. 482.
[204]Malcom Shaw, International law (4th ed, Grotious Publications: Cambridge University Press, 1997), P. 202

the right to freely dispose of the natural resources within its territory[205]. This is true in that the doctrine of exhaustion of local remedies give cognizance to sates' sovereignty by bestowing them the first opportunity to solve their problems by themselves. Following the first opportunity to resolve one's problem, however, we can say that standing before international organs after the exhaustion of local remedies is the reflection of the corollary duties of the principle of permanent sovereignty which entail among other things, proper management of natural wealth and resources, and due care for the environment[206]. In respect to the enforcement of such duties, at national level, it is inevitable that regular courts and administrative remedies to exist to take corrective measures. The problem at this juncture, however, is when the domestic remedies fail to address the problem promptly and adequately. In such a case, to fill the gap in the legal system the writers will scrutinize different legal instruments to pinpoint the available lee ways to exercise one's right at the international plane at the time when the local remedies fail to address the problem.

At the international level, the formal opportunity for individuals and non-governmental organizations to play an enforcement role is extremely limited. Under some of the regional human rights treaties, however, individual victims, including non-governmental organizations, may bring complaints directly to an international body. Thus, the European convention on Human Rights provides that the European commission on Human rights[207]:

> *may receive petition [---] from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the (---) parties of the rights set forth in this convention, provided that the (---) party against which the complaint has been lodged has declared that it recognizes the competence of the commission to receive such petitions.*

On the basis of this, individuals and non-governmental organizations have played a particularly active role in supporting the enforcement role of the EC commission, usually by submitting complaints to that institution concerning the non – implementation by member states of their environmental obligations. In 1991 more than four hundred complaints were received by EC

[205] UN Declaration on Permanent Sovereignty over Natural Resources, GA Res. 1803 (XVII); Para. 5.
[206] Ginther, Supra note 191, P. 84.
[207] European Convention on Human Rights, 1950, Art. 25 (1).

commission concerning non-compliance with environmental obligations, leading to a number of formal investigations by the commission[208].

The case-law of the European court has restrictively applied the concept of direct and individual concern[209]. In practical effect, it is unlikely that a legal or natural person could challenge the non-compliance by , say, the EC commission, with community environmental laws where that non-compliance affected a large number of people in such a way that an individual could not claim that he/she was individually concerned by the act in question. In this respect, however, the case of Green Peace Council and others has now been taken to the European courts which challenge the basis of the existing jurisprudence. In this case, nineteen applicants have asked the court of First Instance to declare void a decision adopted by the commission to grant structural funds to Spain for the construction of two power projects in the Canary Islands because the decision did not comply with, inter alia, Directive 85/337 on environmental impact assessment and Article 130R of the EEC Treaty. The applicants are submitting that all individuals who have suffered or potentially will suffer detriment or loss, as a result of the EC measure which affects the environment should have standing to challenge that measure before the court of first instance. The commission, however, indicated that it will oppose the application on the ground that the applicants do not have standing.

When we come to the African Charter on Human and Peoples' right, it provides that[210]:

> *Before each session, the secretary of the commission shall make a list of the communications other than those of state parties to the present charter and transmit them to the members of the commission, who shall indicate which communications should be considered by the commission. A communication shall be considered by the commission if a simple majority of its members so decide.*

To exercise its power, the African-Charter on Human and Peoples' right further provides a precondition which states that[211]:

[208] Ginther, Supra note 191, P. 201.
[209] Id.
[210] African Charter on Human and Peoples' Right, Adopted on June 27, 1981, OAU Doc. 1982, Art 55.
[211] Ibid, Art. 50.

> *The commission can only deal with a matter submitted to it after making sure that all local remedies, if they exist, have been exhausted, unless it is obvious to the commission that the procedure of achieving these remedies would be unduly prolonged.*

On the basis of the above provisions, one can infer the fact that, the Commission on Human and People's Right can only deal with matters submitted to it by any person, when it makes sure that simple majority of the commission approved the communication to be heard, and it is verified that all available local remedies are exhausted. In exceptional circumstance, however, when there is undue prolongation of a case by a state, the approval of the communication by a simple majority of the commission is sufficient condition, so that the claimant would not be required to exhaust the available local remedies to have standing before the African Human Right Commission.

As to the scope of standing, in contradistinction to the case law of the European Commission, which applies restrictive concept of direct and individual concern, the African Commission on Human and Peoples' Rights follow the jurisprudence of liberal standing. In line with this liberalization of standing, a case was entertained by the African Commission on Human and People's Rights. The case was initiated by a humanitarian organization called CERAC against the Nigerian Government and the Oil Giant Shell.

In the case of CERAC vs. Nigerian Government and the Oil Giant Shell[212], it is revealed that the Farmers' and Fisher folk' livelihood and welfare is intricately bound to the health of the surrounding rivers, streams and soil. Over two decades, the environment and welfare of the Ogoni communities have been seriously damaged by irresponsible oil development. The government has contributed to this harm through its dominant role in the oil industry and its violent response to Ogon protests.

The oil industry, the NNPC-shell consortium, has simply dumped them into unlined pits from which they regularly flow into nearby lands and streams rather than treating or re-injecting oil production wastes.

[212] CERAC Vs. Nigerian Government and the Oil Giant Shell.

The water, soil and air contamination caused by oil production in Ogoni land has endangered the life of plants, fish, crops and the environment at large. For this reason, the local communities are exposed to a variety of water and air-born contaminants linked to serious health problems.

The Nigerian government has contributed to these problems by failing to monitor or regulate oil companies. Rather than focusing on these problems, the government has responded to complaints about the oil industry with brutal repression. The Nigerian government has condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies. The government has neither required the oil companies nor its own agencies to produce basic health and environment impact studies regarding hazardous operations and materials relating to oil production and has even refused entry into the area by scientists and environmental organizations trying to do such studies.

In contradistinction to the damage sustained by the environment and the Ogoni people, the right to health and the right to a healthy environment are well established in international law, and , in particular, under the African charter. Both rights recognize the importance of a clean and safe environment to a person's well-being. As declared by unanimous vote of the UN General Assembly man has the fundamental right to freedom, equality and adequate condition of life, in an environment of a quality that permits a life of dignity and well –being[213]. The African Charter also specifically grants individuals both rights to enjoy the best attainable state of physical and mental health, and the right to a generally satisfactory environment favorable to their development[214].

At their most basic level, the right to health and a healthy environment serve to prohibit governments from affecting the health and the environment of their citizens. In this respect, governmenst must also ensure that private parties, like corporations, do not pose such threats to their citizenry. Towards this end, international treaties and courts have insisted upon appropriate legislation and effective enforcement. The African Charter is one of the international instruments

[213] The First United Nation Conference on Environment and Development, Held in Stockholm, in June 1972, Principle1.
[214] Charter, Supra note 241, Art. 24.

which call parties to the charter to adopt legislative or other measures to give effect to the rights under the charter[215]. In this respect, the Inter-American court[216] also reiterated that a state violates the rights of its citizens when the state allows private person or groups to act freely and with impunity to the determent of the rights recognized.

In line with the above stated international instruments, CERAC after exhausting the available local remedies, on the basis of article 50 of the African Charter, took the case to the African Humanitarian Right Commission. Accordingly, after due consideration was made by the Commission, CERAC and the people of Ogoni were awarded the judgment that they have the right to live in a safe environment which is habitable.

In the eyes of the writers, the Ogoni case has a paramount importance in that it reveals the existence of regional and international remedies at the time when national remedies are exhausted, and fail to address the problem adequately and promptly. Following the same approach, public interest groups, and alert citizens in Ethiopia could have standing to initiate legal action in relation to the right to live in a clean and healthy environment before Regional and International organizations at the time when the local remedies fail to address the problem adequately and promptly.

Discussion Questions

- Discuss the principle of permanent sovereignty and the corollary duty.
- Discuss what exhaustion of local remedies.
- Verify whether there is a leeway by which we could enforce the right to live in a clean and healthy environment before international courts and tribunals or not. If there is, what do you think is the rationale is.

[215] Id., Art. 24 and 16(1).
[216] Inter-American Valasques Rodriguez Case, Inter-Am ct. H.R OEA/ser. L/V/III. 19 Doc 13, 11 164 [Aug. 31, 1988].

5.6. Public Interest Litigation Case: APAP VS. Environmental Protection Authority

A. Action Professionals' Association for the People [APAP] and Its Objectives

APAP is a non-profit making, non-partisan, indigenous non-governmental organization established in 1993 with main objectives of providing legal and professional services to the poor, women, and children in Ethiopia and accessing human rights and legal information to these groups so as to enable them use the law and human rights in bringing about an attitudinal change and as resource in the development process. Therefore, making justice accessible to the poor, women and children has been the raison d'etre for APAP's existence[217].

Accordingly, on the basis of its objective, APAP has initiated the following public interest litigation which is the first case ever in the history of Ethiopia to bring an end to the environmental and human suffering incurred due to the pollution of Akaki and Mojjo Rivers by Governmental and Non-Governmental Industries and Factories.

B. APAP's Complaint to the Environmental Authority [218]

Date Dec 6/2005

File No ›–/13.msl/681/98

Federal Democratic Republic of Ethiopia

To Environmental Authority

Addis Ababa

A Complaint on the Basis of Article 11(1) of the Environmental Pollution Control Proclamation No 300/2002

Complainant: Action-Professions' Association for the People [APAP]

APAP brought this complaint in that it takes cognizance of the pollution on Akaki and Mojjo rivers from the studies conducted in those areas. In this case, some of the studies were initiated by APAP itself, and the rest by other concerned organizations. On the basis of these studies, it becomes clear that, the pollution of the Akaki and Mojjo Rivers is mainly caused by liquid and

[217] Abebe Mekasha, APAP'S Experience in the Provision of Legal Aid: Approaches and Challenges, Paper, December 9, 2004, P.1.

[218] APAP'S Complaint to the Environmental Authority

solid by products of the governmental and non-government industries. In this respect, the studies further specifically reveal the contribution of the Addis Ababa dwellers, and the Mojjo leather factory to the pollution of the Akaki and Mojjo rivers.

On the basis of the studies conducted in those areas, therefore, it has become vivid that the pollution of these rivers is adversely affecting the right of the society to live in a clean and healthy environment. That is, at the time the people tend to use these rivers for their daily life, they are directly or indirectly becoming susceptible to health problems which in turn may have the potential to jeopardize their very existence. According to the studies conducted in these areas, the health problems stated above do not only arise from the difficulty the people face to utilize these rivers for personal and commercial benefits but it also emanatse from the offensive odor in and around those rivers which makes life miserable.

To avert the above stated problems, APAP, taking the right to a clean and healthy environment as part of its objective, this time, it has initiated a prototype complaint against the Environmental Authority. In this case, the complaint is made to pressurize the effective implementation of the rights stipulated in the national and international legal instruments.

In a nutshell, to bring about the legal penetration of the right to a clean and healthy environment, APAP has lodged this complaint to the Environmental Authority on the basis of article 11(2) of proclamation No. 300/2002 to take administrative or legal measures against any person who pollutes these rivers. Simultaneously, APAP calls the authority to inform it the decision made or measures taken to address the problem within the time limit in the Environmental Pollution Control Proclamation.

C. **Press Release by Action-Professionals' Association for the People** [219]

Date 20/12/05

Ref No Ap/17.Wov/688/05

Everyone has the Right to a Healthy Environment

Action Professional's Association for the People disclosed that preparations are underway to sue the government under a public interest litigation charge which is the first case ever in the history of the country to bring an end to the environmental and human suffering incurred due to the pollution of Akaki and Mojjo rivers by governmental and private companies and factories.

