

Law for the Future: the Legal and Policy Foundation for Intergenerational Environmental Justice in Ethiopia.

Yenehun Birlie Mamo*

Abstract

Intergenerational equity, fairness in the relationship between generations, is a term used in many ways for many different purposes. In environmental protection laws, it refers to equity in the use and enjoyment of the fruits of nature among generations. More than a decade and half passed since the right to a clean and healthy environment is recognized as one of the fundamental rights in Ethiopia. However, it is not clear if this right can be extended to the future generations whose interest is being damaged by an unsustainable utilization of natural resources by the present generation. So far, little regard has been given to this issue both by the judiciary and the academia. This piece examines the laws and polices related to the environment and development so as to spot the legal and policy foundation for intergenerational equity in Ethiopia.

Introduction

Environmental problems are among the greatest challenges of our time which raise concerns not only about the life of the present but also the very existence of future generations. Ethiopia has one of the most degraded

* LL.B (Addis Ababa University), LL.M (University of Alabama), Lecturer, Jimma University School of Law. The author can be accessed at yenek2009@gmail.com.

environments in the world. In terms of climate change vulnerability, Ethiopia is among the worst affected ones. At stake is not only the quality of “our” lives today but also the very existence of our offspring. This piece is an attempt to explore the legal and policy underpinning for the protection of the environmental interest of the future generations in Ethiopian context.

After analyzing the Constitutional environmental rights, environmental policies, legislation and development policies and strategies, the article concludes that intergenerational equity is a legally and politically accepted principle in Ethiopia. Despite the fact that the “intergenerational equity” label may be relatively new in Ethiopian legal system, respect for future generations has always been a concern for societies as humans endeavour to improve or sustain the quality of life for their descendants. But due to various factors such as acute poverty, misconception of the relationship between development and environmental protection by the government and the populace, lack of political commitment manifested partly by incapacitating the environmental protection organs, lack of environmental education, awareness, information, poor public participation, restricted access to justice and lenient and vague laws, the environmental interest of the future generations is not being duly implemented in Ethiopia.

The Piece begins with the discussion of the theoretical framework of the theory of intergenerational equity (IGE). The main part of the article deals with the legal and policy foundation of IGE in Ethiopian environmental legal regime. Starting with a passing remark on the moral, cultural and religious foundations for IGE, this part will make a thorough examination of the constitutional, legal and policy base for IGE in Ethiopia. The piece is

brought to an end by a concluding remark which also suggests some solutions for the proper implementation of IGE in the country.

I. Intergenerational justice: Concept, Principles and Background

The term “intergenerational equity”¹ (IGE hereinafter) is very loaded that it is hardly possible to find a common definition for it. It is defined by the International Law Association as “the rights of future generations to enjoy a fair level of the common patrimony”.² IGE is also defined as “an obligation to conduct ourselves so that we leave to the future the option or the capacity to be as well off as we are”.³ The leading scholar in the area, Edith Brown Weiss, said that IGE is a concept that says humans “hold the natural and cultural environment of the Earth in common both with other members of the present generation and with other generations, past and future”.⁴

IGE seeks to strike a balance between the present and future generations in the use and enjoyment of natural resources. Who are future generations? There is no universally accepted definition of the term. It is said that on the face of “continuum of human existence, it seems problematic to define the

¹ In this piece the terms “intergenerational equity” and “intergenerational Justice” are used interchangeably.

² International Law Association, 2002 New Delhi Declaration on Principles of International Law Relating to Sustainable Development, ILA Resolution 3/2002, in ILA Report of the Seventieth Conference, New Delhi (London: ILA, 2002), Principle 2, available online: ILA :<http://www.ila-hq.org>.

³ Samuel Man Abuse of intergenerational Equity, at 1, available at <http://computingforsustainability.com/2011/09/04/abuse-of-intergenerational-equity>, (accessed on 23 September 2012)

⁴ Edith Brown Weiss (1990), *In Fairness to Future Generations*, Environment, Vol. 32, No. 3, at 8. E. Agius also adopts more or less similar definition. E. Agius, “*Obligations of Justice: Towards Future Generations: A Revolution on Social and Legal Thought*” in E. Agius, (ed.), *Future Generations and International Law* (London: Earthscan Publications, 1998) at 10.

future generation as the people who are not-yet-born because ‘future people’ are born into the present generation every minute.”⁵ The meaning of “future generations” ranges from today's children to unborn persons distant in the future without limitation.⁶ Given the closeness of climate change threat, Weiss argues that, there is no theoretical basis for limiting such rights to immediately successive or distant generations.⁷

“Weak sustainability” (WS) and ‘strong sustainability’ (SS) are the two alternative ways of looking at the need to ensure that future generations can supply their needs. In WS, the environment is regarded in terms of “the natural resources or natural capital that is available for wealth creation, and to say that future generations should have the same ability to create wealth as we have”.⁸ Therefore, future generations will be sufficiently “compensated for any loss of environmental amenity by having alternative sources of wealth creation”.⁹ In SS the environment is viewed as presenting more than just economic potential that “cannot be replaced by human-made wealth”.¹⁰ It argues that future generations “should not inherit a degraded environment, no matter how many extra sources of wealth are available to them”.¹¹

⁵ Burns H. Weston (2008), *Climate Change and Intergenerational Justice: Foundational Reflections* 9VTJENVTL 375 at 383.

⁶ Ibid.

⁷ Edith Brown Weiss (ed.) (1992), *Environmental Change and International Law: New Challenges and Dimensions*, United Nations University Press, at 610. It is said, given the closeness of the climate change threat and, therefore, the urgent need to mobilize against it, it is pretty much imperative to think of “future generations in more or less proximate terms in this context: embracing persons potentially within one's personal awareness if not actual knowledge, possibly but not necessarily involving overlapping generations”. See Weston supra note 5, at .386.

⁸ Sharon Beder (2000), *Costing the Earth: Equity, Sustainable Development and Environmental Economics*, *New Zealand Journal of Environmental Law*, 4, (227-243) at 228-229.

⁹ Ibid

¹⁰ Ibid

¹¹ Ibid

For three closely inter-related reasons of ‘non-substitutability’, ‘uncertainty’ and ‘irreversibility’, SS seems many scholars’ favorite.¹² It is argued that human knowledge does not offer any substitute for many types of environmental assets such as the ozone layer, the climate-regulating functions of ocean phytoplankton, and the watershed protection functions of tropical forests.¹³ Therefore, the present generation cannot be certain if we can substitute the environment for future generations. Uncertainty regarding the functions of natural resources and the possible consequences of depletion and degradation are the other reasons for rejecting WS. Some depletions and degradations lead to irreversible losses of species and habitats, while others though not irreversible may be too costly and take centuries to repair.¹⁴

Generally, the non-perfect substitutability¹⁵ of the natural and human-made capital for one another leads us to conclude that future generations may not be better off by the wealth created than by a rich environment. This, in turn, lends itself to a conclusion that WS is not “compatible” with the concept of IGE. Finally, it should be noted that as employed in the existing international instruments, IGE constitutes, in addition to fairness among generations of

¹² See Pearce, David, Markandya, Anil & Barbier, Edward (1989), *Blueprint for a Green Economy*, Earthscan, London, chapter 2

¹³ Sharon Beder, supra note 8 at 229. This non-substitutability of natural resources has been strongly advocated by environmentalism movements which argue that plants and animals have intrinsic value and, hence, deserve protection in their own right

¹⁴ Ibid.

¹⁵ Even when it is possible to substitute, Weiss argues, developing substitutes may be more expensive than conserving the existing supplies. Resource depletion and species extinction narrows the options available to future generations. It is for this reason that Weiss argues “conservation of options” should, as we will discuss in the sections to come, be one of the vital principles of IGE. Even if we accept that it is possible to replace natural resources with human made assets, WS also suffers from another limitation. It raises another equity issue among future generations as human made substitutes are likely to be more expensive than the natural resources (which can also be available freely) and be available only to those who can afford. This will be an inequitable redistribution of access and is against one of the values of IGE- ‘conservation of access’ as we will discuss in what follows. See Weiss (1990) supra note 4, at 8., Sharon Beder, supra note 8, at 230.

different times, an “intra-generational” component which dictates that there must exist “fairness in utilization of resources among human members of present generations, both domestically and globally”.¹⁶ The success of IGE much depends on our success in achieving fairness in utilization of natural resources between and among the present generations of one or more countries particularly between citizens of the developed and developing countries.

II. Arguments for and Against IGE

It may not be so difficult to concede a moral obligation to future generations conceivably as they can't have any say in decisions taken today that may affect them. However, regarding the present generations' legal obligation (and future generations' right), as much as there are proponents, there are plenty of scholars who have made their skepticism heard. In this part, we will examine different arguments forwarded by proponents and opponents of the principle of IGE.

A. Argument for IGE

Some environmental damages pose long-lasting threats that affect the health and wellbeing of future generations. It seems imperative to craft legal frameworks to protect the environmental interest of remote generations. Future generations can't exercise influence over the present ones to demand the protection of their environmental interest.¹⁷ Taking advantage of this power asymmetry, the present generation affects the desires and

¹⁶ G.F. Maggio(1997), *Inter/Intra-Generational Equity: Current Applications Under International Law for Promoting the Sustainable Development of Natural Resources* 4 BFELJ 161, p. 163-164.

