ASSESSMENT OF THE COMPATIBILITY OF PROCEDURAL LAWS FOR STRATEGIC LITIGATION IN ETHIOPIA

[Draft Report]

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Executive Summary

Strategic litigation of human rights is one of the most significant legal tools used to ensure social justice and empower marginalized communities in society. Historically, some of the most prominent social changes have been possible through the use of strategic litigation. Despite this, however, Strategic litigation of human rights has not been effectively utilized in Ethiopia. This study reveals that there are a number of legal factors that constrain the effective utilization of strategic litigation of human rights in Ethiopia. The study demonstrates that while some encouraging legal reforms have paved the way for the initiating of the use of strategic litigation in Ethiopia, there are still a number of areas where reform is needed to effectively utilize strategic litigation of human rights in Ethiopian courts. Strategic litigation of human rights continues to be constrained because of stringent standing rules, complex evidentiary rules, the lack of effective remedy for human rights violations, the lack of awareness by the legal community, as well as other related factors. The study assess the key legal impediments to strategic litigation of human rights under the Civil Procedure Code of Ethiopia as well as other related laws and provides a number of recommendations to improve strategic litigation of human rights in Ethiopia.

CHAPTER ONE

INTRODUCTION AND METHODOLOGICAL APPROACH

1.1. Background and Justification

The protection of human rights and fundamental freedoms is one of the most important elements of the Constitution of Ethiopia.[1] One-third of the constitution is devoted to the protection of human rights. One of the remarkable aspect of the constitutions also the fact that it includes all categories of human rights. A closer look at the provisions of the constitution indicates that civil and political, socio-economic and even third generation human rights such as the right to development and the right to clean environment are also protected. The Constitution also recognizes the application of international human rights norms in giving effect to the meaning and scope of human rights protected in the constitution.[2] Moreover, the constitution established an independent judiciary that has the primary mandate of ensuring the protection of human rights.

Nevertheless, the effective protection of human rights in the particular context of Ethiopia has been problematic because of various legal, institutional and political factors. One of the main challenges that continues to constrain the effective legal protection of human rights is the complex procedural hurdles in the civil procedure code, and the broader rules of evidence and procedure. While the language of the constitution seems to be generous in terms of providing access to justice to any justiciable matter including human rights, the various procedural requirements in Ethiopian laws have created a major legal hurdle for the effective application of human rights norms in Ethiopia. This is all the more difficult when it comes to strategic litigation. The potential to address wide-ranging human rights and social justice issues cannot be effectively achieved unless these complex legal issues are identified and properly addressed. In this regard the assessment study on the compatibility of procedural laws to strategic

[1] Sisiay Alemahu, The Justiciability of Human Rights in the Federal Democratic Republic of Ethiopia, 8 African Human Rights Law Journal (2008).

[2] See Art 9(4) and Art 13(2) of the Constitution.

litigation in Ethiopia will have significant contribution to improve the legal framework for improved access to justice, strategic litigation and the broader judicial protection of human rights.

1.2. Methodological Approach

The research paper uses appropriate data collection tools including a survey of the literature on the subject, assessment of the Civil Procedure Code, other related the substantive laws as well as recent developments such as the adoption of the revised Federal Courts Establishment proclamation 1234/2021. This is complemented by interview questions to key stakeholders including judges, lawyers, researchers and CSOS. The primary information gathered through interviews has been used to complement the assessment study to identify the key procedural gaps as well as the proposed solutions. The research used the following data collection methods:

Desk Review and Research: The qualitative aspect of the research looks into specific regulatory and public policy challenges including legislations, evidentiary rules, policy and regulations as well as practical difficulties encountered in the application of strategic litigation of human rights in Ethiopia. Moreover, apart from analyzing primary legislative instruments, the research looks into secondary resources including, articles, books and various research findings in order to identify the procedural laws that create difficulty for strategic litigation cases in Ethiopia. The research paper also explores developments in international and comparative law in the area of strategic litigation of huma rights that can provide important insights to the discussions in the particular context of Ethiopia.

Questionnaire: In order to identity and understand the specific challenges of ensuring the strategic litigation in Ethiopia, questionnaires were deployed to complement the information gathered through desk review and interviews. In accordance with the target group identified, 150 questionnaires were distributed and collected in order to closely

identify the key procedural laws that continue to constrain the application of strategic litigation cases in Ethiopia.

Key Informant Interviews:

Key informant interviews help to understand the problem of application and enforcement of human rights and the specific factors that impede respect for human rights that exists in various state organs in detail. This method is particularly helpful because the target group which includes directors, commissioners and heads of the key institutions outlined above who have specialist knowledge provide invaluable information to understand and analyze the key challenges in the application and implementation of strategic litigation in Ethiopia. The research includes Key informant interviews from key stakeholders that have particular knowledge on the issue of strategic litigation and the procedural laws that affect the application of strategic litigation in Ethiopia including judges, lawyers, Civil Society Organizations (CSOs), Officials of the Ministry of Justice, law firms, and academics and researchers.

1.3. Objective and Scope of Work

The major objective of this research is to identify the key procedural hurdles for the effective use of strategic litigation of human rights in Ethiopia. Within this broader objective the research aims to achieve the following key specific objectives:

- Explore the constitutional basis for strategic litigation in Ethiopia;
- Identify the specific standing, evidence, and remedies available in the Civil Procedure Code and other relevant laws of Ethiopia;
- Assess the recent law reforms in Ethiopia and how they can be maximized in the use of strategic litigation of human rights;
- Explore some of the developments in international and comparative law that could serve as the basis for improving the use of strategi litigation of human rights in Ethiopia; and
- Provide areas where improvement and reform is needed to effectively utilize strategic litigation of human rights.

CHAPTER TWO

STRATEGIC LITIGATION OF HUMAN RIGHTS : MEANING AND KEY CONCEPTS

2.1. Meaning and Scope of Strategic Litigation

Strategic Litigation involves a specific type of litigation that aims at making a certain social, economic, or political change by bringing legal suits in the courts. It is a type of litigation that aims at developing and implementing a strategy to solve a dispute in a specific stakeholder's interest and to develop principles that others may use to produce a broader impact.[3] The objective of strategic litigation is, thus, not to win individual cases but rather to use the law and the court system in order to have a wider societal impact. Because of the emphasis that strategic litigation has on the broader societal impact, often strategic litigation is also called "impact litigation".[4] At this juncture, it should be noted that the discussion in this research paper focuses on strategic litigation of human rights issues, as opposed to more generalized discussion of all issues related with strategic litigation.

Because of its emphasis on broader societal issues, strategic litigation is different from traditional forms of litigation in many ways. Traditional forms of litigation focus on securing the interests of their client and as such they are client-centered. Unlike Strategic litigation that focuses on making broader societal impacts, traditional individually-based litigation usually focuses on the immediate interests of its clients. Most traditional forms of litigations also emanate from practicing lawyers and law firms which are more focused on the business and commercial interests of their clients. On the other hand, the realm of strategic litigation is usually dominated by public interest groups and CSOs that usually focus on making impact on the larger society in the form of a policy change, legal reform or change in state behavior.[5] Unlike the traditional more individual-oriented litigations that focus on the outcome of a court

[3] Michael Ramsden and Kris Gledhill, Defining Strategic Litigation, Civil Justice Quarterly (2019) 407.

[4] Ibid.

[5] Gabriela Eslava et al, Strategic Litigation Manual: From Theory to Practice, Lessons from Colombia and Lebanon (2020) 2.

decision, strategic litigation focuses beyond the court room and considers the effects of the decisions in order to advocate for wider social change. Strategic litigation transcends individual and private interests to project a particular public interest such as human rights which is the responsibility of all actors.

The impact of strategic litigation goes beyond the legal sphere. At the heart of strategic litigation as the name implies is thus, the objective of remedying structural injustices in society and ensure respect for human rights of all, specially marginalized groups. This is demonstrated by the fact that historically some of the most significant strategic litigation cases have been litigated by public interest groups including the American Civil Liberties Union (ACLU) which was instrumental in litigating some of the most enduring public interest litigation cases. The ACLU was pivotal in leading the case of *Brown v Board of Education* that fundamentally changed segregated schools in the United States and in which the US Supreme Court made one of the most significant decisions in its history.[6] In *Brown v Board of Education* the US Supreme Court ruled that separating children in public schools based on race was a violation of the 14th Amendment which protects the right to equality and equal protection of the law. In more recent times, the growing influence and use of strategic litigation in many areas of legal and policy reform such as fighting discrimination, environmental protection, refugee protection and other diverse areas has promoted a growing academic interest and scholarship on strategic litigation.[7]

[6] Brown v Board of Education 347 U.S. 483 (1954).

[7] A. O'Neill, Strategic litigation before the European Courts, 16(4) ERA Forum (2015); C. Barber, Tackling the evaluation challenge in human rights: assessing the impact of strategic litigation organisations, 16(3) The International Journal of Human Rights (2012) 411-435; G. Fuchs, Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries, 28(2) Canadian Journal of Law and Society/Revue Canadienne Droit et Société (2013) 189.

2.2. The Significance of Strategic Litigation of Human Rights

As pointed out in the introductory section of the paper, strategic Litigation is a significant legal mechanism that aims to address deep-rooted and systemic human rights violations in the wider society. The experience of many states shows that strategic litigation has been used for a variety of purposes including:[8]

- Ensure progressive social changes in society;
- To bring legal and policy reforms that are repugnant to basic constitutional and human rights principles;
- To ensure that national laws are interpreted and applied in line with human rights standards and principles;
- To gain publicity on a major societal issue and garner public awareness and public support to issues that require societal attention; and
- To use it as consequential advocacy tool to create better legal and policy framework that ensure the improved protection of human rights.

As can be seen from the foregoing discussions, strategic litigation of human rights has far reaching significance beyond the immediate effect of winning a particular case. It helps to have a wider impact in society, in particular in marginalized communities, in the form of a policy or legal change that favours their improved protection by the state. It also demonstrates that beyond the immediate effect of the litigation in the form of policy and legal change, the effect of the strategic litigation can help galvanize public support for a particular cause and help as indispensable instrument for advocacy and social justice. Advocates of strategic litigation also argue that it should not be used in isolation. Since the ultimate objective of strategic litigation is to make some systemic change in policy, law, or state practice, it should be used in combination with other advocacy mechanism such as political lobbying, engaging in public awareness and

[8] Gabriela Eslava et al, Strategic Litigation Manual, above.

education campaigns, effective use of a media advocacy campaign, and using international and regional platforms such as the African Union (AU) and the United Nations (UN).[9]

Nevertheless, one also should note that there should be careful consideration of the consequences and effect of strategic litigation of human rights. In large part, pursuing a strategic litigation of human rights is a positive step as it has noble ideas of social justice and addressing larger societal problems. But, a sound analysis of a strategic litigation should also consider any possible negative outcomes that could be counterproductive to that process. Advocates of strategic litigation of human rights provide the following key precautions in considering some of the issues related with its pitfalls. First, potential litigants should consider the costly nature of strategic litigation and recognize that strategic litigation of human rights involves a significant resource investment which may create barriers for litigation. Second, the inherent uncertainty in what outcome that litigation brings also creates difficulties in planning and predicting the outcome and as such it is advisable to plan for negative outcomes and the means of mitigating these outcomes. The unsuccessful outcome of a strategic litigation may also trigger negative publicity towards the person or organization that brought the case in some cases. The research paper will address these issues further in the subsequent sections of the paper.