Ethiopia is signatory to the International Covenant on Economic, social and cultural rights which is part of the International Bill of Human Rights directed at protecting and promoting the human dignity of every individual.

Article 12 of the convention guarantees the right to health as the highest attainable state of health. Similarly, Article 44 of the FDRE constitution stipulates that the government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment. Even if under related proclamations that were issued pursuant to the convention and the FDRE constitution the government has established the Ethiopia Environment Authority along with its duties and responsibilities, Ato Debebe H/Gebriel, Executive Director of APAP reiterated that the authority failed to meet its expectations. Hence, preparations are being finalized to take the case to the courts.

Ato Wongel Abate, a projector officer with APAP who is currently following the case stated that in view of the missions and visions of APAP measures have been taken to inform the relevant government authorities to check the suffering of the people living in the Akaki and Mojo river basins. Thus Ato Wongel argued filing the case as the last chance that awaits APAP from the courses of action it has been following.

[219] APAP'S Press Release

The victims on their part explained the pains and sufferings they have undergone following the pollution of these rivers.

D. **A Reply Letter from Environmental Protection Authority.** [220]

This is the reply given dated December 26, 2005 and addressed to APAP by the Ethiopian Environmental protection Authority to the complaint lodged by APAP on December 8, 2005.

As has been disclosed by the Association, the Environmental pollution control proclamation 300/2002 provides that no person shall pollute the environment by violating the relevant environmental standard. However, this can only be realized and enforced when, as per article 6 of the proclamation, standards are formulated identifying and grading various pollutants. The existence of such standards would allow identification of the installations that are causing pollution and make them liable under the law. In this regard, the Authority has the responsibility to prepare environmental standards in consultation with relevant offices. On the other hand, most of the industries in the country were established before the enactment of the environmental protection laws. The new laws, such as the Environmental pollution control proclamation do not provide for their direct application on pre-existing industries. Even if there were such provisions, their application would result in more harm than the benefit to be obtained. However, Article 18 of the proclamation stipulates that specific regulations will be issued on the enactment of environmental protection laws.

The Environmental Protection Authority has prepared a draft of "Industrial Effluent Emissions Quality Standards and Ambient Environmental Quality Standards" after conducting the relevant studies. In addition to this, it has formulated draft Industrial pollution prevention and control regulation to enforce environmental policies and laws. The draft standards and regulation have been discussed by professionals from various offices, industry owners, and the general public and they have been forwarded to the relevant governmental body for approval.

[220] Reply Letter from Environmental Protection Authority to APAP.

As stated above, the Environmental protection Authority has facilitated the required conditions needed for the enforcement of the constitutional environmental rights and the Ethiopian environmental policy.

Even in the absence of the above mentioned standards and regulation, the authority has carried out various activities to control industrial pollution. Some of these are:

- Preparation of ten industries capacity building directives to reduce pollution caused during industrial production.
- Carrying out Environmental Audits on thirty five old industries to enable them reduce pollution during production. The audit report has been sent to the industries to enable them to take the corrective measures provided in the audit.
- Is finalizing the preparations to give training on methods for carrying out Environmental Audits to leather, textile, beverage, chemical, cement, and sugar industries, which have been included in the Draft Industrial Pollution Prevention and Control Regulation. This would increase the capacity of the industries. It would also help them to conform to the existing and future laws.
- A study on the pollution of the Akaki River due to various pollution sources /houses, industry, service installations, etc. has been carried out in collaboration with the Oromia Environmental Protection office and the Addis Ababa Environmental Protection Authority in August 2005. In line with this, an action plan has been prepared to prevent sources of pollution.
- Preparation of a plan to prevent pollution caused by solid waste through an internationally acceptable method which is being implemented on sub-city level.

In the current budget year the Authority will expand the measures started and, together with this, it is following up the approval of the above mentioned environmental standards and regulation for the implementation of environmental laws.

E. **APAP'S Court Action Against the Environment Authority**[221]

Date March 15/2006

Ref No AP/3. APN/045/98

Federal Democratic Republic of Ethiopia

Federal First Instance Court

Addis Ababa

Plaintiff: Action - Professionals' for the People. [APAP]

Address: Addis Ababa, Zone Arada, Kebelle 11/12, House No. 959.

Defendant: Ethiopian Environmental Protection Authority.

Address: Addis Ababa, Zone Yeka

Statement of Claim: In accordance to the court's order on March 5, 2006 to reframe the initial court action which was filed on February 22, 2006, the plaintiff has now initiated the following court action by reframing its suit in line with the orders given by the court.

On the basis of article 14 of proclamation No. 25/1995, and article 11 (2) of proclamation No. 300/2002 the court has the power to see the case and render its decision.

On the basis of article 11(2) of the Environmental pollution control proclamation No. 300/2002 the plaintiff has the right to institute a court case.

The plaintiff follows the case by its employees with special advocacy license, and could employ others when it thinks necessary.
The plaintiff will render the court summon to the defendant.

On the basis of different studies conducted on the Akaki and Mojjo Rivers the Plaintiff realized the existence of pollution on these two rivers. Having these studies as initial ground, to further consolidate the prima facie of the case, it also conducted its own additional research to reveal the impact of the pollution of these two rivers on the health, economy and social interest of the society. On the basis of these studies, it has become clear that the pollution of the Akaki and

[221] APAP's Court Action against the Environmental Protection Authority

Mojjo rivers is mainly caused by liquid and solid by products of the governmental and non – governmental industries, and the garbage of the dwellers of Addis Ababa.

In this respect, since a river is the source of water, and water is one of the components of the environmental definition, the pollution of these two rivers is indispensable in the pollution of the environment. So, it has become fairly easy to pinpoint the causal connection between the pollution of these two rivers and the jeopardy of the right to a healthy life and the dignity of human beings.

In accordance with the studies conducted in and around these rivers, the plaintiff learned the fact that the society do benefit in different ways from these rivers. Some of the benefits that the people in Addis Ababa get from these rivers are vegetable and fruit products. In addition to these benefits derived by the Addis Ababa people, the people in the vicinity of these rivers do use the water for bathing and washing their clothes. Furthermore, the people in the village use the water for drinking and other daily consumptions, and rearing their animals.

In spite of the above stated personal and commercial consumptions by the society, the continuous and persistent pollution of these rivers is making the quality of the products of these rivers determirate. Furthermore, the damage sustained by the animals and plants of these areas have severe effect on the economy and societal relation of the society. So that, the pollution of these rivers puts the health of the society at stake.

The environmental pollution control proclamation No, 300/2002 under Article 3 states that no person shall pollute or cause any other person to pollute the environment by violating the relevant environmental standards. In addition, this article states that the authority or the relevant regional environmental agency may take administrative or legal measures against a person who, in violation of law, releases any pollutant to the environment. To avert any damage on the health of the people and the environmental. Sub-article 5 of this article also stipulates that the environmental agency shall take any necessary measure up to the closure or relocation of any enterprise. Furthermore, Sub-article 4 of the same article provides that any person who causes any pollution shall be required to clean up or pay the cost of cleaning up of the polluted

environment in such a manner and within such a period as shall be determined by the Authority. On the basis of these legal provisions, it becomes clear that, the Authority has the duty to create net work with other institutions and make proper assessment to manage the pollution of the environment.

In line to the above stated legal provision, the pollution of these two rivers is, therefore, violation of the relevant environmental standards. so much so that APAP, taking cognizance of the effect of the pollution on the right to a clean and healthy environment, lodged a complaint to the authority on the basis of Article 11 of the pollution control proclamation No, 3000/2002 to take administrative or legal measures against any person who pollutes these rivers on December 8, 2005 with file No. AP/ 13. MSL/681/98.

In response to the complaint made by APAP, the Environmental Authority gave its reply on December 26, 2005 with file No1/›ØÑ<1/1. In this respect despite the timely response by the Environmental Authority the plaintiff is dissatisfied by the reply in that the decision made by the authority cannot accommodate the economic and societal interest of the society. For this reason, the plaintiff initiated the following court action to oblige the Environmental Authority to fulfill its duties.

Claimed Relief by the Plaintiff:

- The court to force the Environmental Authority to enact laws which are delegated to it, and to exercise its power to fulfill its duties.
- The court to order the Environmental Authority to avert the pollution on the rivers and to clean up the pollution of the rivers.
- The court to establish a commission from governmental and non-governmental organizations that follow up the measures taken by the Environmental Authority and submit report on the date fixed by the court.

The plaintiff confirms the above given facts are true.

Representative: Advocate Wongel Abate

F. **Summon to the Environmental Authority**

According to Article 233 of the civil procedure code where there are no reasons for rejecting a statement of claim under Article 231, the court shall cause the statement of claim and annexes to be served on the defendant together with a summon requiring him to appear with statement of defense on a day to be fixed in the summons. On the basis of the above stated legal grounds, the court has now issued the following Summon:

File No, 64902

Data: March 15, 2006

To: Ethiopian Environmental Protection Authority

Address: Addis Ababa, Zone- Yeka

Whereas Action-professionals' Association for the people has instituted a civil suit against you on March 15, 2006 for the pollution of Akaki and Mojjo Rivers, you are here by summoned and provided with the suit and annex of pages of 93. In this respect, you are requested to produce your statement of defense with a list of all the witnesses you intend to call and their address, and the purpose for which you intend to call them; and a list of all the documents on which you intend to rely in writing to the registrar on April 20, 2006 at10:30 A.M. in Lideta First Instance court seventh Division.

Take notice that, in default of your appearance on the day mentioned on the summon or default of producing your statement of defense or any evidence, the suit will be heard and determined not withstanding your default.

5.7. Recommendations for the Realization of Public Interest Litigation in Relation to Environmental Proceeding

1. Mushrooming Co-operative and Collaborative effort

Public interest litigation is essentially a co-operative and collaborative effort on the part of petitioner, the state [public authority] and the court to secure observance of the constitution or legal rights conferred upon the vulnerable section of the community. It is a challenge and opportunity for the government and its officers who must not only welcome but must be interested in ensuring basic human rights of the disadvantaged.

So, for the success of public interest litigation, the attitude of the government needs to be co-operative. Without such co-operation the whole program may fail to achieve its goal of justice to mass.

Here, it should be noticed that the occasional discomfort to public authorities out of court's challenges of government lapses and lawlessness is too small a price for the great returns public interest litigation provides by way of strengthening constitutional government and individual freedoms.

2. Realizing Conducive Environment to Public Interest Groups

There is a practical problem of funds for public interest litigation petitions to be brought before the courts. At present the funding is done by the individuals from their own pockets, which is hardly satisfactory.

Accordingly, public interest litigation can become a sharper instrument if there is proper institutional frame -work with regular funding assured.

To this effect, the government can facilitate the engagement of public interest groups in the environmental protection by and through creating conducive environment.

This could primarily be realized by and through directly subsidizing them. This is a pressing need because the extent to which public interest groups can make a contribution to the design and implementation of environmental regulation depends, at least in part, on their level of resource, which in turn may be related to government policy. In other words, there is usually a massive imbalance between the resources of environmental public interest groups and their adversaries, which government funding can at least begin to mitigate.

Secondly, the government may supplement direct funding of public interest groups with financial incentives, and through taxation policy, for example, making contributions to such group tax deductible. They could also, in order to actively encourage private enforcement, offer financial rewards to third parties for successful litigation.