¹⁷ Ibid

circumstances of the future generation and most importantly harm their interest.

This concern was seriously noted in the Brundtland Report:¹⁸

Many present efforts to guard and maintain human progress, to meet human needs, and to realize human ambitions are simply unsustainable – in both the rich and poor nations. They draw too heavily, too quickly, on already overdrawn environmental resource accounts to be affordable far into the future without bankrupting those accounts We act as we do because we can get away with it: future generations do not vote, they have no political or financial power; they cannot challenge our decisions. But the results of the present profligacy are rapidly closing the options for future generations.

The consideration of the power of the present generation to determine or influence the advantages or disadvantages, suffering or wellbeing alone “suffices to support strong *prima facie* obligation not to do what will be seriously disadvantageous to future persons”.¹⁹

For Weiss, IGE is a derivative of the main purpose of global environmental stewardship: “sustaining the life-support systems of the planet, in large part, to ensure the continued survival of the human beings”.²⁰ She argues that the natural environment is the common property of all generations of human

¹⁸ *World Commission on Environment and Development, Our Common Future*, Oxford University Press, 1987 at 13

¹⁹ Clark Wolf, *Intergenerational Justice*, at 280. available at www.public.iastate.edu/~jwcwolf/Papers/Wolf_Intergenerational_Justice

²⁰ Shorge Sato : *Sustainable Development and the Selfish Gene: A rational Paradigm for Achieving Intergenerational Equity*,11N.Y.U.Env.L.J.503,at 509.

species.²¹ Being beneficiaries entitled to use and benefit from it, the present generation “hold the Earth in trust for future generations”.²² Her theory stipulates that all generations have an equal place in relation to the natural system.

She argues that it makes sense to view the human community as a partnership among all generations.²³ Basing her argument on John Rawls’ *Original Position*, she contends that in this partnership, no generation knows beforehand when “it will be the living generation, how many members it will have, or even how many generations there will ultimately be”.²⁴ A generation that is placed somewhere along the spectrum of time but does not know in advance where it will be located “would want to inherit the Earth in at least as good condition as it has been in for any previous generation and to have as good access to it as previous generations.” This requires each generation to pass the planet on in no worse condition than it received and to provide equitable access to its resources and benefits. Each generation is thus both a trustee for the planet with obligations to care for it and a beneficiary with rights to use it.²⁵

²¹ Weiss (1990), supra note 4, at 10, see also, Weiss, *Intergenerational Equity: A Legal Framework for Global Environmental Change* in “*Environmental change and international law: New challenges and dimensions*”, Weiss ed.) Tokyo: United Nations University Press, 1992 at 611. She argues that the theory also applies to cultural resources since they form an integral part of the legacy we give to future generations and are linked to our role as a member of the natural system.

²² Ibid.

²³ Ibid. E. Burke said that “as the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living but between those who are living, those who are dead, and those who are to be born.” See E. Burke “*Reflections on the Revolution in France*,” 130-140 (1790), in 2 *Works of Edmund Burke*, 368 (London, 1854; Reprint Services, 1987).

²⁴ Weiss, *Intergenerational equity: a legal framework for global environmental change*, supra note 21, at 610.

²⁵ Ibid. Professor Paul A. Barresi strongly propounds that our concern for the future generation is deeply rooted in our inherent nature to perpetuate our selves. “As products of natural selection”, he wrote, “human beings ‘care’ about future generations in the sense that

This partnership among all generation of the human species is recognized in different international soft and hard laws, cultures and religions. Christianity and Islam are among the religions which recognize the environmental interest of the future generations. It is mentioned in the Universal Declaration of Human Rights which recognizes the inherent dignity and of equal and inalienable rights of “*all members of human family*” (emphasis mine).²⁶

In 1972, the United Nations Stockholm Conference on the Human Environment recognized that we have a responsibility to "protect and improve" the environment for both the present and the future generations. Likewise, the 1973 Endangered Species Convention, and the 1974 Charter of Economic Rights and Duties of States, the 1982 U.N. World Charter for

each of us is genetically predisposed to do whatever it takes to perpetuate our genes into the next generation in the form of individuals who are genetically predisposed to do the same". Any legal regime intended to achieve intergenerational equity should start "by harnessing our inherent tendency to care about certain members of future generations in certain ways". He argues that neither the ICJ decisions nor the religious and other cultural doctrines Weiss mentions do support for existence of a deeply rooted, essentially worldwide, cross-cultural consensus in favor of recognizing intergenerational group rights and duties in environmental matters. They are manifestations of concerns about the welfare of future generations. For more detailed analysis, see Paul A. Barresi, *Beyond Fairness to Future Generations: An Intragenerational Alternative to Intergenerational Equity in the International Environmental Arena*, 11 Tul. Env. L.J. 59, 70 (1997), and also Paul A. Barresi, *Frame, and the Intergenerational Imperative: A Reply to Professor Weiss on "Beyond Fairness to Future Generations"* (1998), 11 Tul. Env'tl. L.J. 425 pp, 433-434.. See also Weiss (1997), *A Reply to Barresi's "Beyond Fairness to Future Generations"* 11 Tul. Env'tl. L.J 89, at 89-90.

²⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). It is also mentioned in the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the American Declaration on the Rights and Duties of Man, the Declaration on the Elimination of Discrimination against Women, the Declaration on the Rights of the Child, and many other human rights documents reveal a fundamental belief in the dignity of all members of human society and in an equality of rights that extends in time as well as space. See. UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, *Prevention and punishment of the crime of genocide*, 9 December 1948, A/RES/260, UN General Assembly, *Declaration on the Elimination of Discrimination against Women*, 7 November 1967, A/RES/2263, UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959.

Nature and the 1997 UNESCO Declaration on Responsibilities Towards Future Generations, have all shown concern for the ecological legacy we leave to future generations.²⁷ The 1992 Rio Conference on Environment and Development has expressed the commitment to future generations in the context of environmentally sustainable development.²⁸

The case laws of both international and domestic tribunals have also contributed their own share to the development of the principle. At the ICJ, Judge Weeramantry has discussed the historico-cultural framework for inter-generational equity in global legal traditions in his lengthy separate opinion exposé on "equity" in the *Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway)*".²⁹ Domestically, in *Minors Oposa v. Secretary of the Department of Environment and Natural Resources ("DENR")*, the Supreme Court of the Philippines addressed intergenerational equity in the context of state management of national forests.³⁰

B. Argument against IGE

There are as many skeptics as there are advocates for IGE. Our traditional understanding of justice and right/duty relationship has been the main obstacle for the recognition of IGE. For ages, justice has been viewed as that which only applies between the present generations. Similarly, rights have

²⁷ The *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* 1972, UN Educational, Scientific and Cultural Organization, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, available at: <http://www.unhcr.org/refworld/docid/4042287a4.html> (accessed 11 December 2012), *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 1973, Resolution adopted by the General Assembly 3281 (XXIX).

²⁸ The United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992).

²⁹ ICJ case *Concerning Maritime Delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway)* Judgment of 14 June 1993.

³⁰ *Minors Oposa v. Secretary of the Department of Environment and Natural Resources* The Supreme Court of the Philippines 33 ILM 173 (1994) (*Minors Oposa* hereafter).

been treated as claims belonging only to identifiable individuals making it difficult to apply to future generations. It is argued, “[f]uture generations by definition do not exist now; they cannot now, therefore, be the present bearer or subject of anything, including rights”.³¹ Arguing for the rights of “nonexistent persons” is rejected as making no sense. Professor Stone opines that “[n]onpersons,” which include future persons and animals, cannot have rights.³²

By way of summary, the following are the most common arguments against IGE. These are:³³ (1) We are unable to predict the course of the future and hence unable to predict the consequences of our actions. (2) We are unable to ensure that the needs or wants of our descendants can be met, since intervening generations might not take account of them. (3) Future persons are indeterminate or unknowable to us as individuals. (4) The existence of future persons is contingent, not actual. (5) We are ignorant of the needs or desires of future persons. (6) We are ignorant of the number of future people and hence unable to make utility calculations regarding them. (7) We are unable to determine whether future persons will share our social ideals or be members of our moral community. (8) We are uncertain as to whether we share a social contract with future persons, because we have no reciprocal

³¹ Ernest Partridge, *On the Rights of Future Generations* in D. Scherer, (ed.) (1990) *Upstream/Downstream: Issues in Environmental Ethics*, Temple University Press, at 2.

³² Christopher D. Stone as cited in Edwin R. McCullough in “*Through the Eye of a Needle: The Earth’s Hard Passage Back to Health*” (1995), 10 *JENVLL* 389, at .399. Stone wrote, “Why ought we to subordinate *our* welfare to *theirs*, for creatures we shall never meet, with whom there is not even the most fictitious ‘social compact,’ and who are in no better position to return our favors than a contemporary river?”