2.3. Guiding Principles of Strategic Litigation

Strategic litigation as a mechanism for social change has become more dominant over the past two decades by CSOs, activists, human rights defenders and other actors in many states.[10] The use of strategic litigation is not only confined to a particular state but has become a major transnational movement that has attracted a lot of interest by various actors around the globe.

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[9] See, OHCHR Strategic Litigation Can be a Force for Gender Justice, https://www.ohchr.org/en/stories/2021/06/strategic-litigation-can-be-force-gender-justice

[10] Anti-Corruption Resource Centre, Strategic Litigation and Its Untapped Potential for Anti-Corruption (22 July 2023), https://www.u4.no/blog/strategic-litigation-untapped-potential-for-anti-corruption

This has also helped the development of similar tools and mechanism as well as for experience sharing of various activists in how best to utilize strategic litigation for social justice as well as the protection of human rights and fundamental freedoms.[11]

Since strategic litigation cases are usually pursued on behalf of the client, the interests of the client and the objective that the organization set out to achieve may be different. In most cases clients just want to win a case and get some immediate remedy from the case, but the objective that the particular organization representing the client intends to achieve in the strategic litigation case go beyond the immediate satisfaction of the Client's needs. As such organizations need to have the appropriate awareness on these issues and prepare mitigating measures to navigate through these different interests.

The approach that should be taken in preparing a strategic litigation of human rights may depend on a number of factors including the particular type of case and also the specific jurisdiction that the case is brought. But there are also significant similarities of all strategic litigation cases that could provide important insights and guidelines. The experience of a number of countries shows that the preparation for a strategic litigation cases should be mindful of the following key issues :[12]

- The issue at hand should not be an isolated individual case, but rathe one that reflects broader human rights challenges that require the attention of policy makers. It is important to analyze whether the case that is going to be the subject of the strategic litigation is suitable for the systemic change that is sought to be achieved;
- Analyze whether the issue that requires to be addressed is suitable for court decision or through another means such as advocacy;
- Effectively employ a media strategy that can be consolidated with the court case and promote the advocacy campaign to raise public awareness about the issue;
- As strategic litigation can be long and costly, adequate preparation is required how to finance the costs of the litigation;

[11] Gabriela Eslava et al, Strategic Litigation Manual (n above)

[12] Ibid.

- Consider the possibility of approaching a complainant that is willing to file a case and join the strategic litigation;
- Look for any legal professionals and experts that have robust knowledge and understanding about the specific issue that is being litigated;
- Anticipate how courts will react to the strategic litigation case that is going to be filed and prepare responses and mitigating measures;
- Consider the likelihood on whether the courts will favorably receive the case. It means that if the prospect of success is minimal and there is no way that courts will be able to decide in favor of the litigant, then litigation may not be the best solution to the case at hand;
- Lawyers and those involved in the strategic litigation should also analyze political risk factors. If the filling of a strategic litigation case is going to have a back lash in the form of repercussions and intimidations as well as other reprisals.

Strategic litigation can impact broader societal changes through various means such as law or policy reform, state practice, public exposure of an injustice, raising awareness and generating public action for a broader societal change. Advocates of strategic litigation also caution that the litigation should not be considered an end in itself but should provide the basis for a larger public action and campaign of addressing societal injustices and ensuring the respect for human rights. The effective use of strategic litigation also unveils new opportunities to align and consolidate public action on a particular issue. The effective use of the media in the process of the litigation process helps to raise public awareness on the issue and serves as an important tool for advocacy. Even when unsuccessful Strategic litigation can help highlight critical elements of injustice and human rights violations in society that could trigger public debate and discussion which will eventually lead to some form of policy or legal change on a particular issue.[13]

[13] Open Society Initiative, Strategic Litigation Impacts: Insights from Global Experience (2018).

Experience on the strategic litigation of human rights shows some key elements that should be taken into account in the preparation of a strategic litigation case. While some of the issues discussed below may overlap with the principles set out above, the issues raised below more relate with the technical requirements of preparing a strategic litigation of human rights cases.

2.4. Preparing a Litigation Strategy

The preparation of the litigation strategy should involve a number of factors including the choice of the venue where the case is going to be brought, the parties that are going to be part of the litigation, and the identification of the risks and opportunities presented by pursuing the litigation. The Litigation strategy should serve as a "road map" to respond to key questions related with the case such as how the litigation helps to achieve its broader goals, the time that the litigation takes, etc. Experience form NGOs that worked on strategic litigation cases shows the importance of background research that helps to identify the key issues in the particular case. Understanding the legal system and social context helps to prepare the litigation strategy better.[14] The following key issues should be considered in the course of preparing a litigation strategic on strategic litigation.

2.4.1. Analyze the Case Selection and Preparation

The first major issue to address in this stage is to identify the particular injustice that should be addressed. A careful analysis of the case including the framing of the issue form a multi-disciplinary perspective is an important aspect of the case selection process. At this stage potential applicants should also consider whether the issue that needs to be remedied is justiciable, i.e that it is ripe for judicial litigation. It should be noted that not all form of injustice is suitable to strategic litigation. Moreover, given the limited amount of resources, it will not be feasible all forms of injustices to litigation. This requires that cases that are selected are in line with a legal narrative and are suitable for litigation. Because of this, strategic litigation should

[14] Public Law Project, Guide to Strategic Litigation (2014), https://publiclawproject.org.uk/resources/guide-to-strategic-litigation/ .

not be considered as the "go-to" advocacy choice but rather as selective process that should be resorted in exceptional cases.[15]

Organizations pursuing strategic litigation should also assess the issue that are the subject of litigation align with their organizational mission, values, and priority areas. The experience of organizations working on strategic litigation demonstrates that trial monitoring of the court system and following and participating in parliamentary debates helps them to identify the key issues that are debated and the relation to pressing social and legal issues:

> "Other important indicators of an issue's relevance and urgency could be the number of people affected, the severity of the violation, the rights infringed, and the response (or lack thereof) of public institutions through ordinary legal channels. The litigation's timing and the momentum to open the debate are also key elements to consider."[16]

In relation to the case selection process, technical considerations of which jurisdiction or court to pursue with is also important. In this regard strategic litigation should not only be considered within the national jurisdiction of Ethiopian courts but also regional and international forums. Although it is true that regional and international litigation can also require more know-how and resources to litigate, the African Commission and Human and Peoples Rights has jurisdiction to decide cases brought from Ethiopia. These and other factors should also be considered in considering strategic litigation cases.

Strategic litigation should also utilize appropriate mechanisms in which the court system allows for the use of *amicus curiae* as well as expert witnesses that help to consolidate the evidentiary basis of the claim and convince the court to decide on ones favor. This is all the more important in the particular cases of strategic litigation as the evidentiary grounds may be challenged by the state, which is usually the party that is involved as respondent to the case. Moreover, The litigation strategy should analyze the precedent set in similar cases decided by the particular forum where the case is going to be brought, the rules of standing applicable , the time that the litigation will likely take, and the potential remedies that can be given. The experience of NGOs

[15] Gabriela Eslava et al, Manual on Strategic Litigation, above p.5.

[16] Ibid.

show assessment of the judicial standing of the court and whether there is judicial independence of courts as well as the attitude of the courts towards strategic litigation. In some instances NGOs avoid bring cases to courts and judges that are not sympathetic to their cases and where they persistently reject these kinds of cases.[17]

2.4.2. Articulating the Goal of the Strategic Litigation

The articulation of the goal of litigation should involve both the immediate and long term goals. The immediate goal of strategic litigation can be to bring a certain policy or legal change. This may take various forms such as the recognition of a particular right such in the case of forced disappearance, the right to know; the recognition for widespread violation of a particular right; to get a specific judicial remedy; or to seek for the implementation or revocation of a particular policy or law.[18] Moreover, the immediate objective of a strategic litigation can be to demonstrate the incompatibility of national laws and policies with international human rights standards and to rectify the incompatibilities.

The long-term goal of strategic litigation should be to use it as public mobilization tool and shaping public opinion on a particular issue. It helps to build solidarity and public action as well as to heling victims and individuals to present their narratives. It is also important to note that litigation goals can develop over time and there should be the preparation for developing new cases related with the initial case at hand. The strategy should also analyze what kind of legal claim best aligns with the objective that the organization sets out to achieve. For example if the main objective of the organization is to ensure accountability and end impunity, then criminal laws may be sometimes appropriate to pursue where the law allows for such procedure. But if the objective is rather to provide remedies for victims, then a civil case may be the more appropriate litigation strategy.[19]

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[17] Ibid.

[18] C. Ogletree and R. Hertz, The Ethical Dilemmas of Public Defenders in Impact Litigation, 14 New York University Review of Law and Social Change (1986) 23.

[19] Gabriela Eslava et al, Manual of Strategic Litigation, above.

2.4.3. Risk Assessment

As much as strategic human rights litigation can bring positive outcomes, it is imperative to consider its potential risks. As the Open Society Foundation experience in strategic litigation astutely observes:

> before launching a strategic litigation case, activists and lawyers alike must consider the social, political, and historical factors that have influenced the issue at stake and the possible risks and challenges that a ruling could bring to the issue.[20]

The risks of strategic litigation are also greater because of the huge publicity and attention given to it by the public and various actors. Applicants thus, may risk reputational risks and sometimes frustration if the case is not successful. These risks are particularly greater in states such as Ethiopia where rule of law and the democratic culture of the state is not strong. The loss of a strategic litigation case can often lead to a counter-productive legal ruling and precedent that affects a particular right as well as in some cases harm to the victim. For example cases brought on behalf of a refugee if unsuccessful means that it can give leeway to potential deportation by the state.[21]

A careful consideration of the defendant and to whom the case is going to be addressed should also be an important element of the litigation strategy. The choice of defendant, may, of course depend on the kind of the case that is being litigated. Depending on to who the litigation is addressed, it could be to corporations, private individuals and often the state. All these brings different risk and challenges. A case against big companies and corporations has its own challenges as the companies employ every means including by bringing harassment suits against activists that bring strategic litigation cases. Their financial leverage also allows them to employ powerful lawyers and the use of a significant amount of resources to challenge the litigation. In similar vein a strategic litigation case against the state can respond with harassment and intimidation and different forms of oppressive and arbitrary measures.