3. Managing Conflict of Interest, and Working as Hand and Glove

It is important to design a mechanism for the coordination of public interest groups to limit transaction costs and prevent overlapping claims. This is crucial, because many environmental groups could have shared interests in natural resources and the services provided by these natural resources. Furthermore, the issues of cooperation and dealing with conflicting interests will also arise here. Groups who share these interests should therefore be encouraged to coordinate their activities. This is not only important for cost-effectiveness, but also to prevent double recovery of damages. Other important benefits include the pooling of limited financial and human resources and the prevention of legal and other conflicts between the public interest groups involved. The responsible party could also be invited to participate in the gathering of injury related data and the assessment and restoration process, which may prove to be more efficient approach.

Accordingly, if the proceeding is on individualistic, unorganized manner and lacking in institutionalized setting, it will not attain wide momentum. So, the reaction to a particular problem should be by and through the coordination of public interest groups, that is, by forming joinder of plaintiffs.

4. Re-form on the Law which Governs Court Fee

An issue of considerable practical problem in public interest litigation is on who pays the bill for environmental litigation. It is an unfortunate but inescapable fact of life that the energy of the legal system is responsive largely to financial incentives.

It is important to note that litigation costs may be awarded to any party. It means that plaintiffs may be assessed with litigation costs. Accordingly, high costs of civil procedure and especially the risk of losing the case and as a result of having to pay the costs incurred by the other party may deter public interest groups. In other words, unless public interest groups are protected from awards of litigation costs for all but extreme instances of bad faith and frivolous assertion, the ends of the citizen suit measures will be served poorly.

So, to have actual public interest litigation, the government should improve public participation in the legal process by changing the cost rules for cases brought forward by private litigants that are demonstrably in the public interests. To this effect, the government should enact the Draft Bio-safety proclamation, which stipulates no costs shall be awarded against any person who fails in any action if the action was instituted reasonably out of concern for the public interest or in the interest of protecting human health, biological diversity and in general the environment. The Draft Bio-safety proclamation further provides that, the burden of proving that an action was not instituted out of public interest or in the interest of protecting human health, biological diversity and in general the environment rests on the person claiming this.

5. Freedom of Information and the Right to Know

The right to be informed of public acts helps to check the abuse of executive power. Armed with information on government programs, citizens may influence decision making through representations, lobbying and public debate.

The right to know is especially critical in environmental matters. For example, government decisions to site dams may displace thousands of people and deprive them of their lifestyles and livelihood. A responsive government, therefore, ought to widely publicize its river development plans and ought to be receptive to public feedback.

To improve the flow of information about hazardous technologies, the circles with a right to know and those with a duty to disclose should be wider than under the existing law. Public interest groups with demonstrated capabilities for risk management should be drawn as far as possible into the network of information sharing, reinforcing the lines of communication between industry, government and the general public.

In addition to the above scarcity of information, a major segment of society remains unaware and ignorant of their rights under the constitution or as granted to them by benevolent legislation. Ignorance deprives them from taking benefit of such welfare legislations. Even if a few of them are aware of their rights, they do not assert them in court of law. The court fear has settled in their minds that injustice in law courts is the rule and justice is an exception. To alleviate this

problem, the government has to create awareness in the grassroots of the society through formal and informal education.

6. The Role of Lawyers in Public Interest litigation

Public interest advocacy requires a role perception, different from that of a traditional lawyer. A public interest lawyer should be able to mobilize and sensitize the target group and must possess a missionary zeal, lawyers should not only be concerned with legal quibbling for men with long purses and gaining of high fees.

In respect to advocacy law, despite the availability of a law that obliges an advocate to provide five hours of pro bono and work for the indigent, there is no enforcement mechanism to make sure that this nationally and internationally recognized professional duty of lawyers to contribute towards the provision of legal aid.

In this regard, making pro bono a requirement for renewing practice certificate may be one administrative mechanism to ensure compliance. In some jurisdictions, there is an option of financial contribution by the lawyer instead of the pro bono service. This kind of schemes may be taken as best practice to be emulated in Ethiopia.

Furthermore, enforcement mechanism to implement the law on pro bono legal services duty of the advocates must be in place in the civic education for lawyers to be sensitized of their legal and moral duty to engage in pro bono services.

In addition to the above enforcement problem of pro bono service duty, the stringent requirement as to who is eligible to provide legal aid service is another issue which needs due consideration. The Federal Courts' Advocates Registration and Licensing Legislation envisages that legal aid should be provided strictly by high-qualified lawyers. Article 3(1) cumulative Article 10(1) of this proclamation requires that only licensed lawyers can provide legal aid service, and this lawyer has to have, inter alia, a degree in law and a minimum of five years relevant experience. The rationale of this standard may be to ensure quality legal aid service by checking on the expertise and competence of a lawyer. In Ethiopia, where the lawyer/population ratio is quite

small, insistence on this standard would be detrimental to the majority of the populace who are illiterate and poor and the need for aid will be high.

One solution to address this situation could have been to allow all lawyers as well as non-lawyers, particularly law students and trained and certified paralegals to supplement the provision of legal aid service.

The other solution is to design a mechanism to encourage advocates with a Federal Court Special Advocacy license who defends the general interest and rights of the Ethiopian society; work without any consideration in connection to the case which is the subject of application; and have a character suitable for shouldering the special responsibility of defending the Ethiopian society. So, we can safely say that this approach is a pressing need to fill the gap in the provision of legal service which normally emanated due to legal quibbling for men with long purses in the ordinary advocacy markets.

7. The Creation of Separate and Independent Environmental Courts

Widespread and massive environmental degradation and hazard to health by pollution of various kinds has assumed serious and alarming dimensions which has further necessitated the creation of separate and independent environmental litigation. They need to be immediately dealt with by independent courts to remedy and rehabilitate the victim and provide them with justice urgently.

8. The Role of Courts

The court must not issue directions which are incapable of enforcements, loosing its credibility. Court must not issue directions in general terms. It must desist from issuing directions which the executive or its agency is not in a position to carry out. It is crucial, because it is of cardinal importance to the confidence that the people have in the court that its orders are implicitly and promptly obeyed. So, since public interest litigation is a technique which serves to provide an effective remedy to enforce constitutional or legal rights, the courts should be cautious and selective enough in accepting public interest litigation petitions so as to check massive inflow of frivolous petitions. Furthermore, it should be able to supervise the effective implementation of its orders.

9. Pseudo Public Spirited Individuals

It has been increasingly felt that public interest litigation could be misused by people agitating for private grievances in the grab of public interest and seeking publicity rather than espousing public causes.

In such cases those who profess to be public spirited citizens cannot be encouraged to indulge in wind and reckless allegations besmirching the character of others, and so the court must refuse to act at the instance for such pseudo public spirited citizens.

When a petition is filed as public interest litigation the court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. In this respect, therefore, to protect the defendants against frivolous suits, the citizen plaintiff's allegation must be made in good faith.

10. Need for Mass Public Participation

Public interest groups can highlight injustice in some areas in the society. But it cannot be a substitute for a mass-movement outside courts. So, the public interest groups must accept that their fight against injustice will remain incomplete and partially ineffective unless they become a part of bigger action program along with activists outside courts. That is, to have a full fledged success, public interest litigation should be supplemented by mass public participation.

11. Enactment of Enabling Legislations

In order to have actual public interest litigation in environmental proceeding the subsidiary regulations and directives which have not yet been enacted should be enacted by the delegated responsible organs of the government. The enactment of this subsidiary law is important, because they are a means to realize the right to a clean and healthy environment under the constitution, and other relevant environmental laws. To this effect, it is a pressing need to enact the Draft Bio-safety proclamation to panacea the gap in the scope of locus standi in relation to environmental proceeding

12. Forming a Special Environmental Public Prosecutor Office

In addition to citizen suit under the pollution control proclamation, a special environmental public prosecutor office should be incorporated in the legal system.

14. Conducting Press Release

The process of press release in legal challenge is likely to attract a great deal of bad publicity for the public authority, which may well bring many other objectors together and provide a large tide of opinion that the public body feel unable to ignore. So, to pressurize the Environmental Authority to fulfill its duty it is wise to conduct press release.

15. Upgrading Assessment Machinery

To prevent overlapping claims, public interest groups should distinguish private losses from public losses, and limit their assessment studies to public loss only. The public interest group claim is only for the public's loss of use of the natural resource injured. The private losses due to the injury to the same resources are not included because we can address it otherwise through the tort law.

16. Reshuffling Environmental Institutions

Environmental agencies created under environmental statutes are required to implement legislative mandates. Frequently, for lack of staff, money and man power, these agencies fail to implement the laws under which they operate and ecological degradation continues unabated. So, a mechanism should be devised to up-grade the capacity of Environmental authorities to address the environmental problems which could remain unabated due to lack of capacity.

17. Maintaining the Safety of Public Interest Groups

While public interest groups brought legal action against polluters, the polluters may tend to plot a ground to jeopardize the existence of public interest groups with the intention to avoid such legal encumbrance in their activity. To avert such mischief, the government should give due protection to the public interest groups from any attack in any form.

18. Entrenching Full-fledged Legal Action

In judicial review in relation to environmental proceeding, the complaint is that the environmental authority either allows harmful or polluting activity to be carried out or does not prevent the pollutant/s from continuing polluting the environment. This can move the focus of the campaign away from the polluter on to the regulator, which may not be a helpful part of the campaign. So, public interest groups should take care in entertaining environmental issues, not to move the focus of the campaign away from the polluter on to the regulator. That is, the legal action should be against both the Environmental Authority, and the polluter's by and through applying the law of joinder of defendants.

5.8 Judicial Activism, and Environmental Rights Protection

5.8.1 General Overview of Judicial Activism

Judicial activism is a powerful weapon which the judges have to exercise to sub serves the ends of justice by making the law responsive to the felt necessities of the changing time. It is a legal process by which relief is provided to the disadvantaged and aggrieved party and thus where there is a gap in the legislation or the law is silent on a specific point and prompt redress is needed, the judiciary exercises its inherent power by virtue of being a custodian and watchdogs of the constitution. This being a sufficient explanation to the concept of judicial activism for the moment, the concept is defined as the practice in the judiciary of protecting or expanding individual rights through decisions that depart from established precedent or are independent of or in opposition to supposed constitutional or legislative intent. Alternatively the concept is also defined as a philosophy of judicial decision making whereby judges allow their personal views about public policy, among other factors, to guide their decisions, usually with the suggestion that adherents of this philosophy tend to find the constitutional violations and are willing to ignore precedent.

5.8.1.1 Justifications for Judicial Activism

One of the important justifications for judicial activism is that the legislature is uninterested in reframing the law and that the judges should therefore *a*ssume that task since the legislature has failed to keep the law in a serviceable state the courts have been left with a substantial part of

responsibility for keeping the law in a serviceable state, a function which calls for consideration of the reality or contemporary achieving ends of participative and social justice is the other justification behind the movement for judicial activism. The constitutionally granted mandates of the judges are that in discharging their duties they have to keep and take into consideration the social and economic objective of the constitution which the latter sought to protect, promote and provide as prescribed in the law, and hence giving effect to this ideals calls for a happy and harmonious blend of relationship to exist among the three branches of the government so that the law meets its objective. In this respect it is possible to take the experience of the Indian judiciary wherein the court moves away from its formalism and instead, by creatively utilizing its activism, the court directs their movement towards achieving the ends of participative justice.[111]The other justification, perhaps the most important one, is protecting the interests of the weaker, downtrodden, unnoticed or relegated sections of the society. It has been said that achieving social justice is the pillar for judicial activism. However, bringing social justice requires having interaction with the social purpose, the absence of which will make social justice meaningless, purposeless and ineffective since social justice is not something available to the 'haves' and cares least for the have not's. Eradicating social injustice is the other dimension for judicial activism to emerge. In the traditional private court litigation, it is impossible for the lower income groups to enforce their fundamental human rights since courts belong so much to the millionaires who are strong enough to defend their interests even without the help of the courts unlike the poor section of the society which suffers from procedural discomforts.