³³ Kristin Shrader-Frechette(2002), *Environmental Justice, Creating Equality, Reclaiming Democracy*, Oxford University press at 101, See also *Wilfred Beckerman, The Impossibility of a Theory of Intergenerational Justice*, in Joerg Chet Tremmel (2006)“*Handbook of Intergenerational Justice*” Edward Elgar Publishing Limited, at 53-71

relationship with them; possibly we can affect their welfare, but they cannot affect ours.

Cynics about the prospect of IGE tend to conclude that obligations of 'justice' "simply cannot extend to distant future generations' and if our present actions cause misery "in the distant future, it may be unfortunate for members of future generations, but would not be unjust".³⁴

III. Intergenerational Principles, Rights and Obligations

Weiss identifies three basic principles of IGE. These are "conservation of options", "conservation of quality", and "conservation of access".³⁵

Conservation of options demands each generation to "conserve the diversity of the natural and cultural resource base" so that it does not unduly hamper the existing options to future generations in "solving their

³⁴ Wolf, *supra* note 19 at 280. Nevertheless, for some like Annette Baier, the fact that future persons are not now living and that we do not know who exactly they will be or how many of them there will be are irrelevant and do not "rule out the appropriateness of recognizing rights on their part." She claims that if we do agree that "once they are present and actual", future generations "will have rights, what difference is made if we say, not that they *will* have, but that they *do* have rights-*now*?" She said that they are not different from past persons with rights in the present in that they cannot claim any new rights and that their existing rights must be claimed by a person in the present generation. And, since "rights typically are *claimed* by their possessors," the living must empower some persons to make claims for future persons. This issue of allowing the representatives from among the present generations is an issue which is reiterated in the *Oposa vs. Factoran* case. See Annette Baier, *The Rights of Past and Future Persons in McCullough (1995), Through the Eye of a Needle*: *supra* note 32 at. 400 see also *Minors Oposa*, *Supra* note 30. Some have also come up with an obligation of us without the corresponding rights of the future generation by borrowing the "perfect duties "and "imperfect duties" concepts from Kant. The problem with this approach as Partridge claims is that it would make great difficulties since "*perfect duties* follow from the claims of rights-holders while *imperfect duties* do not entail corresponding rights". Hence, this position will weaken our duties to future generations since a "duty to respect another's *rights* generally carries greater weight and has priority over an "imperfect" duty to be charitable". Partridge believes that there are rights of the future generations which would give rise to the "perfect duties" of the present generations. See Ernest Partridge *On the Rights of Future Generations* (1990), at 2-4, available electronically at:http://www.mnforsustain.org/partridge_e_rights_of_future_generation.

³⁵ *Ibid.*

problems and satisfying their own values, and should also be entitled to diversity comparable to that enjoyed by previous generations”.³⁶ Austere preservation of the *status quo* is not what it advocates for as ecological systems are inherently dynamic and technological advances may create substitutes for certain existing resources or significantly optimize their exploitation.³⁷ Conservation of quality requires the present generation to “maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generation”.³⁸ Amid the inevitable change in the environment, the principles requires, its overall quality must be maintained. The last principle, principle of access “calls for the present generation to preserve the legacy of the past to future generations.”³⁹

Planetary rights and obligation flow directly from the IGE principles outlined above. Rights and obligations coexist in each generations. Hence, from the perspective of intergeneration, the rights are owed to the future generations and these rights are linked to the past generations.⁴⁰ These rights and obligations derive from “each generation’s position as an intertemporal entity of human family”.⁴¹ Hence, the obligations of the present generation are to conserve options, quality and access. Intragenerational rights and duties among members of the present generation further complement these

³⁶ Ibid.

³⁷ Id, at 41

³⁸ Edith Brown Weiss (1990),” What Obligations Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Rights and Obligations to Future Generations for the Environment” 84A.J.I.L.198 at 201-202. (Weiss ,What obligations , hereafter)

³⁹ Wiess(1990), supra note 4 a t 42.

⁴⁰ Weiss, Intergenerational Equity and Rights of Future Generations, supra note 21 at 609.

⁴¹ Ibid.

rights and obligations.⁴² The intragenerational rights and obligations derive from the intergenerational relationship that each generations shares with those who have come before and those yet to come. Hence, the intergenerational obligations to save the planet flow from the present generation “both to the future generations as a generation and the members of the present generation, who have the right to use and enjoy the planetary legacy”.⁴³

Weiss characterizes the right of the future generations as a group right in formulating her idea of “planetary rights”.⁴⁴ This is an attempt to solve the difficulty posed by the problem of non-identity for the recognition of IGE. This problem arises since the traditional conceptual framework considers rights to be claims belonging only to identifiable individuals. But to start with, planetary intergenerational rights are not rights possessed by individuals. They are, indeed, generational rights. Intergenerational rights have greater moral force than do duties. They provide a basis for protecting the interests of all generations in a healthy and robust planet.

⁴² Ibid.

⁴³ Id, 610.

⁴⁴ Weiss (ed.) (1992) *Environmental change and international law Environmental Change and International Law*, supra note 7. at .9, This group right conception of Weiss has drawn as many criticisms as the very idea of planetary right itself most notably from, Paul A. Barresi in his article *Frame, and the Intergenerational Imperative: A REPLY TO PROFESSOR WEISS ON "BEYOND FAIRNESS TO FUTURE GENERATIONS"*(1998), 11 TUL. ENVTL. L.J. 425, pp 429-432. Recognizing that future generations indeed do have the right as against us, he claimed that this group right approach would diminish the acceptability of the theory by the developed liberal Western countries who are the most polluter of the environment. He said that it will only be accepted by African and some Asian traditions who presently have little share of the international environmental pollution. Weiss has replied to his criticism by saying that the developing countries with all their potential for development will eventually surpass the developed countries in their share of international environmental pollution and, hence, it is a precondition for a theory of IGE to be accepted by the developing and developed countries if it is going to be successful.(Edith Brown Weiss article *A REPLY TO BARRESI'S "BEYOND FAIRNESS TO FUTURE GENERATIONS"* (1997) 11 Tul. Env'tl. L.J.89, pp 89-92 See also Edwin R. McCullough, *Through the Eye of a Needle*: supra note 32, at.401.

Barresi contends that IGE is conceptually a matter of intragenerational equity, individual rights and intranational equity. Any attempt to propose IGE rights as a group right, like Weiss does, would enjoy little support among developed countries, who firmly believe in individual rights and are the major polluters of the world environment and without whose support fostering IGE is very difficult.⁴⁵

IV. Intergenerational Justice in Ethiopia: the Status Explored

A. Introduction

Previously, I have hinted that Christianity and Islam, among others, have long asserted the rights and duties of the present generations in relation to the use and protection of nature and its resources. Both religious traditions view humanity as one family having equal rights and responsibilities in relation to the use and enjoyment of the fruits of nature.

Christianity and Islam are the two dominant religions in Ethiopia. In Christianity “God gave the earth to his people and their offspring as an everlasting possession, to be cared for and passed on to each generation”.⁴⁶ It is clear that nature and its resources are given to humanity equally irrespective of when it will live and the rights do have correlating duties of

⁴⁵ Paul A. Barresi (1998), *Frame, and the Intergenerational Imperative: A Reply to Professor Weiss on "Beyond Fairness to Future Generations"* 11 TUL. ENVTL. L.J. 425, at 429-430.

⁴⁶ *Genesis* 1:1-31, 17:7-8. "I will maintain my Covenant between Me and you, and your offspring to come, as an everlasting covenant throughout the ages, to be God to you and to your offspring to come. I give the land you sojourn in to you and to your offspring to come, all the land of Canaan, as an everlasting possession. I will be their God." *Genesis 17:7-X*. Weiss has made a relatively lengthy discussions on the two major religions dictation on the rights and duties of each human beings in relation to the utilization of natural resources).

caring for and passing it on to the next generation at least in the same situation it inherited.

In Islamic law, man has inherited "all the resources of life and nature" with certain religious duties to God in using them.⁴⁷ "Each generation is entitled to use the resources but must care for them and pass them to future generations".⁴⁸ The sustainable use of the natural resources is one of the basic tenets of Islamic law. In Islam, nature and its resources are viewed as a joint ownership in which each generation uses according to its need "without disrupting or upsetting the interests of future generations".⁴⁹

From the cultural perspective, one can raise the cultural tradition of the Oromo Society. The Oromo ecotheology teaches a positive relationship between God, humanity and nonhuman creations. It dictates that "man can exploit nature only if the use is reasonable and respectful".⁵⁰ Dr. Workneh states that "one cannot endlessly exploit family members, individuals or groups within society, or nature."⁵¹ The ecotheology encourages the "need to avoid needless exploitation of the Earth and its resources"⁵² which is available both for the present and the future generations. The importance of this ecotheology for sustainable natural resource exploitation cannot be overstated here. The farmers of Konso are well known for their homegrown special terrace building, which is one of the best locally available techniques

⁴⁷ *Islamic Principles for the Conservation of the Natural Environment*, 13-14 (IUCN and Saudi Arabia, 1983) at 13.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Workineh Kelbessa (2005), *The Utility of Ethical Dialogue for Marginalized Voices in Africa*. Discussion paper, Addis Ababa University, at 14.