[20] Open Society Initiative, Strategic Litigation Impacts, above.

[21] Public Law Project, Guide to Strategic Litigation.

2.4.4. Preparing the Evidence

Lastly, the preparation of evidence for the strategic litigation case should be well thought and prepared for. The ability to present robust and adequate evidence largely determines the ability to win a case. Presentation of evidence in human rights strategic litigation cases is all the more difficult for many reasons. Often the kinds of litigation that strategic litigation involves intends to show a certain state behavior and practice that is incompatible with its human rights obligations, or a policy or law that is repugnant to the bill of rights protected in the constitution. Because of this, the evidence that supports to demonstrate this must be robust unlike individual cases of litigation which are usually confined to specific events and issues and are relatively much easier to demonstrate. The fact that human rights strategic litigation largely targets the state means that some of the most relevant evidence is held by the state, and the state may refuse to share the information. Because of this providing adequate information to demonstrate the existence of a violation is difficult. In terms of establishing causation, demonstrating the causal link between the violation and a state conduct or misconduct is often difficult. Moreover, In situations where the particular evidence is in the hands of private individual and corporations, even in some cases the state, it is also difficult to obtain the evidence. The fact that in states such as Ethiopia where access to information is limited, it becomes extremely difficult to produce evidence held by private actors as well as the state.

In the presentation of evidence a strategic litigation needs to have two approaches. First the evidence needs to show the immediate violations sustained by an individual; and secondly, the presentation of the evidence needs to demonstrate that the violations are widespread and show a certain pattern of behavior by the state. This helps to convince the court to act urgently and address the problem. The presentation of legal arguments should be able to use all sources of law relevant to the research including proclamations and legislations, Judicial precedent, norms of international law, the arguments and the weaknesses of the opposing party and other elated factors.

CHAPTER THREE

THE LEGAL FRAMEWORK ON STRATEGIC LITIGATION IN ETHIOPIA

The human rights of individuals and groups forms one of the cardinal principles of the constitutional order of the Federal Democratic Republic of Ethiopia. The significant emphasis given to human rights can be seen from the fact that one-third of the volume of the constitution is devoted to the protection of human rights and fundamental freedoms of individuals and peoples.[22] The content of the FDRE constitution is extensive in that it includes a robust system of civil and political rights and socio-economic rights. One of the most remarkable aspects of the constitution is also the recognition of the right to development. The protection of these rights in the fundamental law of the land, i.e., in the constitution rather than by other ordinary laws of the state, also signifies the higher importance attached to the protection of human rights under the new constitutional order of the country, which came to the scene after the dark history of the country during the military dictatorship of the *Derg*.

The effective promotion and protection of the basic human rights of individuals requires a multitude of measures including appropriate regulatory framework, putting in place institutional mechanisms including judicial organs, quasi-judicial institutions that have a mandate to protect human rights and an effective law enforcement mechanism. Nevertheless, studies clearly indicate that the enforcement of human rights norms is much weaker than what the constitutional aspires to achieve.[23] In the following section the paper will highlight the key legal provisions in the Constitution as other proclamations in relation to the enforceability of human rights that have implications for the broader discussion of the paper on the procedural issues that hinder the application of strategic litigation on human rights.

[22] See Articles 10 to 44 of the Constitution of Ethiopia.

[23] See MIzane Abate, Constitutional Rights Without Effective and Enforceable Constitutional Remedies: The Case of Ethiopia, Northwestern Journal of Human Rights (2021).

3.1. The Constitutional Framework

As a foundational legal document of any state and as a supreme law of the land, the Constitution provides the first legal basis for the subsequent discussion on the procedural issues related with the use and application of strategic litigation of human rights in Ethiopia. It should also be noted that the discussion on constitutional issues does not only cover the substantive issues in relation to human rights but also important provisions that should be the discussion in relation to the strategic litigation for human rights issues in Ethiopia.

First, the constitution in article 13(1) provides that all organs of the state including the judiciary have the responsibility of ensuring that all human rights protected in the constitution are implemented.[24] Another legal ground that should be the subject of discussion is the broad mandate given to courts with regard to access to justice and the rights of individuals to bring a justiciable matter on a wide range of legal issues. The Constitution in article 37 provides as follows:

> Right of Access to Justice
>
> 1. Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgement by, a court of law or any other competent body with judicial power.
> 2. The decision or judgement referred to under sub-Article 1 of this Article may also be sought by:
> (a) Any association representing the Collective or individual interest of its members; or
> (b) Any group or person who is a member of, or represents a group with similar interests.[25]

Most constitutional law scholars in Ethiopia and practitioners refer to the above provision on access to justice in the Constitution is one of the most important legal basis for the procedural enforcement of human rights as well as strategic litigation issues. Moreover, article 13(2) which provides that "[t]he fundamental rights and freedoms specified in this Chapter shall be interpreted in a manner conforming to the principles of the Universal Declaration of Human Rights, International Covenants on Human Rights and international instruments adopted by

[24] Art 13(1) of the Constitution of Ethiopia.

[25] Article 37 of the Constitution o Ethiopia.

Ethiopia." Article 13(2) provides a clear guidance to courts that in cases of interpretation and giving effect to the meaning, scope and application of human rights, courts should be guided by international principles and norms. In fact, a closer look at the Amharic provision of article 13(2) indicates that in interpreting the human rights provisions in the constitution, not only do courts should make reference to human rights treaties ratified by Ethiopia, but also "international human rights instruments and principles". The expansive provision that allows reference to international norms and principles allows Ethiopian courts to consider the existing normative framework and practice in relation to the application of human rights including the requirements for standing (*locus standi)*.

Nevertheless, despite the generous recognition of human rights in the constitution, the actual application and enforcement of human rights is problematic largely because of the procedural legal hurdles that significantly affect their application in the litigation process.[26] Tsegaye notes that human rights litigation including in strategic litigation cases involves various stages.[27] The procedural stage where the litigation process involves identifying the jurisdiction of the court, decision regarding whether the party has standing to present their case, whether there is a cause of action that can be the subject of a legal claim. The Second involves analyzing whether a legal claim can be justiciable, that is the dispute is amenable to be decided by a court of law. While most disputes are justiciable and individuals or groups can demonstrate the legal question at hand to a court of law, some disputes may not be ripe for court decisions. For example administrative, purely political issues and social issues are better addressed through various institutional mechanisms than court litigation. The third phase involves the analysis with regard to the substantive content of the right. This involves analyzing the normative content of a particular right as well as the scope of its limitations bearing in mind the framework of international human rights law as well national law. This stage will also require to articulate the particular obligations of the state and non-state actors, as the case may be, and providing clear grounds for the litigation.

[26] Tsegaye Regassa, Making Legal Sense of Human Rights: the Judicial Role in Protecting Human Rights in Ethiopia, 3 Mizan Law Review (2009).

[27] Ibid.

Lastly human rights strategic litigation will require looking into the specific types of remedies that the applicant seeks to achieve, by considering the previous factors outlines in the introductory part of the paper. The type of remedy sought in strategic litigation of human rights depends on the particular goal set out at the initial stage of the litigation strategy. The court system allows for various forms of remedies including compensation, injunctions, guarantee of non-repetition, amendment or repeal of laws or policies, or the adoption of new laws or policies. Although all the above issues in relation to strategic litigation of human rights have to be carefully looked at, one of the foremost and significant legal challenges in Ethiopia continues to relate to the procedural laws and standing rules. Many scholars in Ethiopia have highlighted to the particular challenge of standing rules of the Ethiopian legal system and how legal changes are need to give way for the effective implementation of human rights protected in the Constitution. The discussion on procedural rules and the impact they have on strategic litigation of human rights is critical because of its ultimate relation with access to justice, which is considered as one of the foremost fundamental rights of individuals. Access to justice will be significantly hampered if the procedural laws of states do not adequately allow for potential litigants and victims to approach courts to seek justice.[28]

The subsequent sub-articles in Article 37 on access to justice also provide little support to broader standing power, especially in relation to cases of strategic litigation on human rights. Article 37(2) (a) provides that any justiciable matter may be brought by "Any association representing the Collective or individual interest of its members". This clause allows members of an association such as trade unions or other members an association who have the same legal interest to be able to have access to justice representing the interest of their group. A similar clause is provided in article 37(2)(b) which provides that "any group or person who is a member of, or represents a group with similar interests" can bring justiciable matter to a court of law. Article 37(2)(b) seems to include class action cases, in which if affected individuals have

[28] See Chi Mgbako et al, Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and Its Impact on Human Rights, 32 Fordham International Law Journal (2008).

the same legal interest in which the relief sought is also similar, they can bring any justiciable matter to a court of law. One can also find a similar provision in article 38 of the Civil procedure Code which allows individuals to be represented by one or more persons to ensure their interests if they have "the same interest".[29] But these provisions do not fully address the problem confronted by rights groups and CSOs that advocate for social justice and who do not have a direct vested interest in the case. As will be demonstrated below, legal developments in comparative jurisdictions show that requirements for standing in human rights strategic litigation should be more open. In many jurisdictions including the African Commission on Human and Peoples Rights have endorsed the principle of *actio popularis,* allowing NGOs, particularly rights groups to act in public interest and submit cases on behalf of victims of human rights. The Constitution should also be interpreted more openly in line with these comparative legal developments that allow for more open standing rules in cases of strategic human rights litigation.

3.2. The Civil Procedure Code of Ethiopia and Standing Rules *(Locus Standi)*

The Civil procedure Code of Ethiopia adopted in 1965 has been an enduring legal document that regulates complex and detailed rules of litigation and the court system of Ethiopia in general.[30] While the relative stability of the law has provided a solid and predictable basis for the legal system of Ethiopia providing detailed rules on civil litigation, most scholars on human rights also point out that it continue to create a number of challenges for the judicial application of human rights including in strategic litigation cases. Moreover, the Civil Procedure Code did not take into account the development the human rights regime including the adoption of the 1995 Constitution of Ethiopia which significantly broadened the scope of protection of human rights. Legal development after the 1960s in international and comparative law also favored a broader standing requirements that paved the way for a robust strategic human rights litigation. Although there have been some attempts to change the Civil

[29] See also 38 of the Civil Procedure Code.
[30] Civil Procedure Code of Ethiopia, 1965.

Procedure Code, it has not been successful and the code continues to govern all civil matters including the way human rights are litigated in Ethiopia.