5.8.1.2 Evolving New Rights: The Sole Creation of Judicial Activism

Herein below new regimes of right which are the results of an active judiciary could be seen taking into consideration the experience of the Indian judiciary where in the courts are very activist in the protection and promotion of human rights both explicitly and implicitly stated. Accordingly, the courts in India, particularly of the Supreme Court, created a new regime of normative rights by stating that 'the state cannot act arbitrarily but instead must act reasonably and in the public interest on the pain of its action being invalidated by judicial intervention. The active judiciaries' creation of rights through PIL includes among other things the right to protection of constitutional and environmental rights.

A. Right to Protection of Constitutional Rights

In the same fashion, the Supreme Court recognized the right to be governed by the rule of law by stating it is implicitly in Article 21 of the constitution. In the case between D.C WADHAWA and STATE OF BIHAR, for instance, the Supreme Court ruled that 'the petition was maintainable since the grievances were not regarding validity of any particular ordinance but about the general unconstitutional practice from the government of Bihar'.

B. Right to Environmental Protection

Concerning the environmental rights creation of the Indian judiciary through its activism the writer of this paper will dwell on it in the coming chapter. Nonetheless, for the purpose of this section we can look at the experience of the high court of Madras in the case of M.K JANARDHANAM Vs THE DISTRICT COLLECTOR, TIRUVALLER, in which case the court demonstrated that 'the enjoyment of life and its attainment and fulfillment guaranteed under Art.21 of the constitution embraces the protection and preservation of natures gifts without which life cannot be enjoyed and hence environmental degradation violates a fundamental rights to life'. From this case one can see that, the court, by broadly interpreting the constitutional right to life, it clearly demonstrates its zeal, emphasis and activism for the protection of environmental rights.

5.8.2 Judicial Activism Under the Ethiopian Legal System: Emphasis on Environmental Protection

In the preceding episode attempt has been made to disclose the role of judicial activism in the protection and enforcement of environmental rights in India. To that end, it has been shown how much the Indian judiciary is anxious and proactive for the better protection of environmental rights through various case demonstrations. The court at various levels, particularly of the high court's and Supreme Court, clearly provides the existing nexus between the right to life and the right to live in a clean and healthy environment. In this respect it is important to mention the Undra Pradesh high court judgment of Indian judiciary which clearly puts the possible nexus between the right to live in a clean and healthy environment and that of the right to life of individuals and groups whose judgment clearly provides the argument that it would be reasonable to hold that the enjoyment of life and its attainment and fulfillment guaranteed by Article 21 of the constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no

reason why violent extinguishment of life alone would be regarded as violative of Article 21 of the constitution rather than the slow poisoning by the polluted atmosphere caused by environmental pollution Spoliation should also be regarded as amounting to violative of Article 21 of the constitution.

This section is allotted to assessing whether this sort of substantive judicial activism really exists or not in the Ethiopian legal system, and whether it is a viable or feasible phenomenon for our judiciary as far as environmental rights protection is concerned.

To begin with the detractors, one important point of criticism raised were the fact that since Ethiopia is a code based and adherents to the principle of legality which compels every interpretation of law given or forwarded by our judges to be predictable and uniform, it is not feasible and possible for our judiciary to assume such a proactive or an activist role for the protection of human rights in general and environmental rights in particular**.** The opponents further go on to state that it is not the function of a judge to deviate from the clearly stipulated wordings of a given legal provision under the guise of judicial activism and to decide a given case handed to him or her. What is expected of a judge is to be formalist to the rule as it is or to conjugate the rulings of the law with a certain factual allegation at his or her hand like plugging a socket with the appropriate place. It goes without saying that any pro activism made by a judge under the guise of better protection of rights and freedoms is unjustified and even that may result in bias and nepotism, unfairness, impartiality and so on and so forth.

They stressed that this does not mean, however, preclude an individual judge from being conscious enough for the cause of environment and environmental protection just similar within other members of the society and even they have the right to hold an analytical thinking and knowledge to that end. Beyond this, the detractors argued, using their judicial power and function, a judge cannot do anything in their case disposition rather they are expected to stick to what the law says without any addition and subtraction.

These being the position upheld by the detractors, the proponents of judicial activism for environmental rights protection on the other hand expound that judicial activism is an indispensable

weapon which the judge should wield not only for environmental rights protection only but for human rights issues in general.

Before we provide the argument and standing on the fate of judicial environmental activism in Ethiopia, here it is a pressing need to comment on what has been pointed out as criticism on the relevance of judicial activism in the protection of environmental rights in Ethiopia and to that end, what has been said was the idea that the principle of legality precludes our judges from being activist since the former requires them to stick to the rule of the law as it is and hence requires interpretation of law given by the judges to be predictable and uniform in all times and places.

But, someone could disagree with this argument of the detractors because of the fact that for one thing it is not feasible to argue that a judge should be static in exercising its judicial function while there is a corresponding dynamism in terms of actual economic, social, and political scenario of a country.

In the existence of this factual scenario, it is not feasible and rational to recommend that our judges should stick to what the law says since there might be instances where in the given factual issues at hand may be beyond the coverage of the law we have at hand.

So much so that, in the environmental arena for a very strong reason it calls the participation of the legislative, executive and judiciary, judicial activism is quite possible and feasible by which the judges in our courts can decide environmental cases just like their Indian counter parts by linking the right to life with the right to a clean and healthy environment thereby they can discharge their constitutionally imposed obligation to protect and enforce the fundamental right to live in a clean and healthy environment under chapter three of the FDRE constitution. This is said confidently because of the fact that in Ethiopia the legal development is so much appealing and conducive as far as environmental law and environmental rights are concerned. In particular, the recognition of public interest litigation as per article 11 of the Ethiopian environmental pollution control proclamation plays a very vital role for that purpose. In other words, the environmental pollution control proclamation under Article 11 clearly enunciated and at the same time complements the traditional moribund approach towards the issue of locus standi, which only requires a person who is personally

and specifically affected to have access to the doors of justice. Unlike this traditional notion of locus standi, however, in the environmental arena quite relaxed and liberalized approaches to locus standi have been adopted. Hence, public interest litigation is allowed with this particular provision of the law.

The important question that could be raised at this juncture is: what is the relevance of a relaxed approach to locus standi to the issue of judicial activism?

In order to answer this question one may be forced to recapitulate what have been discussed in the preceding chapters in relation to the concept of public interest litigation and judicial activism. In the discussion one important point mentioned is the fact that judicial activism and public interest litigation are the two sides of the same coin. In other words, judicial activism and public interest litigation cannot be insulated from each other; the existence of one definitely calls for the existence of the other definitely. Hence, if judicial activism exists public interest litigation is a must and vice versa.

The point here is that because public interest environmental litigation is allowed and, hence is part and parcel of our legal system by which any interested, alert, public-spirited individual or environmentally conscious NGOs can bring a court action, the judges, therefore, have an ample or conducive environment to decide or approach environmental cases by being very sensitive and proactive like their Indian counterpart, wherein judges decide environmental cases by connecting the right to life and the right to live in a clean and healthy environment. What is expected or needed is to expose or sensitize or to create an awareness for our judges as to the possibility of judicial activism in Ethiopian cases too as far as environmental cases is concerned particularly by showing the experience of the Indian judiciary wherein the judges are so much zealous and proactive for the effective enforcement of environmental rights.

Hence, we can safely say that awareness creation greatly matters for the practicability of judicial activism in Ethiopia as far as environmental rights is concerned. Actually this lack of due awareness is not confined to the issue of judicial activism but even the concept of public interest environmental

litigation is not known and appreciated by our judiciary which predates judicial activism by legal recognition and adoption in the environmental laws of the country.

Nevertheless, if the problem related with lack of due awareness on the concept of public interest litigation and judicial activism is rectified or tackled in Ethiopia too, it is possible for our judiciary to be very anxious and conscious for the cause of environmental rights protection, and the right to live in a clean and healthy environment, which is the fundamental and basic rights and freedoms under the constitution will be protected and improved to the greatest extent and to the satisfaction of the right holders. This means our judges would have the capacity and ability to decide environmental cases by substantive expansion of the right to life to include the right to live in a clean and healthy environment, which ensures greater protection of environmental rights .

On top of that, the introduction of proclamation 454/2005, which is a proclamation to re-mend the Federal Courts Proclamation 25/96, also has the potential to bring judicial activism in Ethiopia, not only in environmental issues but also on human rights issues in general. To this end, the provision of Article 2(4) of the same proclamation makes clear that, any interpretation of the law made by the federal supreme court in its cassation jurisdiction shall be made binding on federal as well as regional councils at all levels keeping intact the instances of a different legal interpretation on the same legal point and article at some other time in the future.

The point here is that, this power of the Supreme Court under the proclamation will enable to lay down important legal precedents on a certain legal interpretation of the law. Hence, using this power to create a stare deices, the Supreme Court can clearly come up with a very proactive approach to human rights issues in general and environmental issues in particular, which would necessarily be respected and applied by the lower level courts both at the federal and state level. Thus, once the Supreme Court takes cognizance of judicial activism in the sphere of the environment as practiced in India and tends to say that the enjoyment of life and its attainment and fulfillment guaranteed under Article 15 of the FDRE constitution embraces the protection and preservation of nature's gifts without which life cannot be enjoyed and hence creates a strong link between Articles 15 and 44 of the FDRE Constitution, then the courts in the lower level in which environmental allegations are submitted after exhausting the administrative remedies like the first instant court at the federal level,

would have the probability to uphold such an approach to environmental rights protection in Ethiopia too.

5.9 Summary

Taking cognizance of the nature of environmental problems and the type of damages to the environment, the Ethiopian House of People's Representatives has recently enacted Environmental pollution control proclamation with a liberalized standing. According to this proclamation, any person can bring legal action without the need to show any vested interest when actual or potential damage is done to the environment. On the basis of this liberalization of standing in relation to the environmental proceeding, a question arises in that whether or not it is tenable to argue that legal personality could be bestowed to public interest groups, to the future generation, and to the environment itself as a distinct legal entity.

When we analyze the legal personality to the environment as a separate legal entity, different positions emanate from the fundamental distinctions that can be made in the world view. That is, if the legal system follows anthropocentric view, it would consider human and nature as separate, and human beings placed in the center. This means it considers the environment instrumental to the interest of man denies legal personality to the environment per se as a legal entity. In contradistinction to the anthropocentric view, a legal system that follows ecocentric view seeks a fundamental shift in consciousness from human domination of nature to a perception of human and non-human life as having equal intrinsic values. For this reason, it acknowledges the conferring of legal personality to each distinct part of the environment to exercise their own right on their own behalf.

When we come to the legal orientation of the Ethiopian legal system, however, it sounds haphazard in that it recognizes both anthropocentric and ecocentric views in different legal instruments.

In spite of the ambivalence position in the legal system, it could possibly be argued that bestowing legal personality to the environment as a separate legal entity is corollary to the right of the people to live in a clean and healthy environment. So, it is of paramount importance to

bestow legal personality to the environment as a separate legal entity to realize the interest of different stake holders in relation to the environment.