⁵¹ *Ibid.*

⁵² *Ibid.*

for soil and water conservation and has an incredible contribution for realizing sustainable development.⁵³

There are also some sayings which have an intergenerational implication. To mention but one, there is an Amharic saying “*mogn yeletun bilih ye’ ametun*” which means, “*The fool cares for his day, the wise for his year*”. This has a great impact on shaping the communities’ thinking about the future generations and their fair share in the natural resources. Interpreted generously, it may mean that while the unwise worries with immediate economic growth, the wise worries about “sustainable” development which may have long term benefit not only for himself but for his descendants. Not only that, the northern part of Ethiopia has usually been affected by periodic drought which has often caused hunger and famine. But no matter what happens, the farmers will never consume the seeds and animals which they believe are very important to the future of their own selves as well as the future of their children and grandchildren. Moreover, whosoever fails to save assets for his children would be greatly condemned.

Hence, the above discussion reveals that diverse cultural and religious traditions in Ethiopia presume the existence of successor generations of at least their own “blood community” and care about their wellbeing.

Also, it must be noted that although a well-defined environmental legal regime has been attained since the coming into power of the EPRDF, Ethiopia had had laws aimed directly or indirectly at conserving natural resources and pertaining to the protection of the environmental interest of the

⁵³ Aynalem Adugna, *Population and Environment* at 83 available at www.EthiodemographyAndHealth.Org, (last accessed on 23 October 2012).

future generations. The most important one being the State Forest Proclamation which had the objective of ensuring “ a continuous supply of forest products for *the benefit of the present and succeeding generations of the Ethiopian people*” (Emphasis mine).⁵⁴ Others like the Proclamation for preservation of Game and Fishes⁵⁵ which came in the aftermath of the 1931 Constitution, a Proclamation to provide for the Conservation and Development of Forest and Wildlife Resources⁵⁶ have also impliedly recognized the environmental interest of the future generations. Moreover, as we will see below, the 1931, 1955 Revised and 1987 constitutions of the country had all something to do with the environmental interest of the future generations.

And it should also be noted that the intergenerational thinking has a place in the Civil Code of Ethiopia. Under article 2, it is stated that “[a] child merely conceived shall be considered born whenever his interest so demands, provided he is born alive and viable”.⁵⁷ This provision aims at ensuring that the preborn child’s rights to both economic inheritance and other benefits are taken care of. Though it may mean stretching the provision too much to say that the preborn child’s environmental interest is one of the interests the provision envisages to protect, at least one can conclude that intergenerational thinking is not new in the country’s legal system.

It is against these historical antecedents, cross-cultural analogues and legal backdrop that this part of the article sets to explore the legal and policy

⁵⁴ See the preamble of State Forest Proclamation, N_o 225/1965.

⁵⁵ Proclamation for preservation of Game and Fishes(before the establishment of *Negarit Gazeta*).

⁵⁶ A Proclamation to Provide for the Conservation and Development of Forest and Wildlife Resources N_o 192/1980.

⁵⁷ Civil Code of the Empire of Ethiopia, Proclamation No.165, 1960, article 2.

foundation for IGE in the Ethiopian environmental laws and policies. In attempting to set out the following examples of IGE principles, it is not meant to be completely exhaustive. Virtually, all environmental conservation laws have the future in them and, as the result, their implications on the environmental interest of the future generations, intentionally or otherwise, cannot be denied. The author has chosen to focus on laws and policies that have made explicit reference to the future generations and also the Constitution. Furthermore, principles such as “sustainable development’ and “green economy”, which the theory of IGE is closely aligned with, are discussed.

B. The Constitutional Framework

In elaborating a framework for the domestic protection of any human rights, emphasis is generally placed on their inclusion in a constitutional bill of rights as they are most securely protected when they are entrenched as fundamental norms of a supreme law. Thus, this part of the piece is devoted to discussing the constitutional framework of IGE in Ethiopia. The 1955 Revised Constitution of Ethiopia is remarkable as far as the environmental interest of the future generations is concerned. Under article 130, it is ambitiously declared that “[t]he natural resources in the waters, forests, land, air, lakes, rivers and ports of the Empire are (a) sacred trusts for the benefit of present and succeeding generations of the Ethiopian people”.⁵⁸ The 1987 Peoples Democratic Republic of Ethiopia Constitution (PDRE) also impliedly recognized the environmental interest of the future generations. The Constitution provided for the duty of citizens to protect nature and natural resources, especially to develop forests and to protect and care for

⁵⁸ Revised Constitution of Ethiopia, 1955, Article 130 (B).

soil and water resources.⁵⁹ This duty is imposed, one can argue, to protect the interests of both the present and future generations.

The Constitution of the Federal Democratic Republic of Ethiopia (herein after the Constitution) recognizes the right of all persons to live in a clean and healthy environment.⁶⁰ Government and citizens are designated as duty bearers of the right.⁶¹ This type of formulation of environmental rights and obligations is reiterated in all regional state constitutions in almost identical terms.⁶² Does the obligation here include the obligation owed to future generations? One can argue that on the face of sheer uncertainty in the Constitution over the government's and citizens' actual obligation to the present generation, it could be very difficult to extend it to future generations. The case is not helped by the jurisprudential void the area is currently suffering from.

However, it can also be argued that the obligation of the citizens and the government under the Constitution includes the duty owed to future generations. This argument can be strengthened by taking into account the following facts and considerations. Firstly, the influence of the Rio Conference⁶³ on the environmental and development provisions of the

⁵⁹ The Constitution of the Peoples Democratic Republic of Ethiopia, 1987, Art. 55 (3).

⁶⁰ The Constitution of the Federal Democratic Republic of Ethiopia Proclamation No. 1/1995 (the FDRE constitution hereafter), *Federal Negarit Gazeta, year 1 no.1, article 44(1)*.

⁶¹ Id. article 92(4) cum 9(2).

⁶² See, the regional constitutions, article.42& 105 of Afar, Art.44 &113 of Amhara, Art.44 &, 114 of Benishangul Gumz, art.44 &116 of Gambela, art. 44 & 77 of Harari, art. 44 &107 of Oromia, art.44 & 104 of Somalia, SNNPR art.44 cum 120 of Southern Nations Nationalities Regional State Constitution (SNNPR).

⁶³ Gro Harlem Brundtland ET AL., *Our Common Future: The World Commission on Environment and Development, Our Common Future (the BRUNDTLAND Report hereafter)* (1987). Ethiopia participated in the Rio Conference through the then Premier Tamirat Layne. See Girma Hailu, Environmental Law, Ethiopia, *infra* note 64.

Constitution is notable. Inspired by the Rio Conference the Ethiopian government has made sustainable development the main guiding principle of development in the country.⁶⁴ As such, article 43 of the Constitution declares that all peoples of Ethiopia as a whole have the right to sustainable development.⁶⁵ Sustainable development was coined by the Brundtland Commission which defines it as a development that “meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁶⁶ Sustainable development is a means to integrate environmental concerns into development programmes and rests on a commitment to equity with future generations. Hence, the Constitutional right to sustainable development entails a corresponding obligation the present generations owes to future generations with regard to the use and enjoyment of the environment.

Therefore, it is very difficult to think that a Constitution that undertakes to take into account the interest of future generations in development endeavors of the present generations under article 43 would deny the future generations the right to a clean and healthy environment in the next provision. In fact the whole spirit of the Constitution⁶⁷ coupled with the timing of its making as the interest of future generations was a hot topic/issue worldwide following the Rio Conference shows that the interest of the future generations has a firm place. Consequently, for any one reading article 43 and 44 together,

⁶⁴Girma Hailu (2000), *Environmental Law, Ethiopia, International Encyclopedia of Laws* Kulwer Law International at 27-28.

⁶⁵ Article 43 of the FDRE constitution, see specially sub article 4 of it. See also articles 43 of all the regional constitutions except Afar regional state which provides for sustainable development under article 41.

⁶⁶ World Commission on Environment and Development (WCED). *Our common future*. Oxford: Oxford University Press, 1987 at. 43.

⁶⁷ As we will see below, both the environmental rights and the right to sustainable development are recognized as a group rights. Besides, Land is the common property of all Ethiopians. See articles, 43, 44, and 41 of the FDRE Constitution.

logic would demand him to conclude that the governments and the present generations' environmental obligations are supposed to be owed to future generations as well.

Secondly, a survey into the international Conventions to which Ethiopia is a party gathers ample evidence that Ethiopia has committed itself to protect the environmental interest of future generations. These conventions are made an integral part of the law of the land by the Constitution.⁶⁸ Besides, Chapter Three of the Constitution on Fundamental Rights and Freedoms is expected to be interpreted in conformity with the principles of the Universal Declaration of Human Rights, International Human rights Covenants as well as International instruments adopted by Ethiopia.⁶⁹ In its preamble⁷⁰ and principle part,⁷¹ the Convention on International Trade in Endangered Species of Wild Fauna and Flora calls for protection of wild flora and fauna and strict regulation of trade in specimens of these species which are available both for the present and the future generations to use and enjoy. The Convention on Biological Diversity (CBD) sets out its objective as “[c]onservation and sustainable use of biological diversity for the *benefit of present and future generations*”.⁷² Article 3 of the United Nations Framework Convention for Climate Change expressly incorporates IGE. The article provides that: “[t]he parties should protect the climate system for the *benefit of present and future generations of human kind*, on the basis of

⁶⁸ The FDRE Constitution, art. 9(4).