Standing rules in any legal system are critical to the way how victims and applicants present their case to a court of law, and are as such vital to ensure access to justice. The Civil Procedure Code of Ethiopia provides the standing rules in Art 33. The Civil Procedure Code in article 33 provides as follows :

> *Art. 33.- Qualifications*
> *(I) Any person capable under the law may be a party to a suit.*
> *(2) No person may be a plaintiff unless he has a vested interest in the subject-matter of. the suit.*
> *(3) No person may be a defendant unless the plaintiff alleges some claim against him.*[31]

Most scholars that study the application of human rights strategic litigation in Ethiopia point out that this provision is one of the major reasons that continues to undermine the possibility of litigating human rights strategic litigation for many reasons.[32] In particular, the provision which states that "no person may be a plaintiff unless he has a vested interest in the subject-matter of the suit" has been considered as the most problematic for bringing human rights strategic litigation cases in Ethiopia. Moreover, scholars argue that the rule of the Civil Procedure Code that an applicant should demonstrate a personal vested interest in particular case also applies to cases not just in ordinary courts but also in the House of Federation and the Council of Constitutional Inquiry, which are the main organs that decide in constitutional disputes.[33] The findings of our data also shows that 85% the respondents indicated that article 33 of the civil procedure presents a greater difficulty for strategic litigation.

Article 33 of the Civil procedure Code is problematic for a number of reasons. Scholars argue that the Civil Procedure Code does not seem to make any differentiation on private issues in which the litigants are private persons involving ordinary civil cases and human rights cases which by their nature are of a different nature that usually implicate state failure to protect

[31] Article 33 of the Civil Procedure Code of Ethiopia, 1965.

[32] See Yenehun Birle, Public interest Environmental Litigation in Ethiopia, 11 Mizan Law Review (2017).

[33] Ibid.

human rights. According to article 33(2), only a person who has a legal interest in the outcome of a lawsuit may be a party to the suit. Strategic litigation on the other hand often involves bringing lawsuits on behalf of the public without showing a vested interest. Mr. Ameha also State that that, the Civil Procedure code, specifically article 33, may pose challenges for the effective use of strategic litigation in Ethiopia.[34] The requirement of vested interest in the subject matter of the suit can limit the scope of strategic litigation, which often aims to address broader systemic issues and promote social change rather than solely benefiting an individual litigant.

Although it is difficult to provide a comprehensive definition of what a *vested interest* entails in legal parlance, some attempt in providing a definition meaning to it, would be helpful. The simple meaning of it seems to cover individuals or group of whose rights or interests are directly affected or threatened to be affected. The comparative case law and jurisprudence of some states may give guidance to the meaning of vested interest. In this regard the High Court of Australia in the *Australian Conservation Foundation Inc v The Commonwealth* has provided some key elements of the meaning of what it means to have *vested interest i*n particular case. It noted that interest:

> does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or lose some advantage, other than a sense of grievance or a debt of costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law should be observed, or that a conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi.[35]

The case of APAP v Ethiopian Environmental Authority is one of the leading cases in relation to how standing rules can have a huge impact on strategic litigation.[36] APAP, a non-governmental

[34] Interview conducted with Mr. Ameha Mekonen, executive director of Lawyers for Human Rights, September 20/2023

[35] Australian Conservation Foundation Inc v The Commonwealth (1980) 146 CLR 493.

[36] Action Professionals' Association for the People (APAP) v. the Ethiopian Environmental Authority (APAP v. EPA)

organization lodged a complaint to the Federal First Instance Court alleging that the Akaki and Mojo rivers were polluting the environment though the discharge of liquid and solid waste by factories in Addis Ababa. APAP based its arguments based on Art 37(2) of the Constitution and Art 11 of the Pollution Control Proclamation. The Federal First Instance Court rejected the case arguing that it had no vested interest in the case and that the action can only be brought against direct polluters not the Authority.[37]

The above restrictive rule which applies in most jurisdictions seems to be motivated by two policy rationales. First courts are normally wary of allowing a broad or unlimited access to individuals or groups because it becomes unmanageable for them to handle cases efficiently. The desire for economic efficiency means that they prefer strict rules who can be part of the litigation process of courts. Second, they also insist that any juridical action should focus on a preventing or compensating a real injury sustained by a an individual or group of individuals. This legal understanding had led many jurisdictions to confine the standing rules to those that have only vested interest in a case. In South Africa, before the adoption of the Constitution, courts did not allow individuals to challenge administrative and state action that affect public interest. The law required that applicants or victims need to demonstrate that they have sustained loss or damage which is "personal, sufficient and direct".[38] In similar vein, The standing rules of Germany, limited only to individuals that can show that their personal rights have been violated, and does not extend to a those based on public interest. The standing rules of the United Sates also stipulate a similar requirement that the applicant should demonstrate a "private right" and personal interest to be able to assert a legal claim.[39]

Nevertheless, these strict rules of standing do not reflect current legal developments in international and comparative law. The development of the concept of strategic human rights litigation has challenged these traditional statutory procedural limitations to allow for more open rules of standing in cases that involve public interest cases. Jurists point out that the

[37] Ibid.

[38] Adem, Towards More Liberal Standing Rules in Ethiopia, above, p. 411.

[39] Ibid.

traditional standing rules are 'highly individualistic, concerned with an atomistic justice, incapable of responding to the claims and demands of the collectivity, and resistant to change'.[40] The fact that strategic human rights litigation usually addresses the collective interests of marginalized communities who have limited access to justice. In particular in most African states including Ethiopia, the difficulty of access to justice for vulnerable groups requires interest groups such as NGOs rights advocates and human rights defenders to states the need to have broader and flexible procedural laws that allow for strategic human rights litigation.

Because of this there is more recognition on the importance of having more flexible and broader rules of standing by many jurisdictions. The Indian Supreme Court experience shows that the court has allowed public interest cases by giving broader interpretation of standing rules. For example in the case of *SP Gupta v Union of India (1981) SCC 87 210*, the Indian Supreme Court provided the key rationale why a broad standing requirement is need in cases involving public interest in strategic litigation cases.[41] The court noted that marginalized communities that are "unable to approach the Court for any relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under article 26 and in case of any fundamental right of such person or class of persons, in this Court under article 32 seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons."[42]

These policy rationales have prompted the Indian Supreme Court to allow for more open and generous standing rules. Under current rules of standing of the Supreme Court of India, individuals who can show that they have genuine interest in the case, even if they do not have direct interest in the case can file a case. This has allowed for marginalized groups to be

[40] PN Bhagwati 'Judicial activism and public interest litigation' (1984-1985) 23 Colombia Journal of Transnational Law 561 570.

[41] SP Gupta v Union of India (1981) SCC 87 210.

[42] Ibid.

resented by *bona fide* applicants on their behalf to file case and litigate public interest and strategic litigation cases.

In similar vein the South African Juridical system standing rules have been significantly changed since the introduction of the Constitution of South Africa in 1994. As Jason Brickhill notes:

> The constitutional era saw the liberalisation of standing. Apart from standing to act in one's own interests, the Constitution affords standing to those acting on behalf of another person who cannot act in their own name, those acting in the interest of a group or class of persons, anyone acting in the public interest and an association acting in the interest of its members. Associational standing and public interest standing enable strategic litigation to be instituted by a broader range of parties.[43]

Moreover, the standing rules of the South African Courts also allow for a more open and broader access to *amicus curiae*. The purpose of admitting amicus briefs is to allow courts to have a broader grasp of the factual issues and debates in the case, and there by allowing courts to give more reasonable decisions in the process. This is all the more significant when it comes to strategic litigation cases "given their potential to serve as 'radical outliers', to provide an alternative legal solution to difficult cases, or to fill gaps".[44]

The openness in standing rules of many jurisdictions as outlined above clearly indicates a major shift towards the traditional forms of litigation that used to provide strict rules of standing. The desire for the broader interpretation in terms of changing the standing rules was clearly required by the inadequacies of these rules to allow strategic litigation particularly on human rights issues. The recognition on the importance of broadening the standing rules in relation to strategic of human rights has been also outlined by international guiding principles and norms as well as the African Commission on Human and People's Rights. The International Principles

[43] Jason Brickhill, Strategic Litigation in South Africa, p. 30 citing *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* 2013 (3) BCLR 251 (CC) [32]-[43]; Constitution, s 38, mirroring interim Constitution, s 7(4). See *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC).

[44] See Steven Budlender, Gilbert Marcus and Nick Ferreira, *Public Interest Litigation and Social Change in South Africa: Strategies, Tactics* and Lessons Atlantic Philanthropies 2014); SERI, 'Public Interest Legal Services in South Africa: Project Report' (RAITH Foundation, Ford Foundation 2015).

and Guidelines on Access to Justice for Persons with Disabilities emphasizes on the importance of broadening standing rules by calling on states to:

> Ensure that complaint systems and the justice system are capable of detecting and responding to grave, systematic, group and large-scale violations of human rights through, for instance, class actions, *actiones populares*, public inquiries and prosecutions, following a complaint or on the initiative of the system itself;" [45]

Similarly, the African Commission has adopted a liberal standing rule to allow not just the victims but also NGOs and other groups to appear before the Commission and present cases that involve violations of human rights. The Commission adopted the doctrine of *Actio Popularis* (acting in public interest) to allow for a broad range of actors to litigate cases involving human rights.[46] The most remarkable aspect of the standing rule under the Commission is that NGOs even those NGOs not registered in the state parties jurisdiction can bring human rights cases to the Commission. This was evident in the case of Haregeweyn Gebresellasie v Ethiopia, one of the few cases decided by the Commission against Ethiopia. The case was brought by the Derg officials who were prosecuted for genocide and crimes against humanity during Ethiopia's terror trials, but who were subjected to unreasonable delay in the prosecution process in violation of the African Charter, Article.[47] In this case, the Case was brought by a Gambia based NGO against Ethiopia. In rejecting Ethiopia's claim that the NGO representing the Derg Officials, the Commission noted that :

> "The African Commission notes that neither the African Charter nor the Rules of Procedure of the Commission makes provisions on the locus standi of parties before it. The Commission has however, through its practice and jurisprudence adopted the actio popularis principle allowing everyone the legal interest and capacity to file a Communication, for its consideration. For this purpose, non-victim individuals, groups

[45] The International Principles and Guidelines on Access to Justice for Persons with Disabilities (2019), available at OHCHR https://www.ohchr.org/en/special-procedures/sr-disability/international-principles-and-guidelines-access-justice-persons-disabilities, principle 8(2)(h) .

Morten P. [46] Pedersen. Standing and the African Commission on Human and Peoples' Rights, 6 *African Human Rights Law Journal* (2006): 407.

[47] Haregewoin Gabre-Salessie and IHRDA (On Behalf of Derg Officials) v Ethiopia, Communication No. 301/2005.