In case of legal personality to the future generations in relation to environmental proceeding, it becomes fairly easy if we have a clear picture on what is intergenerational equity. Accordingly, we can safely say that intergenerational equity could exist only when there is sustainable development, that is, when the development in any form meets the needs of the present generation without compromising the ability of the future generation to meet their own needs. The implementation of this principle, therefore, lies in our capacity to form a collective bond of identity with the future generation, and bestowing them legal personality to exercise their own legal rights their own behalf.

In respect to the Ethiopia legal system, since the FDRE constitution, international legal instruments ratified by Ethiopian, and the Ethiopian environmental policy and environmental laws give cognizance to intergenerational equity, it is tenable to argue that there is a leeway to entertain the interest of future generations by bestowing them legal personality to have standing before a court of law on their own behalf.

As regards the public interest litigation to have Public Interest Litigation, with legal penetration, it is important to grant individuals a personal right to a clean and healthy environment as complementary to the collective right. Accordingly, the introduction of such a new fundamental personal right to a clean and healthy environment provides access to justice for citizens in cases where damage is caused to the environment per se. Under the Ethiopian legal system, personal right to clean and healthy environment is recognized in the FDRE constitution, and environmental policy and laws, so that, in Ethiopia, public interest action by alert citizens could certainly be manipulated in case when damage is done to the environment per se.

Furthermore, the granting of personal right to a clean and healthy environment, and liberalization of standing, could also be taken as a vital ground in cases where the government is unwilling to claim damages for injury to the environment per se. That is, where environmental authorities inaction or abuse threatens to harm the environment, the injury arising may be so diffused, and as a result the restrictive traditional doctrine of standing could preclude relief and render the environmental authority's inaction or abuse immune from judicial scrutiny. To curb such

instances, therefore, in Ethiopia it becomes a pressing need to liberalize the standing, and accordingly it is liberalized in order to accommodate public interest litigation. At this point, however, it is important to note that public interest groups have a secondary right of standing. That is, they have standing before the court of law only in cases where the environment authorities do not act at all or not properly within the waiting period. On the basis of this novel procedural set up , this time, APAP, after exhausting the available administrative remedies, has initiated a prototype public interest litigation which is the first case ever in the history of Ethiopia to bring an end to environmental and human suffering incurred due to the pollution of Akaki and Mojjo rivers by governmental and non-government at industries.

In case of ultra virus administrative acts which lead to constitutional dispute, under the Ethiopian legal system, someone who has vested interest has the right to take his case to the House of Federation. In relation to the environment proceeding, when we read Articlse 83 and 84 in tandem with Articles 44(1) and 92(4) of the constitution, and Article 11 of the environmental pollution control proclamation, we can infer the fact that everyone could claim that he has interest in case when damage is done to the environment. So, when there is constitutional dispute in relation to the environment, any person has the right to bring his case before the House of Federation without the need to show any personal injury that he had been specially and differently aggrieved by injuries to the environment.

At the international plane, the formal opportunity for individuals and non-governmental organizations to play an enforcement role is extremely limited. Under some of the Regional Human Rights Treaties, however, individual victims, including non-governmental organizations, may bring complaint directly to all international body. The typical international organization that allows standing to public interest groups is the African Human Rights Commission. So, by exploiting such grounds, public interest groups in Ethiopia could have the possibility to address the environmental problems before international and regional organs at the time when the local remedies fail to address the problem adequately and promptly.

Finally, when we come to judicial activism, since the Ethiopian legal system encompasses public interest litigation in relation to environment, any interested, alert, public-spirited individual or environmentally conscious NGOs can bring a court action, and judges would have an ample or

conducive environment to decide or approach environmental cases by being very sensitive and proactive like their Indian counterpart, wherein the judges decide environmental cases by connecting the right to life and the right to live in a clean and healthy environment. At this juncture, it is a pressing need to expose or sensitize or to create an awareness for our judges as to the possibility of judicial activism in Ethiopian cases too as far as environmental cases are concerned, particularly by showing the experience of the Indian judiciary wherein the judges are so much zealous and proactive for the effective enforcement of environmental rights. Furthermore, in addition to what is stated above, the introduction of proclamation 454/2005, which is proclaimed to re-mend the Federal Courts Proclamation 25/96, also has the potential to bring judicial activism in Ethiopia, not only in environmental issues but also on human rights issues in general. To this end the provision of Article 2(4) of the same proclamation makes clear that, any interpretation of law made by the federal supreme court in its cassation jurisdiction shall be made binding on federal as well as regional councils at all levels keeping intact the instances of a different legal interpretation on the same legal point and article at some other time in the future.

5.10 Review Questions

1. Discuss what traditional and public interest litigation are.
2. Pinpoint the different facets of legal personality in relation to environment.
3. Verify the exhaustion of administrative and local remedies in relation to environment.
4. Discuss what ecocentric and anthropocentric theories are.
5. Discuss what inter-generational and entra-generational equity are.
6. Briefly indicate how public interest groups and/or alert citizens could challenge the constitutionality of Environmental Authorities' acts.
7. List the relevant recommendations for the realization of public interest litigation.
8. Discuss what standing before international courts and tribunals is.
9. Discuss the role of judicial activism in the realization of the right to live in a clean and healthy environment.
10. Indicate the nexus between the right to live in a clean and healthy environment and the right to life.

CHAPTER 6 REMEDIES IN ENVIRONMENTAL PROCEEDING

6.1 Introduction to Environmental Remedies

Courts approach the issue of remedies by applying specified remedies where mandated and invoking inherent powers where not. In either case, actions that are brought based upon harm to the environment require the creation of appropriate remedies. In a sense, it is the fashioning of remedies that judges work most directly with the principles of sustainable development. It is in this setting, for example, that judges practice prevention and give substance to the polluter pays principle. It is also through the fashioning of remedies that judges reinforce the rule of law in the environmental setting by ensuring that violators do not gain advantage by virtue of their misdeeds.

The remedial challenge presented by a given case will depend on the nature of the case. Because constitutional mandates are typically expressed generally and without remedial guidance, remedies in cases involving constitutional violation may, in particular, require judicial discretion and creativity. Judges may, for example:

- Order a halt to unconstitutional conduct,
- Direct that specific remedial actions be undertaken,
- Compensate for past wrong, and/or
- Provide for complex, prolonged regime of performance.

Far more frequent than constitutional cases are matters that involve the enforcement of statutes or administrative regulations. In this setting, judges are frequently called upon to resolve different interpretations of the law, and the resulting decisions can have implications beyond the case at hand. The technical complexity of many environmental laws can lead to statutory ambiguity or a decision by the framers of such laws to settle on broad and general terms that mask disagreement over the detailed substance of the law. Moreover, technological changes may require judges to face unanticipated applications of the law.

In addition, the questions may arise about whether a judge implies a remedy when a statute has been violated. Some courts will strictly construe statutes and deny a remedy if one is not

expressly provided. Other courts imply remedies for private injuries caused by violation of the statutes or regulations. In this setting, the statutes or regulations may establish a standard of care against which wrong doing is measured and that can lead to liability when the violation causes injury to another party. Administrative procedures may exist for enforcing the standard, but may not provide relief to the injured. In such instances, the court must consider, among other things, whether implying a private remedy furthers the statutory or regulatory purpose or could complicate or interfere with governmental enforcement.

While remedies are very much a case-specific, and turn on the nature of the violation and the prayer for relief in the case, courts tend to give priority to the following kinds of remedies in environmental cases:

1, injunctive relief to halt the harmful activity;
2, damage to compensate for harm suffered;
3, orders of restitution or remediation;
4, sanctions to punish the wrongdoer and to deter future violations; and
5, awards of costs and fees

Generally, in legal litigation, remedies are broadly categorized as civil and criminal liability. Similarly, in Environmental Law, the legal remedies are broadly categorized as civil and criminal liability. In regard to Environmental law, the legal remedies that are designed to maintain the status quo are provided in the Criminal Code, Tort Law, and other Enabling Statutes of Environmental Law.

The legal remedies in these different legal instruments are devised in a way they could address any actual or potential damage to the environment, and provide a full-fledged legal remedy to keep up the natural cycle of the environment.

Human needs and wants are unlimited and these unlimited human needs and wants are highly dependent on the scarce resources of the environment. As a result of the above fact, the mad rat race between and among people to accommodate their interest would inevitably cause damage to the environment, so much so that such situation will create dispute between and among the

different personalities, and ultimately it could result in unwarranted exploitation, and over depletion of natural resources. In such scenario, the law provides different types of remedies to regulate and cease the unfair relation, and to strike the happy balance between and among the parties who have conflict of interest in relation to environment. To regulate the unfettered acts of man, our legal system devised the civil and criminal liabilities with different mechanisms but the same objective, which is taking reactive and proactive measures in case when there is actual or potential damage to the environment.

6.2 Some Guidelines for Assessing Sanctions in Environmental Cases

The criteria considered by courts in assessing sanctions in environmental cases typically include the following[222]:

- **Seriousness of the offence**: the potential for harm to the environment and the regulatory scheme, the extent of the damage caused, and the blameworthiness of the defendant should all be considered in assessing penalties. Specific factors for evaluating the seriousness of the offence include the amount by which any emissions exceeded the applicable standard, the toxicity of the pollutant, the sensitivity of the surrounding environment, and the length of the time of violation. In general, how much did the conduct diverge from the required behavior? Whether the defendant has a history of violations or has made a good faith effort to comply is also relevant.
- **Ability to pay**: the penalty should reflect the means available to the defendant. For example, a fine appropriate for an individual or a small company will have little impact on a large enterprise. The latter should suffer a penalty appropriate and substantial enough to have a real economic impact and be greater than the cost of complying with the legal requirements. At the same time, a fine that is too large can take away the financial resources necessary to ensure future compliance or remediate existing contamination. Nonetheless, closure of a company is generally considered an appropriate penalty for repeated, serious offences.

[222] Dinah Shelton and Alexander Kiss, Judicial Hand Book Environmental Law, (Printed at the Publishing section of the United Nations Office at Nairobi, 2005), P.60 and ff.

- **Economic gain**: the profit obtained or costs deferred or avoided through non-complying actions should be reflected in the penalty. No offender should profit from its misdeeds. Thus, for example, one who has carried on an activity without a required permit or license should have a fine high enough to disgorge such economic benefits as avoided licensing fees, the value of having postponed capital expenditures on needed pollution control (i.e., the investment value to the polluter of money which would have been spent on pollution control equipment had the violator timely complied), and any avoided costs, such as the cost of maintaining pollution control equipment that should have been in place earlier.
- **Polluter pays**: the sanction should reflect the value of the over all damage caused by the offender, and the social, environmental and economic impacts. In other words, the sanction should force internalization of environmental and other costs.
- **Abatement cost**s: ensuring payment of costs of clean up, restoration or remediation should be paramount. Generally, sanctions should be in addition to rather than in lieu of compensatory remedies to ensure the deterrence effect on the overall remedy.

Having a bird's eye view on the general framework of the legal remedies in relation to environmental proceeding, and some guidelines for assessment of sanctions in environmental cases, now let us proceed to the warms eye view on the different facets of legal remedies with the very objective to have a full-fledged legal machinery and to keep the status quo ante of the natural cycle of the environment.

6.3 Constitutional Law Remedies

From the very reading of the FDRE Constitution we can infer the fact that all Federal and State legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the right to live in a clean and healthy environment[223]. Furthermore, it clearly stipulates that the 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[224].