⁶⁹ Id., art. 13(2).

⁷⁰ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, Washington DC, March 1973 and Amended on 22 June 1979, Art II.

⁷¹ It advocates for a strict regulation of trade in specimens of species in a way that should not endanger the survival of species, recognizes right of future people to use and enjoy from wild flora and fauna.

⁷² *Convention on Biological Diversity*, Rio Dejerio, 1992, preamble; third paragraph, see also Art. 1 stating that the components of biodiversity should be used sustainably and shared equitably.

equity and in accordance with their common but differentiated responsibility and respective capabilities” (Emphasis mine).⁷³ Hence, interpreting article 44 in line with the Conventions discussed above reveals that the right to a clean and healthy environment is guaranteed both for the present and future generations.

Thirdly, interpretation of the Constitutional environmental rights in a way that includes the interest of the future generations is becoming common in the world these days. In the famous *Oposa V. Factoran* case, the Supreme Court of the Philippines concluded that everyone’s right to the use and enjoyment of nature’s endowment imposes a corresponding duty to protect it for the future generations.⁷⁴ Moreover, at least twenty-two domestic constitutions since 1970s and particularly since 1990s have recognized the inter-temporal right⁷⁵ which suggests the emergence of IGE as a customary international law.

Also, the current trend by many authors⁷⁶ is taking environmental rights not only as the rights of the present generations but also of the future

⁷³ *United Nations Framework convention on Climate Change*, Rio Dejanerio, 1992, art.3 (1). See also article 2 which states that economic development should proceed in a sustainable manner”.

⁷⁴ Manguiat, Ma Socorro Z "*Maximizing the value of Oposa v. Factoran*". Georgetown International Environmental Law Review. at 3.

⁷⁵ Albania, Andorra, Argentina, Brazil, East Timor, Eritrea, Georgia, Germany, Ghana, Guyana, Iran Malawi, Micronesia, Namibia, Papua New Guinea, Poland, Qatar, South Africa, Uganda, Vanuatu, and Zambia. See Marcello Mollo *et al.*, *Environmental Human Rights Report: Human Rights and the Environmnet-Materilas for the 61st Session of the United Nations Commission on Human Rights*, Geneva, March16-April22 2005 (Oakland California: Earthjustice Legal Defense Fund,2005) A-1.

⁷⁶ Ibid, See also Richard P. Hiskes (2005), *The Right to a Green Future: Human Rights, Environmentalism and Intergenerational Justice*, Human Rights Quarterly, Vol. 27, No. 4 1346-1364, , Edith Brown Weiss (ed.) (1992) *Environmental change and international law: supra note 9, Manual on the rights of the Children* at www.eycb.coe.int/compasito/chapter_5/5.html.

generations. The duty to preserve and protect the environment is a duty that is owed “not merely to all other human beings, non-human beings, and inanimate objects in present time but extends also to future generations.”⁷⁷ Numerous international instruments from the Charter of the United Nations, the Universal Declaration of Human Rights and its two International Covenants through a host of conventions and declarations that are concerned with the dignity, worth and progress of mankind support the right of the future to a clean and healthy environment. It is said “[w]hen we speak of mankind, we speak of the human race as it exists today and also as it will in the future”.⁷⁸ Considered to be among the so-called third generation or collective rights, environmental rights “affect whole societies or groups of people rather than just individuals... [who] share in the common heritage of humankind”.⁷⁹

Hiskes refers to environmental rights as “as a special category of rights distinctive for its bearers' connectedness to groups, future generations, and even fellow living organisms sharing the same environment.”⁸⁰ He argues that environmental rights (“emergent rights” as he prefers to call them) are rights that are markedly different from rights usually attached to individuals

⁷⁷ Manual on the rights of the Children at www.eycb.coe.int/compasito/chapter_5/5.html. see also Alan Boyle , Human Rights or Environmental Rights: A Reassessment, electronically available at http://www.law.ed.ac.uk/file_download/publications/0_1221_humanrightsorenvironmentalrightsareasses.pdf.

⁷⁸ Weiss (ed.) (1992), *Environmental Change and International Law*, supra note 7 at 176. It is said that ‘an intergenerational dimension must be necessarily inferred in these international instruments extending to all future generations as an obligation *erga omnes* that derives some support from customary international law and is regarded as an emerging norm of customary international law. See L. Gündling, “Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility? Do We Owe a Duty to Future Generations to Preserve the Global Environment?” 84 A.J.I.L. at 190& 212.

⁷⁹ *Manual on the rights of the Children*, supra note 77.

⁸⁰ Richard P. Hiskes, *The Right to a Green Future*: supra note 76, at 1351.

for two reasons. First, they are the response to environmental “threats that are themselves emergent phenomena”.⁸¹ According to him, the object of the right, “environment” “is a “collective product of individual human activity”.⁸² So, it is very difficult, if not impossible, to attribute environmental problems to a single agent. Even when this is possible, in most cases, it is not the isolated acts of the individuals that pose bigger menace but the cumulative effect and interaction of individual acts. It is in response to this problem that “emergent” environmental rights are considered to be necessary.

Environmental rights are there not just to protect an individual from another identifiable individual’s foul play as is the case in most existing laws. They are rather rights “against the effects of all the unseen, unnamed, perhaps no longer living fellow citizens who collectively made choices, took actions and made policies that threaten us now”.⁸³ Furthermore, environmental rights intend to protect the future generations from actions or welfare will be hugely affected by our decisions while we are alive.”

Second, Hiskes claims that environmental rights are rights that we “hold only because of our relationships with others that cause collective effects on our shared environment”.⁸⁴ Put differently, they are rights due to us-not because of “something in our individual nature-but because of the effects of our relationships with others”.⁸⁵ Moreover, those

⁸¹ Ibid.

⁸² Id. As Chobanian recapitulates, “[e]nvironmental pollution is of a fundamentally different nature than isolatable single agent threats to our well-being”. Collins-Chobanian, cited in Richard P. Hiskes, *The Right to a Green Future*: supra note 76 at 1353

⁸³ Hiskes supra note 76, at 1354.

⁸⁴ Id.1353.

⁸⁵ Ibid. See also Jack Donnelly (1989), *Universal Human Rights in Theory and Practice*, at 14.

relationships involve other living humans and future generations. The unique relationship with the future invoked by emergent environmental rights makes it necessary to ascribe rights to future generations as well.

Generally, the above discussion shows that there are compelling logical and pragmatic reasons to extend environmental rights to future generations. Accordingly, one can argue that “all persons” referred to under article 44 of the FDRE Constitution refers not only to “all persons” of the present but also of those who will live in the future. Thus, the obligations to protect the environment under the Constitution flow from the present generation both to the present generation and members of future generations who have the right to use and enjoy the nation’s legacy. The Constitution’s employment of the terms “all persons” and “peoples of Ethiopia as a whole” under articles 44 and 43, respectively, instead of ‘everyone, every person, every citizen’ e.t.c. as employed in most cases in Chapter Three suggests that the right to a clean and healthy environment and of development are envisaged to be group rights. Due to the unique nature of environmental rights that connects the past, the present, and the future and of the problems the rights aim at solving, collective environmental woes, this right must be interpreted as including future generations’ right.

From an intragenerational perspective, a cumulative reading of articles 25 and 44 of the Constitution reveals that equality in the use and enjoyment of environment and its natural resources among the present generation of Ethiopia is guaranteed.⁸⁶ Moreover, the Constitution states that it is the duty of the government to formulate policies that ensure and promote equitable

⁸⁶ Article 25 of the FDRE Constitution declares the equality of all Ethiopians without any discrimination on the basis of nation, nationality, color, sex, birth... or any other status.

distribution of wealth among all Ethiopians.⁸⁷ The equality of women and men in utilization and enjoyment of the country's natural resources is guaranteed as well.⁸⁸

C. IGE in the Environmental and Developmental Policies and Programmes

This issue of sustainable development has been reiterated in the Conservation Strategy of Ethiopia (CSE)⁸⁹ which serves as a blueprint for sustainable development in the country and the main source of the 1997 Environmental Policy of Ethiopia (EPE herein after).⁹⁰ Reiterating the recognition of environmental sustainability in the FDRE Constitution and in the national economic policy and strategy as a key prerequisite for lasting success, the EPE aims at an “overall comprehensive formulation of cross-sectoral and sectoral issues into a policy framework on natural resources and the environment to harmonize these broad directions and guide the *sustainable development*, use and management of the natural resources and the environment”.⁹¹

The EPE has taken the issue of IGE one step further by explicitly recognizing the environmental interest of the future generations. The Policy declares that:⁹²

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

⁸⁷ Article 89(1&2), see also article 90(1) of the FDRE Constitution.

⁸⁸ See articles 35(1,6&7),89(7), 25 cum 44 of the FDRE Constitution.

⁸⁹ *Conservation Strategy of Ethiopia, Volume 1. The Resources Base, its Utilization and Planning for sustainability*, National Conservation Secretariat in collaboration with Ministry of Economic Development and cooperation, 1996.