> and NGOs constantly submit Communications to the Commission. Thus, the Commission upholds the argument of the IHRDA on their capacity to approach the Commission in its capacity as an organisation with an interest in the protection and promotion of human rights in Africa under the *actio popularis* principle."[48]

There are a number of reasons why the Commission allowed for more liberal standing rules with regard to human rights litigation cases. The glaring difficulty of victims and marginalized communities to access justice in Africa is profound. The idea that only the victim should bring cases to the Commission will be counter-productive to the Commission's mission of ensuring respect for human rights in the state parties to the African Charter including Ethiopia. In this regard the Commission outlined the policy reason why NGOs and other entities should be allowed to stand before the commission representing victims by noting that the "characteristic of the African Charter reflects sensitivity to the practical difficulties that individuals can face in countries where human rights are violated. The national or international channels of remedy may not be accessible to the victims".[49]

As can be clearly seen from the above discussion, legal developments on standing and access to justice in international and comparative law demonstrate that strict rules of standing as provided in the Civil Procedure Code cannot be sustainable to cases involving strategic litigation of human rights cases. It is thus, imperative to explore the applicability of the Civil Procedure Code including article 33 in line with current developments in international and comparative law that clearly allow for more open and flexible rules of standing so that NGOs, rights groups, public interest litigators and others can have access to the courts to seek remedy for violations of human rights of victims and act in public interest. Moreover, the strict requirement of vested interest in the Civil Code and its constitutionality and legality in respect of cases involving strategic human rights litigation c can be challenged constitutionally.

The adoption of the Constitution of Ethiopia in 1995 and the inclusion of the provision on Access to Justice in article 37 was meant to address these short comings. If one closely looks

[48] Ibid, para. 61.

[49] Ibid, para. 62.

article 37, it stipulates that 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." Unlike the Civil procedure Code, which requires that applicants should have a vested interest, there is no parallel stipulation in article 37 of the Constitution. Scholars argue that article 37 should be interpreted to allow for NGOs and other groups to have the right to represent victims and present their cases in court.[50] Moreover, since article 13(2) allows for interpretation of the provision in light of international human rights instruments, a broader interpretation is required as we have seen that international human rights instruments and comparative experiences show a more broad standing rules that allow for strategic litigation of human rights.

This understanding seems to have also partly influenced the recently adoption of Federal Courts Proclamation 1234/2021 which came up with more broader standing rules in relation to cases involving strategic litigation of human rights cases. The subsequent discussion on the Federal Courts Proclamation will demonstrate why the newly adopted standing rules are encouraging for the use of strategic litigation on human rights.

3.3. Federal Courts Proclamation No. 1234 /2021

A more recent legal development that should also pave the way for increased involvement of courts in the justiciability of human rights is revised Federal Courts Establishment Proclamation No. 1234.[51] The proclamation gives new ground for the judicial protection of human rights in Ethiopia. First the proclamation in article 6 gives a clear mandate for the courts to invoke the human rights protected in the Constitution as well as to international treaties to which Ethiopia is a party. Article 6(1) reads as follows :

> Art 6: Substantive Laws to be Applied by Federal Courts
> 1. Federal Courts shall settle cases or disputes submitted to them within their jurisdiction on the basis of :
> a. the constitution, Federal laws and International Treaties to which Ethiopia is a party;

[50] Article 37 of the Constitution of Ethiopia.

[51] Federal Courts Proclamation 1234/2021.

The above provision settles a long-standing lack of clarity and confusion on the place of international treaties, in particular international human rights treaties in Ethiopian courts. Previously, judges, lawyers, and legal scholars argued that there was no legislative basis to make direct application of international human rights treaties. They argue that for international human rights treaties to be applicable, they need an enabling legislation that would make them applicable at the domestic level by Ethiopian courts. Because of this, the fact that the revised Federal Courts Establishment Proclamation allows courts to apply directly international human rights treaties is a major step that could also be instrumental on the justiciability of human rights in Ethiopia.

Mr. Ameha states that, proclamation No. 1234/2021 made a breakthrough in strategic litigation and underwent certain amendments, one of which pertains to the modification of article 33 within the civil procedural law. This particular amendment brings a noteworthy change by eliminating the requirement of vested interest on a suit, as mandated by the Civil Procedure Code.[52] However, it is important to note that the amendment introduces a new requirement in its place, namely the necessity of demonstrating a sufficient reason. Although the amendment acknowledges the need for showing a sufficient reason, the legislation itself does not explicitly outline the precise criteria or factors that would qualify as sufficient reasons. This absence of clear guidance within the law leaves room for interpretation and may lead to varying interpretations among legal practitioners, judges, and litigants. Mr. Dan Yirga, Executive Director of the Ethiopian Human Rights council (EHRCO) also emphasized the importance to improving standing rules in order to ensure effective protection of human rights. For instance, article 11 of Federal court establishment Proclamation should be clarified to establish clear guidelines regarding standing in human rights cases.[53]

The adoption of this proclamation is important in that the scope of liberalizing the standing condition is extended to issues related to the protection of Fundamental Rights and Freedoms,

[52] Interview with Mr Ameha Mekonen, Executive Director of Lawyers for Human Rights, interviewed on September 26 2023.

[53] Dan Yirga, Excutive Director of the Ethiopian Human Rights Council interviewed on September 18/2023

Unlike the Environmental Pollution Control Proclamation which limited the liberalization to only environmental pollutions. According to Mr. Melkamu, this proclamation has attracted various CSOs and public interest litigants to engage in practicing strategic litigation. For example, on the basis of this proclamation, Lawyers for Human Rights (LHR) initiated public interest litigation in some cases including a strategic litigation on street children in Addis Ababa and the lack of protection afforded to them by the state.[54] Other CSOs have also initiated strategic litigation to defend the environment in Ethiopia. For example, Defend the Environment has brought some cases on cases related with environmental protection against Addis Ababa city Administration.

The Revised Federal Courts Proclamation article 11 further provides additional impetus for the justiciability of human rights. This provision is important for two reasons.[55] First article 11(3) further complements article 6 by proving that "…the Federal Hight Court may render decision, judgement or order in order to protect justiciable human rights specified under chapter three of the Constitution".[56] Article 11 which deals with the first instance jurisdiction of federal courts, makes it clear that it is incumbent on the court to apply justiciable human right protected in the constitution. However, a question may be raised on what the meaning of justiciable human rights means within the meaning of article 11(3).

As discussed in the aforementioned sections of the paper, there is nothing in the constitution that bars courts from making all human rights justiciable. The structure of the Constitution does not indicate any differentiation in terms of the justiciability of human rights. The second reason why article 11 is important is in sub article 4, it provides for public interest litigation to be introduced in Ethiopia, which was problematic before the introduction of this law. Article 11(4) provides, that "any person who has vested interest or sufficient reason may institute a suit before the Federal High Court to protect the rights of his own or others."[57] The fact that the

[54] Interview with Melkamu Ogo, Executive Director of Stand for the Environment, Interviewed 19 September 2023.

[55] See Federal Courts Proclamation No. 1234 (2021).

[56] Art 11(3) Federal Courts Proclamation No. 1234 (2021).

[57] Art 11(4) Federal Courts Proclamation No. 1234 (2021).

provision allows any person with sufficient reason to file a legal suits, means that rights groups and public interest groups including CSOs should be allowed to have the right to standing in cases of human rights, in particular those relating to the strategic litigation of human rights. If this interpretation is adopted, Ethiopian courts makes will be more accessible, since NGOs, and legal experts can represent individuals that are collectively affected by violation of human rights can be represented in courts.

Despite the relative relaxation of standing in relation to basic human rights under federal courts proclamation No. 1234, cases that are filed before the Federal High Court are very few or non-existent except in the above-mentioned few cases. According to Mikael, a lawyer in human rights cases, the requirements of **"**sufficient reason**"** under article 11(4) of the proclamation also preclude CSOs and individuals from instituting a suit against right violators, as it seems to put another burdened to prove the existence of sufficient reasons for a strategic litigant. Another lawyer Mr. Amanuel, further argues that giving the High Court the power to hear public interest litigation limits the right to appeal.[58] Ms. Eyerusalem, a judge at the first instant court on the other hand disagreed with this assertion, arguing that human rights and strategic litigation cases are complex and involve large amounts of material jurisdiction. She therefore believes that giving the federal high courts the power to hear these cases is the right decision, as the judges in the high courts have relatively better competence and expertise than judges at the first instance court.[59]

3.4. Other Legislative Basis for Strategic Litigation of Human Rights in Ethiopia

Although the above laws largely regulate issues related with standing and the procedural requirement of strategic litigation in Ethiopia, there are also other legislative grounds that need to be looked into in order to use the strategic litigation of human rights effectively. The first proclamation that contains the issue of strategic litigation is Proclamation No. 300/2002 of the Environmental Pollution Control proclamation. Under article 11 of the Proclamation, it allows

[58] Amanuel Debabe, phone interview on September 18/2023

[59] Inteview with Judge Eyerusalem Fentabe, Judge of the Federal First Instance Court in Bole, Interview conducted on 16 September 2023.

individuals to bring cases if they sustain any form of environmental pollution. Subsequent to the promulgation of this proclamation, the first CSO that used strategic litigation is the Action Professionals Association for People (APAP), which instituted a legal suit against the Ethiopian Environmental Protection Authority on its failure to protect from environmental pollution. But the case was dismissed by the Federal First Instance Court on preliminary objection stating that APAP has no vested interest in the particular case. Both the appellate court and the cassation bench of the Federal Supreme Court of the Country have affirmed the decision of the lower courts.[60]

Since the above-mentioned APAP case, neither public interest litigants nor any CSO has not practised strategic litigation cases. However, a local CSO, Stand for the Enrolment has been instituting legal proceedings representing victims of environmental pollutions. The founder of Stand for the Environment, Melkamu Ogo, who litigates strategic litigation on environmental issue lodged to Environmental Protection Authority for administrative remedy as per article 11 of the Environmental Protection Authority.[61] Following this case, Defend the Environment has filled various PIL cases against pollutants, including Addis Ababa Abattoirs and Addis Ababa City Administration Gulele Sub City Trade and Industries Bureau.[62] These legal developments can provide a new path for strategic litigation of human rights in Ethiopia.[63]

The second proclamation that provides opportunity for strategic litigation is the Federal Courts Advocates Licensing and Registration Proclamation No. 199/2000. The Proclamation is repealed by the new Federal Advocacy Service Licensing and Administration Proclamation No. 1249/2021. The revised proclamation allows for special advocacy license to be issued to

[60] APAP v. Ethiopian Environmental Authority, Federal First Instance Court, file No.64902, 2007 (1999 E.C), APAP v. EPA, Federal High Court, File No. 51052, Judgment rendered on the 12th of June 2008, APAP v. EPA, Federal Supreme Court Cassation division, File No.39779, Decision of 3 December /2008

[61] Interview with Mr Melkamu Ogo, above.