[223] The Constitution of the Federal Democratic of Ethiopia of 1995, Neg. Gaz., 1st Year No. 1, Art. 13.
[224] Id., Art. 89(5) and Art. 91(2)

In line with the above stipulations, Article 91 of the FDRE Constitution clearly spelt out that the government shall endeavor to ensure that all Ethiopians live in a clean and healthy environment; and that government and citizens have the duty to protect the environment.

To bring about the legal penetration of the above responsibilities on the government and citizens on to ground Article 37(2)(b) of the FDRE Constitution ensures that the door is wide open for the public interest groups to safeguard the environment from potential or actual damage to the environment.

Having the above substantive and procedural laws, the FDRE Constitution under Article 44(2) stipulates that:

> *All persons who have been displaced or whose livelihoods have been adversely affected as a result of State Programs have the right to commensurate monetary or alternative means of compensation, including relocation with adequate assistance.*

So, in case when any state program affects the interest of any person, the interested party or any public interest group could demand adequate, prompt and effective compensation as a legal remedy. As to the realization of this right, the court of law which entertains the case would be expected to take judicial notice of the legal provisions in the enabling legislations.

6.4 Administrative Remedies

According to the preamble of Proclamation No 295/2002, assigning responsibilities to separate organizations for environmental development and management activities on the one hand, and environmental protection, regulations and monitoring on the other hand is instrumental for the sustainable use of environmental resource, thereby avoiding possible conflicts of interests and duplication of efforts. Furthermore, it has become necessary to establish a system that fosters coordinated but differentiated responsibilities among environmental agencies at federal and regional levels.

Now therefore, it has become a pressing need to establish the Environmental Protection Authority and it is proclaimed as Environmental Protection Organs Establishment Proclamation on the basis of Article 55 of the FDRE Constitution.

According to Article 5 of this proclamation, the objective of the Authority is to formulate policies, strategies, laws, and standards, which foster social and economic development in a manner that enhances the welfare of humans and the safety of the environment sustainable, and to spearhead in ensuring the effectiveness of the process of their implementation.

To realize this objective the proclamation under Article 6 empowers it, inter alia, to coordinate measures to ensure that the environmental objectives provided under the constitution and the basic principles set out in the environmental policy of Ethiopia are realized.

In line with the above stipulation, Article 3 of Proclamation No 300/2002, reiterates that the Authority or the relevant Regional environmental agency may take administrative or legal measures against a person who, in violation of law, releases any pollutant to the environment.

According to the same article:

> *Any person engaged in any field of activity which is likely to cause pollution or any other environmental hazard shall, when the Authority or relevant regional environmental agency so decides, install a sound technology that avoids or reduces, to the required minimum, the generation of waste and, when feasible, apply methods for the recycling of waste.*
>
> *Any person who causes any pollution shall be required to clean up or pay cost of cleaning up the polluted environment in such a manner and within such period as shall be determined by the Authority or by the relevant regional environmental agency.*
>
> *When any activity poses a risk to human health or to the environment, the Authority or the relevant regional environmental agency shall take any necessary*

> *measure up to the closure or relocation of any enterprise in order to prevent harm.*

This article is indicative in that the Authority or the relevant regional environmental authority can take administrative or legal remedies proactively or reactively in case when there is actual or potential damage to the environment. The administrative and legal measures could entail among other things installation of sound technology, recycling of waste, cleaning up or payment of the cost of cleaning up the polluted environment, and any measure up to the closure or relocation of any enterprise in order to prevent harm.

In line to the above stipulation, the Proclamation[225] provides that:

> *1, Incentives for the introduction of methods that enable the prevention or minimization of pollution into an existing undertaking shall be determined by regulations issued hereunder.*
>
> *2, Importation of new equipment that is destined to control pollution shall, upon verification by the Authority be exempted from paying of custom duty.*

This article is the manifestation of the fact that protection and safeguarding of the environment is the responsibility of both the government, and each and every citizen, so much so that in case when there is positive steps by alert citizens to install sound technologies to avert pollution it is a must case for the government to supplement such efforts at least by exempting these parties from paying custom duty.

6.5 Civil Liability

Torts Law is fashioned as an instrument for making people adhere to standards of reasonable behavior and respect the rights and interests of one another. Thus, it does this by protecting the legal interests and by providing compensation for the loss suffered by him from the person who has violated the same. Therefore, to constitute a tort or civil injury;

1, There must be a wrongful act committed by a person;

2, The wrong act must give rise to legal damage or actual damage; and

3, The wrongful act must be of such a nature as to give rise to a legal remedy in the form of an action for damages

[225] Id., Art. 10

In Environmental Law, liability for a tort arises when a wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty. That is, when there is public or private nuisance.

Discussion questions

- What do we mean by nuisance?
- What are the legal mechanisms to avert private and public nuisance?

Nuisance

The word 'nuisance' is derived from the French word 'nuire' which means "to hurt or to annoy". Blackstone described nuisance as something that "worketh hurt, inconvenience or damage".

At this juncture it is important to know that nuisance is of two kinds.

These are:

1, Public, general or common and

2, Private

1, Public or Common Nuisance

Public nuisance is an act affecting the public at large or considerable portion of it; and it must interfere with the rights which members of the community might otherwise enjoy. Acts, which seriously interfere with the health, safety, comfort or convenience of the public generally, which tend to degrade public interest have always been considered as public nuisance.

The basis of the law of nuisance is the maxim sic utere tuo ut alienum non laedas: which means that 'a man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbors'.

In order that an individual may have a private right of action in respect of a public nuisance he must show:

1, a particular injury to himself beyond that which is suffered by the rest of the public;

2, such injury must be direct and not mere consequential injury;

3, the injury must be of substantial character, not fleeting or evanescent

Therefore, in order to entitle a person to maintain an action for damage caused by that which is a public nuisance, the damage must be particular, direct and substantial. This is true in case when the plaintiff manages to get redress only to his personal injury via the traditional litigation. Under our legal system, this could be entertained on the basis of Article 33(2) of the Civil Procedure Code and Article 2091 of the Civil Code.

However, in case of public nuisance, on the basis of Article 37(2) (b) of the FDRE Constitution and Article 11 of Pollution Control Proclamation, if the case is initiated by public spirited individual or public interest groups in case when there is actual or potential damage to the environment and when the damage is so diffused, it is not a prerequisite to show that they have vested interest to get standing before the court of law.

In a nutshell, we can safely say that in case of public nuisance the damage to the environment could be manifested by affecting both private interests and diffused public interests. In such a case, the private parties would enforce their rights to the extent that they are especially and differently aggrieved, and the public interest groups could enforce the remedy as to the diffused interests that could affect the interest of the public at large, the interest of the future generation, and the intrinsic value of the environment.

2, Private Nuisance

Private nuisance is using or authorizing the use of one's property or of anything under one's control so as to injuriously affect an owner or occupier of property by physically injuring his property or by interfering materially with his health, comfort or convenience. Winfield has defined Private Nuisance as unlawful interference with a person's use or enjoyment of land or some right over or in connection with it. Private Nuisance includes acts leading to**:**

1, Wrongful disturbances of easements or servitude, e.g. obstruction to light and air, disturbances of right to support;

2, Wrongful escape of deleterious substances into another's property, such as smoke, smell, fumes, gas, noise, water, filth, heat, electricity, disease causing germs, trees, vegetation, animals etc.

Persons Liable for Nuisance

It is general principle that an action for nuisance must be brought against the hand committing the injury, or against the owner for whom the act was done. An action for nuisance will lie against the person;

1, if he causes it;
2, if by neglect of some duty he allowed it to arise; and
3, when it has arisen, without his own act or default, he omits to remedy it within a reasonable time after he became or ought to have become aware of it.

Remedies for Nuisance in Environmental Proceeding

The remedies for nuisance are:
1, abatement,
2, damages and
3, injunction

Injunctions

Whenever possible, prevention of harm should be the courts primar objective, especially where there is constitutional or legislative obligation to protect the environment. The principle of prevention will most likely necessitate injunctive relief where the threat of harm is imminent or a harmful activity is on-going.

Injunctive relief is a long-standing remedy that can abate pollution or other environmental harm. Injunctions can be preliminary (immediate), temporary, or permanent, and typically issue according to an evaluation of several factors: irreparable harm, the absence of other remedies, practicability of compliance, threats to public health, financial effect on the defendant.

Preliminary or emergency injunctions, which are frequently issued according to expedient procedures, can be particularly appropriate in environmental cases where urgent action is needed.

The decision to issue an injunction and the form of the injunction are left to the trial judge as an exercise of equitable discretion. In some instances, injunctions can be important to securing compliance with the law and requiring affirmative remediation of harmful environmental conditions. Administrative agencies frequently participate in setting out a detailed schedule of required actions designed to cure the violation and remediate the harm.
Injunctive relief is commonly authorized by environmental statutes[226].

Damages

Where the harm has already occurred, indemnities or compensatory damages may be awarded to the injured party. The basic function of an award of damages is to compensate for the full losses suffered to the environment and the services it provides as well as the expenses that have been incurred due to the environmental harm. The exact type of award depends upon the nature of the harm, the characteristics of the environment in question, and the technical capacity to repair the damage.

Any award of damages or indemnity requires giving an economic value to the loss suffered. There are many difficulties that arise in this respect when the environmental damage occurs.

Not all parts of the environment are easily valued. There are many environmental components that have not market value, because they are not openly traded or they are considered public goods (e.g. clean air), public trusts (breaches) or national patrimony (national parks). Abstract but crucial environmental services such as life-support systems or pollination by bees have not been generally considered in economic terms. In general, however the economic value of the environment as a whole can be considered as the sum of all the goods (food, lumber, medicinal plants, shelter) and services (life support, recreation, assimilation of contaminants) provided during the time a given activity is taking place. Any diminution in the quality or quantity of the

[226] Supra note 255, P. 54 and ff.

flow of goods and services associated with an alteration of environment due to the activity can be considered as environmental harm.

The total economic value of environmental harm incorporates both value of use, direct and indirect, and values not based on use and exploitation. Uses can involve consumption (trees, fish) or non-consumptive actions (bird watching). Indirect uses include, for example, prevention of erosion and flooding by preserving ground-cover and maintenance of plankton as part of the marine food chain. Preservation of options for future services is also a use that is impaired by environmental harm. Non-use values include preserving nature for its intrinsic value and conserving on behalf of future generations.

Various valuation methods can be used. For products derived from environmental components, such as fish or timber, market value can usually be determined for losses sustained. For non-market goods and services, indirect method must be used. One is the cost of rehabilitation or restoration where this is possible. There may be associated economic costs such as lost earning or hedonic damages associated with the pleasure derived from recreational or landscape benefits from the harmed environment. All damage awards require determining the base line of evaluation, pre-harm value.

In general, property damages have been recovered for:

- Loss of value,
- Loss of profits,
- Other economic losses such as rental value, costs of clean up, repair or remediation to the property.

Personal injury damages have been assessed for:

- Injury,
- Disease,
- Increased risk of disease,
- Emotional distress,
- Fear of contracting disease, and
- Medical monitoring for early detection.

Perhaps the most difficult area, and one of which courts differ, concerns whether or not a present claim can be presented for suffering based upon exposure to carcinogenic substance or ingestion of toxic substance prior to the onset of physical symptoms. One court has imposed a requirement that the plaintiff show exposure to a toxin and more than 50 percent probability of developing cancer in order to prevail on an anticipatory claim of this kind. Other courts have said that plaintiffs must show more than a generalized fear, or the fear must be rationally based. Where the risk is particularly high, a plaintiff may be able to presently recover the full value of a future disease by showing a probability of contracting it because of exposure to the defendant's toxic product or other wrongful conduct. This may be the only way to recover where there is a latency period and short statute of limitations.