⁹⁰ FDRE (1997), Environmental Policy of Ethiopia (hereafter EPE).

⁹¹ *Id.*, section 1.4.

⁹² *Id.*, at 2.1.

the needs of the present generation without compromising the ability of the future generations to meet their own.

In what seems in line with the Weiss's "conservation of diversity" model discussed in part one, the policy under its specific policy objectives has stated that essential ecological process and life support systems, and biological diversity shall be preserved so that the "*satisfaction of the needs of the future generations is not compromised*" (Emphasis mine).⁹³ Moreover, it is stated in the policy that "species and their variants have the right to continue existing, and are or may be useful now and/or for the *generations to come*" (Emphasis mine).⁹⁴ The EPE also pronounces that renewable natural resources shall be used in such a way that their regenerative and productive capabilities are maintained and where "possible enhanced so that *satisfaction of the needs of the future generations is not compromised*" (Emphasis mine).⁹⁵ Moreover, the issue of sustainability and intergenerational equity is mentioned here and there in the policy.⁹⁶ From the sectorial environmental policies, the water sector and the forest sector policies repeatedly mentioned the issue of sustainable development.⁹⁷ These sectorial guidelines in the policy are meant to benefit the country by helping to achieve sustainable development by avoiding the careless use and destruction of Ethiopia's fragile environment and precious natural resources on which present and future generations depend. The Policy also recognized the intragenerational aspect of IGE by stating that "social equity shall be assured particularly in

⁹³ Id, at 2.2(a).

⁹⁴ Id. sec.2.3 (q).

⁹⁵ Id.sec 2.2(a).

⁹⁶ See, for instance, sections dealing with non renewable resources, forest management, at 3.2(f), energy policy 3.5(b).

⁹⁷ The Federal Democratic Republic of Ethiopia, *Ethiopian Water Resource Management Policy*, Ministry of Water resources, 2001.

resource use”.⁹⁸ The equality of men and women in the use and management of natural resources is also asserted.⁹⁹

The Wildlife Development, Protection and Utilization Policy and Strategy sets out the sustainable protection and development of the countries wildlife as the most important strategy of the sector. Particularly, section 2.2 states “[p]rotecting the wildlife resources and their habitat, maintaining the balance of nature and transfer the same to *the next generation* in accordance with the international wildlife conventions and agreements to which the country is a signatory” (Emphasis mine).¹⁰⁰

As mentioned above, Ethiopia is a party to the Biodiversity Convention which is meant to protect the world’s biodiversity for the benefit of the present and future generations. Based on the principles therein, Ethiopia has adopted a Strategy and Action Plan in 2005. The Strategy underlines the importance of conserving biodiversity for attaining sustainable development.¹⁰¹ The Strategy aims at containing the erosion of biological diversity and ensuring its conservation “*for the benefit of present and future generations*” (Emphasis mine).¹⁰² Its overall goal is to see to it that “[e]ffective systems are established that ensure the conservation and sustainable use of Ethiopia’s biodiversity, that provide for the equitable sharing of the costs and benefits arising therefrom, and that contribute to the

⁹⁸ EPE, supra note 90, sec.2.3(L).

⁹⁹ Id at 2..3 (j).

¹⁰⁰ The Federal Democratic Republic of Ethiopia Ministry of Agriculture and Rural Development Wildlife Development, Protection and Utilization Policy and Strategy, March 2005, Addis Ababa, section 2.2.

¹⁰¹ FDRE (2005), Institute of Biodiversity Conservation, National Biodiversity Strategy and Action plan.

¹⁰² Id. Section 3.2.

well-being and security of the nation”.¹⁰³ The Strategy is more ambitious in that it wants to protect species that might not “have known direct economic value today” as may “*turnout to be economically important in the future*” (Emphasis mine).¹⁰⁴ This, indeed, is in line with the Biodiversity Convention and the principle of “Conservation of Options”¹⁰⁵ set out by Weiss.

The two five years development Plans of Ethiopia, A plan for Accelerated and Sustained Development to End Poverty (PASDEP)¹⁰⁶ and the Growth and Transformation Plan (GTP)¹⁰⁷ adopted sustainable development as a guiding principle. The GTP’s long term objective is “to become a country where democratic rule, good-governance and *social justice* reigns (upon the involvement and free will of its peoples; and once extricating itself from poverty and becomes a middle-income economy” (Emphasis mine).¹⁰⁸ Anchoring on natural resources protection and development is identified as a key to realizing the plan.¹⁰⁹ Most importantly, the plan aims at “integrated and sustainable development and utilization of water resources ...ensuring fair and equitable utilization of the resources taking into consideration the demand and benefit of the future generation...”¹¹⁰

The GTP has singled out climate change and its consequential unpredictable weather conditions with potential negative impacts particularly on

¹⁰³ Ibid.

¹⁰⁴ Id. 1.2.

¹⁰⁵ Weiss (1990), supra note 4. At 37.

¹⁰⁶ Ethiopian : Building on progress, *A plan for Accelerated and Sustained Development to End Poverty* for 2005/6-2009/10 volume 1, Main Text Ministry of Finance and Economic development ,Sept.2006.

¹⁰⁷ The Federal Democratic Republic of Ethiopia Growth and Transformation Plan (GTP hereinafter) 2010/11-2014/15, September 2010, Addis Ababa.

¹⁰⁸ Id. Section 2.1.

¹⁰⁹ Id. Section 5.1.3

¹¹⁰ Id, 5.4.5

agriculture¹¹¹ as one of the most important challenges to its effectiveness. Hence, it provides that “building a carbon neutral and climate resilient economy and enforcement of existing environmental laws are priority actions in connection to the environmental conservation.”¹¹² To achieve that, the Ethiopian government has come up with Climate Resilient Green Economy (the CRGE herein after) strategy.¹¹³ Recognizing the fact that the country is severely exposed to the effects of climate change though its contribution to the causes of the change is one of the lowest in the world, the CRGE document declares its ambition to exploit the unique opportunity and necessity climate change presents “to switch to a new, sustainable development model”.¹¹⁴ The CRGE is completely cognizant of the fact that rapid economic growth, if not carefully managed and planned, “may jeopardize the very resources it is based on and lead to unsustainable levels of use ... preventing the current generation from passing on an equivalent level of resources *to the next generation*” (Emphasis mine).¹¹⁵

D. In Environmental Laws

In addition to the Constitution and other policies discussed above, environmental legislation has explicitly or impliedly recognized IGE. A case in point here is the Environmental Protection Organs Establishment Proclamation.¹¹⁶ The term “environmental protection” is defined under this Proclamation as “sustaining of the essential characteristics of nature and

¹¹¹ Id. Section 9.2

¹¹² Id. Section 8.7.3

¹¹³ Federal Democratic Republic of Ethiopia: *Climate-Resilient Green Economy strategy, at I. The strategy* was adopted under the leadership of the Prime Minister’s Office, the Environmental Protection Authority, and the Ethiopian Development Research Institute.(CRGE, hereinafter).

¹¹⁴ Id., at III.

¹¹⁵ Id at 16.

¹¹⁶ *Environmental Protection Organs Establishment Proclamation No.295/2002.*

enhancing the capacity of the natural resource base with a view to safeguarding the interest of the present generations *without compromising the opportunity for the future*” (Emphasis mine).¹¹⁷ This Proclamation which precedes virtually all post-FDRE environmental laws serves as the starting point of all actions and legislation. It can serve as an interpretative tool for all provisions both in this proclamation, in the Environmental Impact Assessment proclamation,¹¹⁸ Environmental Pollution Control Proclamation,¹¹⁹ etc. None of the subsequent proclamations has defined the term “Environmental protection” which suggests that only the definition under proclamation 295/2002 is to be used when the need arises. Thus, any law, policy, strategy and decision that has environmental protection as its direct or indirect objective should take into account the environmental interest of the future generations.

The Federal Environmental Protection Authority of Ethiopia (the EPA hereinafter) is established with a responsibility to “formulate policies, strategies, laws and standards, which foster social and economic development in a manner that *enhance the welfare of humans and the safety of the environment sustainable [Sic]*, and to spearhead in ensuring the effectiveness of the process of their implementation” (Emphasis mine).¹²⁰ Thus, safeguarding the interest of the future generations is one of the duties of the EPA. It is for this reason that the 2003 EPA Environmental Impact Assessment (EIA) Procedural Guideline makes equity one of the core values of EIA.¹²¹ Similarly, Environmental Units¹²² and Regional Environmental

¹¹⁷ Ibid, article 2(6).

¹¹⁸ Environmental Impact Assessment Proclamation, *infra* note 140.

¹¹⁹ Environmental Pollution Control Proclamation No.300/2002.

¹²⁰ Ibid, art. 3.

¹²¹ EPA (2003) Environmental Impact Assessment Procedural Guideline series 1, section 4.2.1.

Agencies¹²³ are duty bound to implement the right of future generations related to the environment.