[62] Ibid.

[63] Ibid.

lawyers who seek to defend the general interests and rights of the public.[64] Interestingly, the law provides less rigorous requirements for obtaining such a license than the other types of licenses. Applicants for this license are exempted from some requirements such as furnishing of evidence of professional indemnity insurance and sitting for the advocacy entrance examination. Additionally, any person who has an advocacy license can render advocacy service to defend the general interest and rights of the society without holding a special advocacy license as long as he delivers *pro bono* service. However, a person has to notify the Ministry of Justice before rendering such service. Melkamu Ogo argues that the flexibility of the law about special license emanates from its intention to protect the general interest and the rights of the public.[65] However, according to Mr. Mickael a lawyer who has experiences in public interest litigation, this provision of the law is not used because of the misunderstanding of lawyers of that the *pro bono* services in the Proclamation only refers to individual cases.

Mr. Melkamu Ogo, notes that the misunderstanding of the provision is not only within the lawyers but also within the authority who grants special licences. In the previous Proclamation for instance even though the power to grant special license is given to the Ministry of Justice, the Ministry didn't issue a directive on the details of how the license is issued. Mr. Melkamu also notes that, because of the directive was not issues, his application for such a license was rejected by the Ministry. The response from the questionnaires also reveals that there is a Lack of awareness of strategic litigation among lawyers. Moreover, the lack of any incentive and encouragement from the Ministry of Justice to lawyers to discharge their commitments *of pro bono* services and public interest litigation has had its own negative on the possibilities for strategic litigation of human rights.

Another possibility for statutory use of strategic litigation of human rights is to use the mandate of the Council of Constitutional Inquiry and the House of Federation. Constitutional law scholars argue that the House of Federation is given the power to settle constitutional disputes that clearly indicate repugnance with the constitutional norms. But this does not undermine the

[64] Article 14 Proclamation No. 1249/2021

[65] Interview with Eyereusalem Fantabil, above.

power of courts to apply human rights norms. Moreover, constitutional law scholars argue that the House of Federation is given the power to settle constitutional disputes that clearly indicate repugnance with the constitutional norms. For example if a law or regulation is repugnant to the constitution and needs to be invalidated, the House of Federation will be more suited to decide on these matters.

In relation to the rules of procedure including on standing to present a case before the Council of Constitutional Inquiry and the House of Federation, there are some points of discussion that need to be clarified. Article 4 of the Proclamation to Re-enact fort the Strengthening and Specifying the Powers and Duties of the Council of Constitutional Inquiry provides that "when constitutional interpretation on issues before courts of law arise, the court or the interested party may submit the issue." Similarly, article 5 provides that "any person who alleges that his fundamental rights and freedom" has been violate can bring a case to the Council. Moreover, the Constitution provides some guidance on who can bring case for constitutional interpretation to the council. But some guidance may be found in Article 84(2) of the Constitution which provides that "any court or interested party" can submit a case for constitutional interpretation. As can be inferred, the Council seems to allow for a boarder standing requirement than the Civil Procedure Code in cases that require Constitutional interpretation. Scholars argue that the word "interested party" should be interpreted to not just the litigants in a particular case, but also other interested parties that will directly or indirectly be affected by the outcome.[66] The rules of procedure as well as the working method of the Council should reflect this interpretation in relation to standing issues related with Constitutional interpretation.[67]

The Proclamation to Provide for Federal Administrative Procedure No. 1183/2020 also provides some supportive provisions in terms of access to justice for administrative complaints brought by affected individuals. Article 48 of the Proclamation which provides on the procedure of

[66] See Adem Abebe, Towards More Liberal Standing Rules, above.

[67] Ibid.

filing of Petition for judicial review provides that "any interested person may file a petition requesting a judicial review of a directive." The subsequent reference in article 48(2) "anyone whose interest is affected by an administrative decision may file a petition requesting judicial review" indicates that the reference in Article 48(1) includes not only include individuals whose rights are affected directly but to those that have interest in the case, which should reasonably include human rights and public interest litigants and organizations.

3.5. Evidentiary Rules and Standards

The presentation of evidence and the ability of applicants to provide a broad source of evidence also determines the possible outcome of the case. The weight and strength of a legal argument will not suffice in order to attain a positive outcome in a litigation if the requisite evidence is not adequately presented to the court. The fact that the nature of strategic litigation of human rights by its nature is different from individual cases of litigation also calls for some discussion on how the rules of evidence apply to strategic human rights litigation in Ethiopia.

Ethiopian law does not have a separate law governing the rules of evidence. This does not mean, however, that there are no rules that govern the presentation of evidence in civil cases. The civil procedure code as well as the cassation decisions of the supreme court guide the rules applicable in relation to civil cases, including arguably cases involving strategic litigation of human rights. The relevant provision of the Civil Procedure Code that govern the rules on the presentation of evidence are provided in various provisions of the Civil Procedure Code. The most important ones includes Art 137 which reads:

> Art. 137.- Documentary evidence when to be produced
> (I) The parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely….

The scope of documentary evidence to be presented to the court according to Art 137 seems to include a broad range of evidences. The rule seems to be that they should be relevant to the case that is being litigated.[68] Both the wording of Art 137(1) and the subsequent provision in

[68] See Art 137 of the Civil Procedure Code of Ethiopia, 1965.

Art 138 indicates that the court will only decline if the evidence presented is "irrelevant or otherwise inadmissible".[69] It is not clear what the rules of admissibility of a documentary evidence are from the provision of the law, but the requirement that the documents presented should be relevant can be taken as a good ground to allow for a broad evidentiary basis in cases including strategic litigation of human rights. Similarly the Civil Procedure Code in Art 223 provides that a party to a suit can provide a list of the names and addresses of the witnesses that can testify in the case. The requirement in Article 223 seems to be that the statement of claim should indicate "the purpose for which [the witnesses] are to be called". Moreover, Art 264(2) provides the Court with additional powers to examine any additional witnesses if it deems necessary. Art 264(2) reads :

> Where the court considers it necessary at any time to examine any person other than a party to the suit and not called as a witness by a party to the suit, it may of its own motion summon such person as a witness to give evidence or to produce any document in his possession on a day to be fixed and may examine him as a witness or require him to produce such evidence.[70]

Moreover, the subsequent provisions of the Civil Procedure Code, article 265 and article 266 also allow further flexibility for courts to call additional witnesses and to recall and examine witnesses respectively. These provisions can be helpful to allow some flexibility for presenting g evidence and witnesses to the court in strategic litigation cases.

However, it is arguable whether these provisions are adequate and provide the required flexibility to allow the presentation of amicus briefs which is vital to the effectiveness of strategic of strategic litigation of human rights cases. A number of questions may be raised in relation to whether the current rules as indicated above and as the practice of the courts allow for a broad range of evidence in cases involving strategic litigation of human rights. It should also be noted that the nature of evidence presented in strategic human rights litigation in some cases may require a different approach. Because the major objective of strategic litigation is to demonstrate a certain form of state behavior such as persistent violation of human rights of a

[69] Ibid.

[70] Art 264(2) of the Civil Procedure Code of Ethiopia 1965.

specific issue such as torture or environmental pollution, or some form of social injustice such as the issue of street children and their desperate condition that call for a coordinated action of government.

As such, the basis of the evidence presented may be different in individual cases of litigation that largely relies on isolated incidents and events and the demonstration of the evidence also focuses on proving a particular incident. For example in the recent strategic human rights litigation case that we presented to the Federal High Court Human Rights Bench in *Lideta*, one of the key issues that we confronted was in relation to this issue.[71] One of the claims that we made in relation to the state was that, the use of inappropriate methods to remove and detain street children by police during diplomatic visits of foreign leaders and the AU meeting of Heads of States. In order to prove this, we presented evidence of such form of state conduct in many occasions as reported in different formal news outlets as well as the report of the Ethiopian Human Rights Commission. But the state objected this by arguing that the Applicants did not present concrete evidence of when and where these violations were conducted and asked the court to decline to accept the evidence.[72] While the outcome of this case is ongoing, it is important to note that Courts should be more flexible in accepting these kinds of evidences. The objective of presenting the evidence in this particular case was to demonstrate that there is a particular state conduct or behavior that should not be repeated and for which we sought declaratory judgment. It does not matter to show whether a particular law enforcement official did something on a particular date and particular place.

Second the rules of evidence do not clearly show whether they allow for expert witnesses to be presented in court. This is particularly important issues as most strategic human rights litigation cases would require a detailed explanation of the issues presented to the court, which often require expert testimony. In this regard, it is encouraging to see that the practice of Ethiopian courts has been more open to accept the presentation of expert witnesses. Recent cases in the Federal courts shows that courts have been generous not only in allowing expert

[71] Lawyers for Human Rights v Ministry of Women and Social Affairs and Others, File No. 300824.

[72] Ibid.

witnesses to explain the factual issues related with the case but also in some cases, providing detailed explanation of the scope and applicability of human rights such as freedom of expression and other rights. This is a welcome development to allow the use of expert testimony in strategic litigation of human rights in the Federal courts.

Moreover, some legislative developments in Ethiopia seem to indicate that courts and quasi-judicial institutions should have a broad source of evidence and information that will allow them to reach at sound and reasonable decisions. For example, the article 9(1) of the Proclamation to Re-enact fort the Strengthening and Specifying the Powers and Duties of the Council of Constitutional Inquiry provides that the council may call "upon pertinent institutions or professionals, to appear before it and give opinions". The subsequent sub-article, article 9(2) further provides that the Council may "when it deems for investigating constitutional cases, the Council may require the presentation of any evidence or professional to examine the same." These provisions are better framed in terms of allowing rights groups and CSOs to present amicus briefs in cases involving strategic litigation of human rights.