In case of damages, the measure of damage is the diminution in value of the property in consequence of the nuisance. Apart from this if some individual suffers beyond what is suffered by him in common with other persons affected by that nuisance, then that individual can also bring an action for special damage. If a person finds that the injury complained of as present or impending is such as by reason of its gravity or its permanent character or both, which cannot be adequately compensated in damages then he can pray and obtain an injunction.

For the above very fact, to have a full-fledged remedy, besides the remedies that are provided under the tort law, the environmental law is reshuffled in a way it could address and render remedy in case when there is actual or potential damage to the environment per se. In other words, the environmental law has a leeway by which it could address the interest of the public, the environment, and the future generation. This approach would inevitably widen the scope of liability, and as a result it would have greater impact to deter pollution to the environment in whatever way and against whoever.

When we look at the Ethiopian legal system, the Torts Law, in line with the above principles, provides civil remedies for personal injury and their property. According to this instrument:[227]

> *The damage due by the person legally declared to be liable shall be equal to the damage caused to the victim by the act giving rise to the liability.*

[227] Civil Code of the Empire of Ethiopia of 1960, Neg. Gaz., 19th Year, No 2, Art. 2091

Furthermore, in line with the principles of strict liability:[228]

> *1, A person who exposes another to abnormal risk, by using or storing explosive or poisonous substances, or by erecting high-tension electric transmission lines, or by modifying the lie of the land, or by engaging in an exceptionally dangerous activity, shall be liable where the danger he has created materializes, thereby causing damage to another.*
>
> *2, The provision of Sub-Art (1) shall apply notwithstanding that the author of the danger is the State or has received an authorization from the public authorities.*

From the very reading of this article, we can discern that the realization of the danger is a precondition to have prima facie fact before court of law. Therefore, this provision would enable us only to take reactive measures in case when there is actual damage to the environment; but not when there is potential damage to the environment.

As to liability, the mere fact that the author of the danger is the state or has received authorization from the public authorities, would not exonerate them from liability. So, any party that involves itself in such transaction should not only rush to get authorization; rather he has to look for any means or technology which could avert the realization of damage to the environment.

Discussion questions

- **Is it advisable to solely rely on reactive measures? Should this be supplemented by proactive measures?**

In relation to the principle of estoppel, Article 2088 of the Civil Code provides that the rules relating to liability arising out of abnormal risks … may not be invoked by a person who, under a contract concluded by the person legally responsible, is connected with the dangerous industrial activity… which has caused the damage. In such a case, the consequences of the damage shall be settled in accordance with the rules governing the agreement reached.

[228] Id., Art. 2069

Discussion question

- **Could contractual agreements create estoppel on the fundamental right to live in a clean and healthy environment?**

From the very reading of the above articles of the Tort Law, we can safely say that the Tort Law is oriented in a way it could address environmental related type of damages which could affect vested interest of the plaintiff. So, Tort Law is not in a position to encompass damage to the environment per se which could affect the public interest, the intrinsic value of the environment, and the interest of the future generation.

6.6 Criminal Liability

As a reflection of growing awareness among the judiciary of seriousness of environmental wrongdoing, laws and courts are increasingly punishing wrongdoers by imprisonment[229].

The most important function of the state is acting as the guardian of the law and order, preventing and punishing all injuries to itself and all disobedience to the rules, which it has laid down for the common welfare. In regard to Ethiopian Environmental Law criminal liability is encompassed in the Criminal Code, and other enabling environmental statutes.

In addition to enjoining harmful environmental conditions and granting compensation for the damages caused by such conditions, the other critical function performed by judges in fashioning remedies in environmental cases is penalizing environmental wrongdoing. As is the case with all law enforcement, the objective in punishing violators is not so much punishment for punishment's sake. Rather, it is to express community rejection of the conduct and send a message of "deterrence" that discourages similar misconduct in the future.

While in some jurisdictions punitive damages may serve a role in punishing non-compliance, the two principal means of penalizing environmental misdeeds are civil penalties and criminal sanctions, such as criminal fines and incarceration. Other sanctions may include community service and other innovative measures that have a nexus with the wrong.

[229] Supra note 255, P.59.

The considerations that guide assessment of financial sanctions are similar whether the penalty is civil or criminal in nature. Thus, whether a judge is assessing a criminal fine or a civil penalty (in a system which allows for civil penalties), it is valuable for the judge to consider the deterrence value, and measure of consistency in approach, offered by assessing fines and penalties that, at a very minimum, disgorge the economic benefit that a polluter realizes by virtue of its non-compliance. There are methodologies for determining the economic benefit of noncompliance that can also be discussed.

This is important in part because technology and processes designed to curb environmental degradation can impose significant short-term cost on polluters. Many polluters opt to violate the law, assuming that they will not be apprehended or if they are caught that the penalties assessed will be less costly than the measures required to act in line with the law. In order to preserve profits, individuals or companies may be tempted to ignore regulations and legislations mandating anti-pollution measures. Similarly, when products are banned, such as ozone-depleting substances or trade in endangered species, incentives to continue trading increase as the ban becomes effective and scarcity produces rising prices.

In most cases, administrative and judicial penalties may be imposed within a statutory range. Where it is allowed, per diem penalties focus the violator's attention on the need for immediate cessation of the illegal act and the need for remedial action. Violations of the US Clean Air Act, for example, may be considered separate daily violations. Again, at a minimum all economic benefits realized by a violator from non-compliance should be recovered. Penalties should also be large enough to deter further noncompliance, ensure fair and equitable treatment throughout the regulated community, and promote swift resolution of environmental problems and enforcement actions.

For the above reason, to avoid any possible contradiction between the Criminal Code and the other enabling environmental statute, the Criminal Code provides that[230]:

Nothing in this Code shall affect regulations and special laws of criminal nature:

[230] The Criminal Code of the Federal Democratic Republic of Ethiopia, Proclamation No. 414/2004, Neg. Gaz., Art. 3.

Provided that the general principles embodied in this Code are applicable to those regulations and laws except as otherwise expressly provided therein.

Reiterating the above position, the Pollution Control Proclamation provides that[231]:

Unless the provisions of the Criminal Code provide more severe penalties, the penalties laid down under this Proclamation shall be applicable.

Furthermore, when we read Article 3 of the Criminal Code in tandem with Article 12(3) of Pollution Control Proclamation, it is clear that in case when someone pollutes the environment, the court which entertains the case would take judicial notice of the severe penalty on either of these legal instruments. In other words, unless the provisions of the Criminal Code provide more severe penalties, the penalties laid down under this proclamation shall be applicable.

Having the above facts in mind, as it is clearly indicated under article 92(1) and (2) of the FDRE Constitution, and the preamble of Proclamation No 300/2002 the government and citizens have the duty to protect the environment. But, in case when they fail to realize their duties and/or act against their very mandate the law provides legal remedies as corrective and rehabilitating measures which could strike the happy balance between and among the conflicting interests of different personalities.

As extension of the above legal orientation, the Pollution Control Proclamation[232] provides that:

1, a person who, under this proclamation or under any other relevant law, commits an offence for which no penalty is provided for either in the Criminal Code or under this Proclamation, is liable on conviction:

***a**, in the case of a natural person, to a fine of not less than five thousand Birr and not more than ten thousand birr or an imprisonment of not more than one year or both;*

[231] Supra note 224, Art. 12(3)
[232] Id., Art. 12

> ***b**, in the case of a juridical person, to a fine of not less than ten thousand Birr and not more than twenty thousand Birr.*
> *2, Where a juridical person is convicted pursuant to Sub-Article (1) of this Article, the officer in charge who should have known the commission of the offence, and who failed to fulfill his duty appropriately shall be liable to a fine of not less than five thousand Birr and not more than ten thousand Birr or an imprisonment of not less than two years or both.*

Taking into consideration their very nature, this article provides different legal treatment for natural and juridical persons. That is, while it imposes fine and/or imprisonment as a legal remedy against natural persons, it solely imposes fine as a legal remedy against juridical persons. The rationale behind imposition fine as a sole remedy is the fact that juridical persons are artificial persons who cannot, by their very nature, be subjected to imprisonment. However, at this juncture, you have to notice the fact that the officer, in charge, who should have known the commission of the offence and failed to fulfill his duty appropriately, could be liable to a fine and/or imprisonment.

To bring about the legal penetration of the above legal duties to safeguard the environment, the Ethiopian legal system bestows vast power to inspectors'. As clearly indicated under Proclamation No 300/2002, inter alia, inspectors shall ensure compliance with environmental standards and related requirements, and to realize this duty they can enter any land or premises at any time which seems appropriate to them without prior notice or court order[233]. This would enable them to make the lion is share contribution in the realization of the legal machinery.

Discuss the issue of privacy under Art. 8 of Proclamation No. 300/2002 vis-à-vis Art 26 of the FDRE Constitution.

For the above reason, the law provides safety measures in case when any party impedes, hinders or obstructs their activities. The safety measures are clearly indicated in the same proclamation as follows[234]:

[233] Id., Art. 8
[234] Id., Art.13

> *1, A person commits an offence if he hinders or obstructs an inspector on duty on execution of his duty, fails to comply with a lawful order or requirement made by inspector, impersonates an inspector, or refuses an inspector entry into any land or premise or hinders an inspector from getting access to records, prevents an inspector from checking, copying extracting any paper, file or any other document, withholds, misleads or gives wrong information to an inspector.*
> *2, A natural person who commits an offence under Sub-Article (1) of this Article is liable, on conviction, to a fine of not less than three thousand Birr and, the case of a juridical person, to a fine of not less than ten thousand Birr and not more than twenty thousand Birr, and imprisonment of the officer in charge for a term of not less than one year and not more than twenty two years or a fine of not less than five thousand Birr or both.*

When we come to the issue of transparency and accountability, records have a grain of contribution to produce prima facie facts as to whether there is actual or potential damage to the environment. So much so that, in case when a person commits an offence if he fails to comply with this Proclamation or any regulation issued hereunder to keep records of activities or products or the types, characteristics or amounts of waste or of any other information, or if he alters any record shall be liable, on the basis of article 14 of Proclamation No 300/2002, to a fine of not less than ten thousand Birr and not more than twenty thousand Birr.

As to the management of hazardous wastes and other materials, remedy is provided in both the Criminal Code and the Environmental Enabling Legislations. However, from the very reading of these articles, we can infer the fact that there is discrepancy in the remedies provided by these different legal instruments.

Before we embark on the judicious solution, let us thoroughly compare and contrast these provisions hereunder;

In relation to the Mismanagement of Hazardous Wastes and Other Materials, the Criminal Code, on the one hand, stipulate that[235];

> *Whoever:*
>
> a. *fails to manage hazardous wastes or materials in accordance with the relevant laws; or*
> b. *fails to label hazardous wastes or materials; or*
> c. *unlawfully transfers hazardous wastes or materials, is punishable with a fine not exceeding five thousand Birr, or rigorous imprisonment not exceeding three years, or with both.*

On the other hand, the Pollution Control Proclamation in relation to the Mismanagement of Hazardous Wastes and Other Materials provides that[236]:

> ***1**, A person commits an offence if he fails to manage a hazardous waste or another substance according to the relevant laws, mislabels or fails to label or in any way withholds information about any hazardous waste or other material or attempts to take part or takes part or attempts to aid in the illegal traffic of any hazardous waste or other material.*
>
> ***2**, A natural person who commits an offence under Sub-Article 1 of this Article is liable on conviction, to a fine not less than twenty thousand Birr and not more than fifty thousand Birr and in the case of a juridical person to a fine of not less than fifty thousand Birr and not more than one hundred thousand Birr, and to a term of imprisonment of the officer in charge of not less than five years and not more than ten years, or a fine of not less than five thousand Birr and not more than ten thousand Birr or both.*

From the very reading of these articles, we can easily infer that the remedies provided under the Environmental Pollution Control Proclamation are more severe than the remedy provided in the Criminal Code, so much so that on the basis of Article 3 of the Criminal Code and Article 12(3)

[235] Supra note 226, Art. 520
[236] Supra note 224, Art. 15

of Proclamation No 300/2002 we can safely conclude that the severe penalty which is provided in the environmental law would prevail over the Criminal Code.