Environmental Pollution Control Proclamation under article 11 recognizes public interest litigation (PIL herein after) which has a great significance for environmental protection not only of the present generation but also of the future ones.¹²⁴ Under this proclamation, anyone who believes that someone is polluting or is likely to pollute the environment can bring a legal action without showing vested interest.¹²⁵ This aspect of the Proclamation has a constitutional foundation under the FDRE Constitution which recognizes a broad access to justice.¹²⁶ The minute of the constitutional assembly confirms that it is possible to bring justiciable matters (like environmental issues)¹²⁷ and it can be brought by any person not only for the interest of the present but representing future generations.¹²⁸

In *Oposa v. Factoran* case, the first of its kind in the world, the Supreme Court of the Philippines granted standing to a group of children who sued to uphold their environmental rights and those of the future generations.¹²⁹ The children represented by the Philippine Ecological Network, a Manila

¹²² Environmental Protection Organs Establishment Proclamation, Supra note 119, art. 14.

¹²³ Id. Art.15.

¹²⁴ EPC supra note 119.Article 11(2).

¹²⁵ Ibid.

¹²⁶ See FDRE Constitution Article 37.

¹²⁷ For details on the issue of enforcement of environmental rights, see James R. May and Erin Daly (2011), *New Directions in Earth Rights ,Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmnetal Rights Worldwide*, IUCN Academy of Environmental Law, at 1. See also JAMES R. MAY AND ERIN DALY (2009), *Vindicating Fundamental Environmental Rights Worldwide OREGON REVIEW OF INTERNATIONAL LAW* Vol. 11, 365, at 366-439.

¹²⁸ (Minute of the Constitutional Assembly),የኢትዮጵያ ሕገ መንግስት ጉባኤ ቃለጉባኤ ጥራዝ-3-ሕዳር 8-13/1987 ጥራዝ 00001-000063

¹²⁹ Minors Oposa, supra note 30.

Environmental Group, sought to stop the logging of the fading old-forests. The children argued that continued deforestation would cause irreparable injury to their generations and succeeding ones, and hence would affect their constitutional rights to “a balanced and healthy ecology”.¹³⁰ The court held that the children had standing to defend the rights of their generation to a sound environment and to perform their duty to preserve that right to the future generations.

One can, therefore, argue that any public spirited person who believes that someone is polluting or is likely to pollute the environment and hence violate/will violate the right to a clean and healthy environment of his generation and that of future generations can bring legal action against the perpetrator in the Ethiopian courts. By doing so, not only can he defend his constitutional right under article 44 of the FDRE Constitution but also perform the constitutionally imposed duty to protect the environment. And it should be noted that this right to standing in environmental matters is allowed both for physical and juridical persons including NGOs.

Unfortunately, this liberal standing to sue is allowed only on pollution cases. Not only that the case can only be brought against the actual or potential polluters and not against government bodies which fail to discharge their duties.¹³¹ This is confirmed by the supreme courts’ decision in *APAP v. EPA* case. Using the PIL procedure provided in the Proclamation, Action for Professionals Association for the People (APAP herein after) brought a court

¹³⁰ Ibid.

¹³¹ Action for Professionals .Association for the People (APAP Vs. Environmental Protection Authority, Civil file no.64902, Federal First Instance Court, Oct.31.2006 unpublished. (APAP V. EPA hereinafter)

action against EPA.¹³² The applicant alleges the pollution of the Akaki and Mojo Rivers by different industrial effluents which cause great danger to the life and health of the people. The applicant further alleges that the EPA fails to carry out its obligation of stopping the pollution. The First Instance Court rejected the case by an order on the preliminary objection stating that APAP, the applicant, can't take a court action against the EPA unless it is a polluter itself.¹³³ The Court reasoned out that the cumulative readings of Articles 11(1) and 11(2) of Proclamation 300/2002 does permit any public spirited citizen to bring a legal action against the polluter and not against the EPA fail for failing to discharge its mandated duties.¹³⁴ An appeal was made to the Federal High Court which confirmed the decision of the lower court for the very same reason.¹³⁵ APAP finally applied to the Supreme Court Cassation division but the case was rejected for absence of fundamental error of law.¹³⁶

In the absence of an administrative procedure law and poor access to environmental information that would open up the government and the absence of judicial review, arguably, putting environmental protection organs out of the reach of PIL begs many questions and hence can be counted as a missed opportunity. Little or no environmental sensitization of or misperception by the judiciary of the relationship between poverty reduction or development and environmental protection will remain to be a

¹³² Ibid. The applicant (APAP) argues that PIL environmental cases is allowed “because environmental well-being involves public interest and because the related rights are basically *group rights* that enshrine many human rights”. See *APAP v.EPA*, application to the Supreme Court Cassation division, June 9, 2008.

¹³³ *APAP v.EPA*, Supra note 131.

¹³⁴ For a detailed treatment of the Case, see Sisay Alemayehu, *Action Professional Association for the People v. the Ethiopian Environmental Protection Authority: a Torchbearer or a Lost Opportunity?*, the Ethiopian Human Rights Series Vol.IV.at 66-85

¹³⁵ *APAP (Appellant) v.EPA (Respondent)*, Federal High Court, Order of 8 May, 2007, File No.51052.

¹³⁶ *APAP v.EPA*, application to the Supreme Court Cassation division, 9, June 2008.

problem in a foreseeable future. As seen in the *APAP v. EPA* case, courts are unsympathetic to environmental cases. The rejection of the case based on preliminary objection without adequately assessing the competing arguments of both parties¹³⁷ thereby invoking their inherent power of judicial review that any active court would have done, demonstrates the courts' reluctance to engage themselves in novel cases like protection of the environmental interest of future generations. Hence, the absence of a judiciary as an active partner to sustainable development by extending its reach beyond its traditional field would continue to be a problem for the development of jurisprudence of protection of the environmental interest of the future generations. Even worse, the courts don't have a clear understanding of their role in the implementation of the rights guaranteed by the Constitution which partly explains their disinterest in the environmental cases.¹³⁸

The other proclamation worth mentioning here is the Environmental Impact Assessment Proclamation which has constitutional and environmental policy roots and whose primary objective is the promotion of sustainable development.¹³⁹ As per the Proclamation, environmental impact assessment has to be undertaken on proposed development activities, legislation, policies

¹³⁷ See Sisay Alemayehu, supra note 134, at 83

¹³⁸ The author had the chance to visit some five First Instance Courts and the High Court of Addis Ababa (in 2007 and 2009) and talked to quite a few judges. During the conversation, it was clear that they believe that they don't have any role in implementing the constitutionally guaranteed rights, in the absence of an enabling legislation; that environmental protection is a "luxury" in this country. More than 50% of the Supreme Court, 46% of high court and 48% of first instance (Woreda) court judges in five regions including Addis Ababa thought that judges have limited or no role in enforcing the human rights chapter of the Constitution. 341 judges were interviewed in the survey. *Assefa Fiseha and Solomon Nigus, Report on the Needs Assessment for in service training of Judges and Prosecutors, June 2009.*

¹³⁹ See, for instance, EPE, supra note 90, at 2.3(f). It advocates the principle of precaution. See article 92(2) of the FDRE Constitution.

and strategies. The proclamation also provides that the principle of precaution shall be followed when there exists a conflict between short-term developmental benefits and long-term environmental protection.¹⁴⁰ Properly performed, EIA is a useful tool for promoting sustainable development and includes many components that can help facilitate intragenerational and intergenerational equity. But, the practice of EIA in the country leaves much to be desired and its usefulness for the promotion of the environmental interest of the future and the present generations is fully appreciated by many.¹⁴¹

V. Concluding Remarks

In our previous discussions, we have seen that intergenerational environmental thinking has a place in the cultural, religious, and legal and policy frameworks in Ethiopia. But one may ask if the future generations of this country at all deserve the concern identified above.¹⁴²

It can be argued that in the presence of acute poverty where millions of people lack access to basic needs, where the concern is not about quality of life but about life itself and “saving” for ones’ future use is hard to practice,

¹⁴⁰ Environmental Impact Assessment Proclamation No. 299/2002, the preamble and article 4(2).

¹⁴¹ Solomon Kebede, *Some Reflections on Environmental Governance*, *infra* notes 154. Solomon expressed that only very few projects are undergoing EIA in Ethiopia. He also mentioned that EIA is restricted at the project level leaving Strategic EIA out. Public Lecture by Dr. Twelde Berhan Gebreegziabher Director General of EPA, 7 May 2009, at *Akaki* Campus, Addis Ababa University. I got the chance to participate in the lecture in which expressing the fact that EIA is not being undertaken at a level he would like to see, the director stated the bright future EIA will have in Ethiopia .

¹⁴² It shall be noted that IGE applies not only to the future generation of one community or one person or one nation but to all future generations of humanity. But the discussion in this part is made in relation to the future generations of all Ethiopians since if intergenerational equity is adequately taken care of at the national level, most of the problems of inequity in the world can be tackled. But, this is not, as not noted in the forgoing discussions, to dwarf the importance of intragenerational equity for the prevalence of the intergenerational justice.

concern for the future generations is likely to be seen as a luxury that will have to wait. In a least developed country like Ethiopia, economic and social development and poverty eradication are the first and overriding priorities. Even environmental protection in general is “still a luxury”. When one finds himself in a desperate situation like this, he may not worry about his future interest let alone his descendants or the descendants of his species no matter how “hard wired” in his nature the concern may be. Certain studies have shown that culture itself has conceivably undergone a shift away from the intergenerational perspective.¹⁴³ Poverty has pushed the future out of view.