The findings of our data collected from interviews and questionnaires also shows additional challenges in relation to the presentation of evidence in strategic ligation of human rights. 70% of our respondents mentioned that the lack of well-organized strategic litigation centred evidence law is one of the key challenges for strategic litigation. The following are some of the specific challenges mentioned by respondents in relation to hearing and presentation of evidence in strategic human rights litigation:

- In strategic litigation the opposing party has significant resources. In human rights strategic litigation cases the defendant is often the government or a powerful corporation. This means that the opposing party have significant resources to challenge the evidence and delay the proceedings. Nevertheless, there is no evidence rule that helps the strategic litigants, for instance by shifting the burden of proof from plaintiffs to defendants or well-structured system that allows for access to sources of evidence.[73]

[73] Meron, Ethiopian Women Lawyers Association interviewed on September 20/2023

- The evidence presented in strategic cases often involves sensitive or confidential information. In human rights cases, the evidence may involve personal information about victims of human rights abuses, or sensitive information about government activities. This can make it difficult to collect and present the evidence without putting witnesses at risk or compromising government security.
- The defendants could also destroy important source of information and evidence. In some cases, the evidence of human rights abuses may be difficult to collect because it is hidden or destroyed by the perpetrators or state agents. In other cases, the evidence is located in remote or dangerous areas or under government control which makes access to the evidence extremely difficult.
- To solve these challenges our informants stated that, in the presentation of evidence, both direct and indirect evidence should be considered. However, human rights issues often involve complex legal and factual issues. Therefore, it is crucial to take into account the unique nature of human rights cases in considering the presentation of evidence in the courts. In order to address these complexities, the involvement of amicus curiae, plea bargaining and expert witnesses should be introduced into our legal system. Amicus curiae, or "friend of the court," can provide valuable insights and expertise to assist the court in understanding the broader implications of the case. Expert witnesses, on the other hand, can offer specialized knowledge and analysis relevant to human rights violations. Moreover, the idea of equality of arms in the judicial process which intends to give equal opportunity in the presentation of arguments and evidence is an indispensable element of strategic litigation.

Nevertheless, our research findings indicate that there are a number of factors that hinder the effective application of this principle. As Meron from EWLA notes, still strategic litigation by its nature is very challenging and complex legal process in which the litigant may not have a direct interest in the case, whereas the defendant on the other hand most of the time involves a powerful sate or private company that has all the leverage to counter such claims.[74] Moreover, the process of gathering evidence is very difficult as access to information and sources of

[74] Meron from the Ethiopian women Lawyers association interviewed on September 20/2023

evidence is extremely difficult . For instance, in some legal proceedings by Defend the Environment, an official request for access to publicly held data and information from the Addis Ababa City Administration was declined. The applicant resorted to other means to present its evidence in a court of law.

A significant number of the interviewees and more than 55 % of our respondents share the view that the role of judges in the presentation of evidence should be flexible to ensure a fair trial. Instead of passively receiving evidence, judges should take an active role, seeking clarification when evidence is unclear. This proactive approach by judges can help ensure that all relevant information is properly examined and considered. Judges can play a role in gathering evidence and ensuring a thorough examination of the facts, keeping in mind the power dynamics and potential obstacles faced by victims. According to our respondents, by adopting such flexible and proactive approach including allowing access to *amicus curiae* and expert witnesses, the legal system can better accommodate strategic litigation of human rights. According to Mr. Usman, a lawyer at MOJ, these measures contribute to a more robust and equitable process, ensuring that victims have a fair chance to present their cases and seek justice.[75]

3.6. Remedy

As data through both questionnaires and interviews reveals, the current substantive law for moral damages in cases of human rights violations is inadequate, as it imposes a fixed amount of 1000 birr regardless of the severity of the violation.[76] This represents a significant gap in addressing aggravated human rights violations. Human rights violations can have far-reaching consequences, causing physical, emotional, and psychological harm to the victims. The fixed amount fails to account for the gravity of the violation and the resulting impact on the individuals affected. Victims often require support and adequate assistance to recover from the trauma they have endured. Rehabilitation funds for victims could provide access to medical

[75] Interview with Mr Usman, a public prosecutor at the Ministry of Justice, September 28/2023.

[76] This position seems to emanate from the provisions of the Civil Code Art 2116 (3) which provides that "the compensation awarded for moral injury may in no case exceed one thousand Ethiopian dollars".

care, counselling, vocational training, and other essential services that aid in the recovery and reintegration of survivors. Another issue is the absence of clear guidelines on the types of remedies that should be provided and how they should be administered. This lack of clarity creates ambiguity and inconsistency in addressing human rights violations, resulting in uneven outcomes for victims seeking justice. It is crucial to establish comprehensive guidelines that outline the range of remedies available, taking into account the diverse needs of victims and the circumstances of each case.

According to Mr. Ameha Mekonen, Executive Director of LHR "the substantive law challenges for strategic litigation in Ethiopia primarily revolve around the availability and clarity of legal provisions that specifically address remedies for government violations of human rights. Strategic litigation involves using the law to bring about social change and protect individuals' rights."[77] However, in Ethiopia, there are gaps in the substantive legal framework that make it difficult to engage in strategic litigation effectively. One key challenge is the absence of explicit legal provisions that clearly state the remedies available for acts that violate human rights committed by the government. This lack of clarity can create uncertainties for litigants seeking to pursue strategic litigation and can hinder their ability to advocate for appropriate remedies and seek justice for the violations they have suffered. Additionally, the substantive law contain gaps, inconsistencies, or outdate provisions that do not adequately address emerging human rights issues or which do not align with international human rights standards. This can limit the effectiveness of strategic litigation in challenging government actions or policies that infringe human rights.

These challenges in the substantive law can undermine the ability to hold the government accountable for its actions and obtain redress for victims of human rights violations through strategic litigation. Addressing these challenges requires legal reforms that involve reviewing and amending existing laws to ensure they provide clear and effective remedies for human

[77] Interview with Mr Ameha Mekonen , above.

rights violations. Moreover, Mr. Fantahun, a lawyer in EWLA notes that the remedies for human rights violations are not clearly stated in substantive law.[78]

Moreover, the findings of the research from the interviews and questionnaire we gathered indicates that the courts may also be reluctant to interfere with government action in cases involving strategic litigation of human rights. From their experiences, most lawyers argue that courts are generally hesitant to interfere with the actions of the government, even when those actions violate human rights. The courts in Ethiopia are unaccustomed with human rights laws and difficult for them to apply human rights provision to specific cases. As Ermias, a practicing lawyer[79] argues the culture of entertaining human rights matters in Ethiopian courts are very rare as the issue of human rights was mostly related to constitutional interpretation and there is high level of government pressure that undermines the independency and impartiality of the courts. Moreover, government refusal to comply with the orders of the courts has often manifested in some cases which undermines rule of law and respect for human rights.

When a litigation process concludes with the plaintiff losing the case, it is not uncommon for the prevailing party to seek reimbursement of their legal costs. This practice, commonly known as cost recovery or cost shifting, can pose challenges in the context of strategic litigation, where the objective is to promote public interest. Applying cost recovery laws to strategic litigation cases can be seen as unjust for several reasons. Firstly, strategic litigation is often initiated with the intention of advancing public interest, seeking justice, or addressing systemic issues. Imposing the burden of covering all costs on the plaintiff in the event of a loss can discourage individuals or organizations from pursuing such cases, as the financial risk becomes significant. Furthermore, strategic litigation often involves advocating for marginalized or disadvantaged groups who may lack the resources to bear the financial burden of cost recovery. This further exacerbates the imbalance between parties and undermines the principle of equal access to justice. Legal developments in some jurisdictions indicate that individuals that bring strategic

[78] Mr Fantahun from Ethiopian Lawyer Association interviewed on 19 September2023.

[79] Ermias Legese Public prosecutor at minister of justice interviewed September 19/2023

litigation of human rights cases are relieved form making cost recovery for the state. As Jason Brickhill notes:

> "The potential to recover costs and the risk of adverse costs orders can be significant considerations. ….unsuccessful parties invoking constitutional rights in good faith against the state should not be ordered to pay the state's costs. Where the state wins, each party should pay their own costs. This approach protects litigants who assert constitutional rights from costs, which might otherwise act as a powerful deterrent."[80]

While it is true that article 462(1) of the Civil Procedure Code gives some level of discretion for courts in making assessment of the costs to paid as a result of litigation, this understanding must particularly be reflected in cases involving strategic litigation of human rights.[81]

[80] Jason Brickhill, Strategic Litigation in South Africa, Above.

[81] See article 462(1) of the Civil Procedure Code which provides that "unless otherwise expressly provided, the costs and incident to all suits shall be the discretion of the court and the court shall have full power to decide by whom Of out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect."

CHAPTER FOUR

EXTRA-LEGAL FACTORS AND OTHER CHALLENGES FOR STRATEGIC LITIGATION OF HUMAN RIGHTS IN ETHIOPIA: KEY FINDINGS

As the study clearly indicates, strategic litigation can be a powerful tool for promoting human rights and social justice. However, both the absence of detailed substantive laws and procedural hurdles continue to make strategic litigation of human rights difficult. It should also be noted that while the major focus of the research is on the impact that procedural laws have on strategic litigation, there are also other extra-legal factors that significantly influence the use of strategic litigation of human rights. Because of this, it is imperative to briefly highlight the factors that lead to underutilizing of strategic litigation of human rights in Ethiopia.

4.1. Lack of Awareness of Strategic Litigation

Most people including lawyers and CSOs in Ethiopia are unaware of strategic litigation and its utility in legal discourse. This is due to a number of factors, including the limited development of strategic litigation in Ethiopia, the lack of specialized training for judges and lawyers on strategic litigation, and the lack of public awareness on strategic litigation. The findings of the research indicates that 90% of the respondents responded that lack of awareness and exposure to strategic litigation is the main cause of underdevelopment of strategic litigation of human rights in the Ethiopian legal system. Mr. Wondessen raises an important point about the lack of familiarity with the term "strategic litigation" and the distinction between litigation and strategic litigation.[82] He acknowledges that while there are initiatives within their office to work on litigation, the lack of adequate understanding and the limited mandate of the institution are huge obstacles to pursue strategic litigation.

[82] Wendwesen Tadese, Environmental Protection authority legal department, interviewed on September 15/2023.

4.2. Absence of Special Courts/Benches to Entertain Strategic Litigation Cases

The lack of specialized courts for human rights cases can make it difficult for strategic litigants to have their cases heard by judges who are familiar with the relevant international human rights laws and standards. As most judges are busy with entertaining civil and private matters such as property law, family law succession, it is difficult and time-consuming for them to entertain human rights cases. The establishment of the human rights division within the Federal High Court is seen as a positive outcome of the new law.[83] It has opened up possibilities for entertaining cases that were previously not practiced. However, many respondents in the questionnaires responded that this adoption of the law is not fully adequate due to various factors, including the negative attitudes of judges, public prosecutors, public defenders, and lawyers. They argue that a comprehensive and effective implementation of the law requires a shift in approach from these key stakeholders. The challenges faced by the human rights bench are also evident in the execution and enforcement of its decisions, which further highlights the need for a more robust and committed enforcement of human rights by the courts.