Similar to what is discussed above, there is discrepancy in the above indicated legal instruments as to remedies in case when there is pollution to the environment. Reading these different provisions, we can apply same judicious solutions for any discrepancy in the remedies of these different instruments hereunder.

As to Environmental Pollution, on the one hand, article 519 of the Criminal Code provides:

> *1, Whoever, in breach of relevant law, discharges pollutants into the environment is punishable with fine not exceeding ten thousand Birr, or with rigorous imprisonment not exceeding five years.*
>
> *2, Where the pollution has resulted in serious consequences on the health or life of persons or on the environment, the punishment shall be rigorous imprisonment not exceeding ten years.*
>
> *3, Where the act of the criminal has infringed a criminal provision entailing a more severe penalty, the provisions on concurrent of crimes shall apply.*

On the other hand, in relation to Offences Relating to Pollution, Article 16 of Proclamation No 300/2002 provides that;

> *A natural person commits an offence if he discharges any pollutant contrary to the provision of this Proclamation or regulations issued hereunder and is liable, on conviction, to a fine of not less than one thousand Birr and not more than five thousand Birr or to an imprisonment of not less than one year and not more than ten years or both and, in the case of juridical person, to a fine of not less than five thousand Birr and not more than twenty five thousand Birr and an imprisonment of the officer in charge for a term of not less than five years and not more than ten years, or a fine of not less than five thousand Birr and not more than ten thousand Birr or both.*

When we come to the Environmental Impact Assessment, which deals with proactive measures to avert pollution to the environment, similar to the above scenario, remedies are provided in

both the Criminal Code and the Environmental Laws with different degrees of penalty. So, we have to still apply judicious application of these provisions taking into consideration the rule provided under Article 3 of the Criminal Code and Article 12(3) of Proclamation No 300/2002.

According to Article 521 of the Criminal Code, acts Contrary to Environmental Impact Assessment whoever, without obtaining authorization from the competent authority, implements a project on which an environmental impact assessment is required by law, or makes false statement concerning such assessment, is punishable with simple imprisonment not exceeding one year.

In line with the above stipulation, Article 18 of Proclamation No299/2002 provides that;

> *1, without prejudice to the provisions of the Criminal Code, any person who violates the provisions of this Proclamation or of any other relevant law or directive commits an offence and shall be liable accordingly.*
>
> *2, Any person who, without obtaining authorization from the authority or the relevant regional environmental agency or makes false presentations in an environment impact assessment study report commits an offence shall be liable to a fine not less than fifty thousand Birr and not more than one hundred thousand Birr.*
>
> *3, Any person commits an offence if he fails to keep records or to fulfill conditions of authorization issued pursuant to this Proclamation and shall be liable to a fine of not less than ten thousand Birr and not more than twenty thousand Birr.*
>
> *4, When a juridical person commits an offence, in addition to what ever penalty it may be meted with, the manager who failed to exercise all due diligence shall be liable to a fine of not less than five thousand Birr and not more than ten thousand Birr.*
>
> *5, The court before which a person is prosecuted for an offence under this Proclamation or regulations or directives emanating from it, may, in addition to any penalty it may impose, order the convicted person to restore or in any other way compensate for the damage inflicted.*

Finally, before we wind up the discussion in relation to Criminal Liability, let us proceed to address some issues in relation to Forfeiture and Restoration. According to Article 17 of proclamation No 300/2002:

> *The court, before which a person is prosecuted for an offence under this Proclamation or regulations issued hereunder, may, in addition to any penalty it imposes upon the convicted person, order:*
>
> *a. the confiscation of anything used in the commission of the offence in favor of the state or to dispose of it in any other way;*
> *b. that the cost of cleaning up and the disposing of the substance, chemical or equipment seized be born by the convicted person; and*
> *c. the convicted person to restore to the state in which the environment was prior to the infliction of the damage, and when such restoration is not possible to pay appropriate compensation.*

From the reading of this article, it is vivid that the negative externality in whatever form emanated from the act of any person would be expected to be eternalized by and through confiscation of the means/agent of pollution, by imposing the cost of cleaning up and the disposal of the substance, and by obliging the polluter to rehabilitate the environment, and when restoration is not possible to pay appropriate compensation.

In a nutshell, in case when there is damage to environment, the party that causes damage to the environment can be subject to civil and/or criminal liability to realize the objectives of both civil and criminal liabilities.

6.7 Enforcement of Judicial Decision

Courts have had recourse to innovative oversight mechanisms to ensure compliance with judgment in environmental cases. Those held liable for violations of environmental laws or causing environmental harm may be directed to return to court with plans for compliance or remediation and targets and timetables for completing the tasks set forth. Courts in India and Pakistan, inter alia, have appointed oversight commissions to monitor compliance and report back to the court on measures needed or adjustments that may be required. Often considerable

judicial oversight is needed to ensure fulfillment of structural injunctions. In extreme cases the court may place an environmental resource in receivership.

In Ethiopia, a decree is not executed automatically, but only upon application by the decree holder to the court which issued the decree[237]. However, once an application is made the court executing the decree has complete control over the proceedings, and all the questions arising between the parties in the suit in which the decree was passed concerning the execution, discharge or satisfaction of the decree must be determined by that court and not by a separate suit[238]. The theory is that the execution proceeding must have the same finality as the original suit, and all questions which could have been raised regarding the execution must be raised before the court executing the decree. The order of the court in execution proceedings constitutes a final judgment within the meaning of Art. 320(1). Since execution is a separate proceeding, an appeal can be taken from the final order in execution as well as from the judgment of the court on the merit of the case.

Judicial authorities on occasion face non-compliance with judgments. When this happens most courts have power to punish acts committed in contempt of court; indeed, just as judicial enforcement of environmental requirements is essential to the integrity of those requirements, judicial enforcement of judgments is fundamental to the integrity of those judgments and to social respect for the rule of the law.

In Ethiopia where the judgment-debtor refuses without good cause to comply with the decree; or the court is satisfied that the judgment-debtor, although able to comply with the decree, has willfully failed to do so, the court may order the arrest of the judgment-debtor and his detention in the civil prison for a period not exceeding six months. Following this the court shall order the judgment-debtor be released from detention upon the amount due of the decree being paid into court or to the officer in charge of the prison, or satisfaction of the decree being otherwise obtained; or upon the request of the decree-holder[239].

[237] Supra note 199, Art. 378(1)
[238] Id., Art. 375(1)
[239] Id., Art.389 and 390

6.8 Summary

Courts approach the issue of remedies by applying specified remedies where mandated and invoking inherent powers where not.

Generally, in legal litigation, remedies are broadly categorized as civil and criminal liability. Similarly, in Environmental Law, the legal remedies are broadly categorized as civil and criminal liability. In regard to Environmental law, the legal remedies that are designed to maintain the status quo are provided in the Criminal Code, Tort Law, and other Enabling Statutes of Environmental Law. The legal remedies in these different legal instruments are devised in a way they could address any actual or potential damage to the environment, and provide a full-fledged legal remedy to keep up the natural cycle of the environment.

To regulate the unfettered acts of man, our legal system devised the civil and criminal liabilities with different mechanisms but the same objective, which is taking reactive and proactive measures in case when there is actual or potential damage to the environment. So, in case when any state program affects the interest of any person, the interested party or any public interest group could demand adequate, prompt and effective compensation as a legal remedy. As to the realization of this right, the court of law which entertains the case would be expected to take judicial notice of the legal provisions in the enabling legislations.

In line with the above stipulation, Article 3 of Proclamation No 300/2002, reiterates that the Authority or the relevant Regional environmental agency may take administrative or legal measures against a person who, in violation of the law, releases any pollutant to the environment.

In Environmental Law, liability for a tort arises when a wrongful act complained of amounts either to an infringement of a legal private right or a breach or violation of a legal duty. That is, when there is public or private nuisance.

In a nutshell, we can safely say that in case of public nuisance the damage to the environment could be manifested by affecting both private interests and diffused public interests. In such a case, the private parties would enforce their rights to the extent they are specially and differently aggrieved, and the public interest groups could enforce the remedy as to the diffused interests

that could affect the interest of the public at large, the interest of the future generation, and the intrinsic value of the environment.

For the above fact, to have a full-fledged remedy, besides the remedies that are provided under the tort law, the environmental law is reshuffled in a way it could address and render remedy in case when there is actual or potential damage to the environment per se. In other words, the environmental law has a leeway by which it could address the interest of the public, the environment, and the future generation. This approach would inevitably widen the scope of liability, and as a result it would have greater impact to deter pollution to the environment in whatever way and against whoever.

The most important function of the state is acting as the guardian of the law and order; preventing and punishing all injuries to itself and all disobedience to the rules, which it has laid down for the common welfare. In regard to Ethiopian Environmental Law criminal liability is encompassed in the Criminal Code, and other Enabling Environmental Statutes.

In addition to enjoining harmful environmental conditions and granting compensation for the damages caused by such conditions, the other critical function performed by judges in fashioning remedies in environmental cases is penalizing environmental wrongdoing. As is the case with all law enforcement, the objective in punishing violators is not so much punishment for punishment's sake. Rather, it is to express community rejection of the conduct and send a message of "deterrence" that discourages similar misconduct in the future.

Furthermore, when we read Article 3 of the Criminal Code in tandem with Article 12(3) of Pollution Control Proclamation, it is clear that in case when someone pollutes the environment the court which entertains the case would take judicial notice of the severe penalty on either of these legal instruments. In other words, unless the provisions of the Criminal Code provide more severe penalties, the penalties laid down under this proclamation shall be applicable.

Finally, it is important to note that courts have recourse to innovative oversight mechanisms to ensure compliance with judgment in environmental cases. Those held liable for violations of

environmental laws or causing environmental harm may be directed to return to court with plans for compliance or remediation and targets and timetables for completing the tasks set forth. Courts in different legal systems have appointed oversight commissions to monitor compliance and report back to the court on measures needed or adjustments that may be required. Often considerable judicial oversight is needed to ensure fulfillment of structural injunctions. In extreme cases the court may place an environmental resource in receivership.

6.9 Review Questions

1. Briefly discuss what constitutional, administrative, civil, and criminal liabilities are in relation to environment.
2. Verify the legal elements that should be fulfilled to say that a physical or legal person is civilly and/or criminally liable.
3. Pinpoint the rationale behind having multifaceted legal remedies in case when there is actual and/or potential damage to the environment.
4. Indicate some guide lines for assessing sanctions in environmental cases.
5. Discuss whether legal remedies have retroactive application or not.
6. Indicate the judicious solution in case when there are different remedies in different legal instruments for the same act/omission.
7. Discuss the mechanisms of enforcement one decision is rendered by a court of law.

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