But then an equally, if not more, powerful argument can be forwarded in support of future generations’ claim for the safeguard of their environmental interest. Firstly, compared to the future citizens of developed countries, the future citizens of developing countries will find themselves in an exceptionally dangerous situation due to the environmental problems created by the present and the past generations. With direct dependence on natural resources rather than developing viable economic options, unsustainable exploitation and rapid population growth, the present (and the past) generations of countries like Ethiopia have caused (and are causing) numerous environmental problems that put both the present and the future generations in an intricate position.

In Ethiopia, renewable natural resources have now run down to a low level of productivity.¹⁴⁴ Their exploitation has been and still is beyond their "self-replicating capacity". The permanent loss in value of the country's soil

¹⁴³ Christopher D. Stone (2004), “ *Common but Differentiated Responsibilities in International Law*” 98 Am J.Int’l L 276 at 295; see also Lynda Collins (2006), *The Doctrine of Intergenerational equity in Global Environmental Governance*, Master Thesis, University of British Columbia at 28.

¹⁴⁴ EPE, supra note 90 introductory sentence, paragraph 2.

resources caused by soil erosion is increasingly dire.¹⁴⁵ Much of the natural and cultural heritage is under threat through neglect, decay, removal or destruction as well as through the less visible and tangible impacts of changing socio-cultural values.¹⁴⁶

Land degradation is the major environmental problem in the country.¹⁴⁷ It is one of the major causes of low and in many places declining agricultural productivity on which about 85% of the population depends and continuing food insecurity and rural poverty in Ethiopia. The depletion and degradation further intensifies poverty, leading to even more intensive depletion and degradation.

Therefore, the vicious circle of 'poverty-environmental degradation-poverty' has put future generations of developing nations like Ethiopia in such a delicate situation. As a result, heirs of poor farmers in Ethiopia may find themselves being treated like aliens. If an Ethiopian farmer in his middle age now believes that he has at least a moral backing to blame his parents for making him live with this terrible natural resource deficit now as they failed to take his welfare into account when planning on their own, he should realize that in the next few decades, failing to invest in land improvement

¹⁴⁵ Id., para.5. The permanent loss in value of the country's soil resources caused by soil erosion in 1990 was estimated to be Birr 59 million.

¹⁴⁶ Id., sec.1.3.

¹⁴⁷ Aynalem Adugna, *Population and Environment* available at www.EthiodemographyAndHealth.Org at 72-73. Primitive land-use practices which included clearing of vegetation cover for farming and fuel, and lack of innovation in farming practices, vague legal environments of land ownership and uncertainty of tenure with the resultant fragmentation of land-holdings, exponential growth in population numbers, several decades of war and conflict (northern Ethiopia), lack of capital resources for investment in environmental rehabilitation, climate change, drought, and the resulting population dislocation, long history of settlement, are among the prominent causes of degradation.

techniques would be tantamount to committing a “genocide” against his descendants.

With a steady increase in industrialization and a fast increase in population in the country, these problems are likely to exacerbate. Hence, viewing from this angle, the future generations of poor countries like Ethiopia have a strong moral claim necessitated by practical realities, in addition to the legal guarantees discussed above, to have their natural resources protected. We can’t even think about weak sustainability¹⁴⁸ in this country as we are leaving nothing other than an overdrawn environment and a huge debt to our children and grandchildren.

Secondly, for an exceedingly selfish generation, environmental protection in the interest of the future generation will benefit the present generations. It is said that environmental rights are the only human rights that “are intrinsically tied to the welfare and interests of future generations as moral persons and that provide reciprocal benefits for present generations in arguing for beneficial environmental policies”.¹⁴⁹ Hence, it shouldn’t be forgotten that even current initiatives undertaken on behalf of future generations have real benefits for the present generation. We are suffering from environmental woes because of what past and present generations have done. The effects of environmental degradation and climate change will not wait for so long. It is being increasingly felt today. Hence, for a selfish generation that doesn’t care about his future descendants, the theory of IGE

¹⁴⁸ Weak sustainability claims that future generations will be sufficiently compensated for any loss of environmental amenity by having alternative sources of wealth creation. See generally the discussion in part one.

¹⁴⁹ Hiskes, *supra* note 76, at 1357.

presents an opportunity for it to enter into environmental protection through the backdoor.

With this moral, cultural, religious, and legal and policy backing for the protection of environmental resources for future generations, one may wonder what the future holds for future generations. It should be noted that as far as legal protection is concerned, as said above, there are concerns regarding its adequacy and clarity. In some parts, it is put as a preambular paragraphs and definitional provisions, some are overly general, ambiguous, and excessively lenient. Furthermore, it is not clear from the Constitution whether its right to clean and healthy environment could be extended to future generations as the rights of future generations and the duty of the present generations in this regard are not clearly articulated. Finally, there is not specific organ mandated with the protection of the interest of the future generations.

Most importantly, even the laws with their inadequacy and ambiguity are not being implemented for the following reasons. The first factor relates to inadequate administrative capacities. There are lack of requisite scientific knowledge, managerial expertise, trained personnel, financial resources, institutional frameworks and popular support necessary to implement effective environmental protection laws both for the present and the future generations.¹⁵⁰

¹⁵⁰The Ethiopian environmental protection organs, they are poorly financed, and understaffed. Financially speaking, for instance, from the 3,907,642 birr allocated for EPA in the 2000 Ethiopian budget year, 2,348,300 was intended to cover the salaries of the employees, and the remaining balance, about one and a half million birr, was intended to cover all of the EPA's other expenses. See the EPA Report, 2007.

Secondly, there are inadequate political commitment and popular support. Poverty eradication to increase economic growth and development opportunities being the overwhelming priority of the government, long-term environmental protection for the welfare of the future generations may not be anything more than rhetoric. As the government is caught up with these priorities, it is hard to see any development project blocked or hindered by conflicts with the environmental interest of the future generations at least in the near future.

But it should not be forgotten that, as the World Commission on Environment and Development noted, poverty reduction without taking into account environmental protection is a futile exercise.¹⁵¹ The government's misconception of the link between environment and development is also held by the public and the courts which also do not have a clear understanding of their role in implementing the constitutional environmental rights. The environmental protection campaign, both for the future generations and the present generations, has little popular support and participation.

Future generations cannot contest decisions that would affect their interest as we have seen above. Therefore, there is a need for someone, from the present generations, including NGOs, to bring their case before the court on their behalf. But due to the unfavorable legal environment¹⁵² and political misconceptions regarding NGOs,¹⁵³ and the requirement of standing, and

¹⁵¹ Report of the World Commission on Environment and Development: Our Common Future, Published as Annex to General Assembly document A/42/427, Development and International Co-operation: Environment, August 2, 1987 accessed on September 24, 2012.

¹⁵² See EPC, article 11.

¹⁵³ *The Charities and Societies, Proclamation* paralyzes NGOs thereby restricting them from getting more than 10% of their annual budget from foreign sources should they plan to engage in human rights advocacy. See *Charities and Societies Proclamation* No. 12/2009.

perhaps the judiciary's non-alignment, this has become such a difficult enterprise.

There is a need, therefore, for an increasing capacity building, environmental education and awareness creation, more political commitment, more liberalization of standing rules if the environmental interest of future generations is to be realized. This should, of course, be complemented by the enactment of a law that clearly and adequately protects the needs of the future generations. Otherwise, as it stands now, protection of the environmental interest of the future generations is a little more than a political rhetoric of sustainable development aimed at pacifying environmentalists, deflect pressure from the international community, attracting foreign aid from developed nations and economic or technical assistance from multilateral institutions. As exaggerated and politically motivated some of the criticisms regarding the environmental impacts of some high profile development projects such as Gibe III and the Grand Ethiopian Renaissance Dams maybe, they are not without substance.¹⁵⁴

¹⁵⁴ The EIA of the Gibe III, for instance was made two years after the construction has started when international financial institutions demanded it for extending loan which is against the principle of EIA which suggest that it should be proactive. See Solomon Kebede, *Some Reflections on Environmental Governance with Emphasis on EA: A Lecture Delivered to Alabama University LL.M Students*, June 2009 (on file with the writer). See also See Public Lecture by Dr. Twelde Berhan Gebreegziabher Director General of EPA Supra Note 141. The problems are worse when it comes to the floriculture industries which have found the Ethiopian environmental regulatory regime favorable to boom. Around 10 floriculture farms have done EIA reports; not with the aim to fulfill the legal requirements but only to get a bank loan from the Development Bank of Ethiopia see. Mulugeta Getu (2009) *Ethiopian Floriculture and its Impact on The Environment: Regulation, Supervision and Compliance*, 3(2) Mizan Law Rev, at 257. Besides no environmental assessment is publicly available for the Grand Ethiopian Renaissance Dam. There are no known plans for watershed management or soil conservation to address it. Ethiopia's Renaissance Dam: A Mega-Dam with Potentially Mega-Consequences at <http://thinkafricapress.com/ethiopia/nile-concerns-over-new-mega-dam-egypt-sudan>, accessed on 4 December 2012.