4.3. High Cost of Litigation

The cost of litigation in Ethiopia is high, particularly for complex cases. Strategic litigation often requires the retention of specialized lawyers and experts, which can be very expensive.[84] Additionally, as strategic litigation requires injunction, restitution and pecuniary remedies for the victims of human rights violation and as it involves so many victims, the court fees could be very high. For instance, the court fee for 50,000,000.00 reliefs for the violation of environmental rights is 502,850 and if it is 100,000,000 the cost of litigation becomes 1,002,850.00 (One million, two thousand, eight hundred fifty and 0/100) which is very expensive and impossible for strategic litigants to pay for the course fee. Mr. Ameha also notes that "One of the challenges in strategic litigation lies within the realm of court fees. In many

[83] Proclamation No1234/2021

[84] Merga Kasaye, Ethiopian Human Rights Commission interviewed on 21 September 2023.

cases, even when pursuing strategic litigation aimed at addressing matters of public interest, the payment of court fees remains mandatory."[85]

This poses a significant challenge because strategic litigation often involves advocating for causes that serve the broader public interest. Logically, it seems unjust that individuals or organizations engaged in strategic litigation, driven by the goal of promoting public welfare, are burdened with court fees. This situation raises concerns regarding the affordability and accessibility of the legal system. If individuals or organizations seeking to address human rights violations or other matters of public concern are deterred from pursuing litigation due to the financial burden, it undermines the fundamental principles of justice and equal access to legal remedies. The expense associated with court fees can discourage potential litigants from bringing forward meritorious cases, thereby impeding progress in advancing human rights and social justice. This creates a dilemma where those most in need of legal protection and redress may be deprived of their rights simply due to financial constraints. As a result of this, those few strategic cases brought before the court are compelled to request the court for non-pecuniary reliefs such as, injection and restoration.[86] Moreover, 78% of our respondents responded that the court procedure in Ethiopia, from opening of a file, to hearing and decision making is very complex and time-consuming.

4.4. Lack of Lawyers and Legal Aid for Strategic Litigation

As the finding of the research reveals, despite the flexibility provided in the Federal Courts Advocate Licensing and Registration Proclamation which allows for special licences to litigate public interest issues, the interest of lawyers to provide free legal aid for human rights issues on behalf of the public is almost non-existent. Legal aid is essential for ensuring that strategic litigants, who are often poor and marginalized groups, have access to the justice system. However, despite some attempts of community services by Law Schools in Ethiopia, legal aid is not widely available. Mr. Dan Yirga from EHRCO also reiterates that, "we have encountered serious challenges in crucial areas of human rights due to a lack of access and strategic

[85] Interview with Ato Ameha Mekoenen, above.
[86] Ibid.

engagement with the courts. Our experience has revealed that the litigation process lacks orientation, consistency, and strategic focus. At times, non-experts are involved, resulting in a project-oriented approach that fails to align with our actual goals and objectives. This unsustainability hinders our ability to effectively ensure human rights. The key challenge we face is the absence of committed legal experts, and another challenge lies in the court's understanding of human rights. Additionally, the procedures are not always welcoming to human rights organizations. He also notes that, the CSO sector has encountered serious challenges to access justice as the licensing is granted to individuals rather than organizations working on human rights.[87]

Another significant challenge is the reluctance of legal professionals to get involved in human rights cases, particularly outside of their pro bono duties. 70% of our data shown lawyers prioritize professional fees and have misconceptions about the concept of strategic litigation. They may perceive strategic litigation as an attempt to advance political agendas against the government rather than focusing on combating human rights violations. This reluctance can stem from various factors. Lawyers may be concerned about potential professional risks, such as backlash from government authorities or reprisals against themselves or their clients. They may also have reservations about the feasibility of achieving meaningful outcomes in human rights cases, considering the complexities and challenges involved.

4.5. Fear of Reprisal from the Government:

About 66% of respondents noted that fear of reprisal from the government is a significant challenge for strategic litigants in Ethiopia. The Ethiopian government has a history of harassing and intimidating human rights defenders and lawyers who challenge the government's policies and practices. This can create a climate of fear in which strategic litigants are afraid to bring cases against the government. There are a number of ways in which the Ethiopian government has harassed and intimidated human rights defenders, lawyers and even judges. For example,

[87] Dan Yirga, Executive Director of Ethiopian Human Rights Council Interviewed on September 18/2023

the government has arrested and detained human rights defenders and lawyers and placed human rights defenders and lawyers under surveillance, raided the offices of human rights organizations, prosecuted human rights defenders and lawyers, threatened and harassed human rights defenders and lawyers and their families. This climate of fear can deter strategic litigants from bringing cases against the government. Strategic litigants may be afraid of being arrested, detained, or prosecuted. Strategic litigants are afraid of losing their jobs, their homes, or their livelihoods. The fear of reprisal from the government is a particularly serious challenge for strategic litigants who are challenging the government's human rights record. As the data shows the Ethiopian government has a poor human rights record, and it is sensitive to criticism of its human rights policies and practices. As a result, the government is more likely to harass and intimidate strategic litigants who are challenging its human rights record.

4.6. Limitations of Democratic Institutions

Mr. Biruk, who works in the legal department of the Ombudsman institution, emphasizes the importance of strategic litigation in safeguarding public interest.[88] The institution of the Ombudsman is primarily tasked with protecting the rights of the public in matters of maladministration. However, their mandate is limited to making recommendations regarding such violations. The role of the Ombudsman's legal department becomes more active when the recommended changes are not implemented, and they need to escalate the matter to other authorities, such as the Human Rights Commission (HRC). However, a significant challenge they face is the lack of financial autonomy, which hampers their ability to effectively address a wide range of cases. This financial constraint restricts their capacity to engage with organizations that are working on strategic litigation or pursue legal actions beyond making recommendations.[89]

Moreover, there is lack of commitment from the executive to enforce their decisions or ensure compliance with the recommendations of the Ombudsman. This limitation in enforcement

[88] Biruk Milkias Ethiopian Institution of Ombudsman, interviewed on 14 September 2023.

[89] Ibid

powers can undermine the effectiveness of the Ombudsman's efforts to address public interest violations. Even if the Ombudsman identifies instances of maladministration and provides recommendations for corrective action, there may be no legal mechanism to compel the responsible parties to comply. This can result in a lack of accountability and hinder the Ombudsman's ability to effectively protect the rights and interests of the public which requires public interest litigation. Moreover, the Ombudsman's jurisdiction may be limited to specific areas or sectors, which can create gaps in addressing public interest violations across the board. Different institutions or sectors may have their own oversight mechanisms or regulatory bodies, and the Ombudsman's mandate may not extend to all of them. As a result, certain cases or sectors may fall outside the purview of the Ombudsman, leaving gaps in the protection of public interest cases which necessities strategic litigation. Similarly, the mandate of the Ethiopian Human Rights Commission is limited to investigation and recommendation in which the commission doesn't have a mandate to institutes cases involving strategic human rights litigation.[90]

4.7. Lack of Specific Legislation

While Ethiopia has made progress in adopting constitutional provisions and international human rights instruments, there is a need for more specific and comprehensive legislation that addresses various aspects of human rights violations. The absence of such legislation can create ambiguity and hinder the effectiveness of strategic litigation. Furthermore, there are gaps in substantive law concerning the recognition and protection of certain marginalized groups or vulnerable populations. Mr. Fantahun highlights the importance of enacting laws that explicitly protect the rights of these marginalized communities, ensuring their inclusion in the strategic litigation framework.[91] The data collected through questionnaires also reveals that the lack of legislation in the area of human rights violation can limit the scope of strategic litigation in addressing systemic discrimination and human rights violations.

[90] Ibid.

[91] Ibid.

CONCLUSION AND RECOMMENDATIONS

Conclusion

Strategic litigation of human rights provides a tremendous opportunity to address deeper social injustice and marginalization. Unlike traditional forms of individual-oriented litigation that focuses in the immediate outcomes of the case, strategic litigation of human rights emphasises on bringing changes in policy and law that could have wider impact in society. The foregoing discussions have demonstrated that the constitutional provisions that provide a wide range of protection of human rights could not be effectively implemented without the requisite procedural laws that make these laws operational. While the adoption of new laws such as the Federal Courts proclamation No. 1234/2023 provide new grounds for strategic litigation of human rights, the Civil Procedure Code, the court rules and procedures, as well as evidentiary challenges continue to constrain the efficacy of strategic litigation of human rights. In order to improve strategic litigation of human rights in Ethiopia, a number of legislative reforms as well as improving the awareness and understanding about strategic litigation of human rights is critical.

Recommendations

The study and the data collected through interviews and questionnaires also demonstrates the following key recommendations which help to improve strategic litigation of human rights in Ethiopia.

- Based on the data collected through questionnaires, it shows that the main factors affecting the effectiveness of strategic litigation in Ethiopia are both substantive and procedural in nature. However, a higher number of respondents indicated that procedural law pose significant challenges to strategic litigation of human rights. From the foregoing discussions, It is also evident that procedural law creates the most challenging situations for the application of strategic litigation.

- The study shows that a large number of respondents identified difficulties in successfully filing a case for strategic litigation under the Civil Procedure Code. This suggests that there are obstacles such as complex procedural requirements, lack of clarity in the filing process, or limited access to legal assistance that impede individuals or organizations from initiating strategic litigation cases. The laws currently applicable should have the flexibility to entertain strategic litigation of human rights cases, in line with the spirit of article 37 of the Constitution and the evolving international and comparative law on strategic litigation of human rights.
- Filling a case emerged as the most common challenge reported by respondents and Providing evidence was identified as the next major challenge in human rights strategic litigation under the Civil Procedure Code. This indicates that there are difficulties in gathering, presenting, and substantiating the necessary evidence to support the claims made in the litigation. Other constraints include issues related to accessing relevant documentation, obtaining testimonies, or allocating resources to meet the evidentiary requirements of the case. In contrast, the data indicates that the challenges related to the hearing as well as decision and relief stages were reported by a smaller number of respondents. This implies that once a case has progressed to these stages, the procedural obstacles may be somewhat alleviated, and the focus shifts more towards presenting arguments and obtaining a final determination.
- Court fee is has been identified as another challenge for Human Rights strategic litigation. As strategic litigation is for public interest, it is difficult to bear the cost of the court at the individual level. Efforts should be made by the court system to allow strategic litigation of human rights cases to be filled without charge, or with a very minimum amount of court fee.
- In terms of the specific laws that lack clarity or create challenges, the data collected consistently highlights that the following issues as key obstacles to strategic litigation of human rights. Across the various responses, a significant number of participants consistently identified standing rules under the civil procedure code article 33; the constitution articles 37, 83 and 84; the lack of organized evidence law, court fee under

article 215; and absences of clear procedural rule for article 11 of proclamation 1234/2021 as key obstacles to strategic litigation of human rights.

- Other factors that affect the effectiveness of strategic litigation cases in Ethiopian courts include the sensitivity of courts to strategic litigation cases, the difficulty of providing evidence, the lack of transparency in the court system, and political interference in the judiciary, the lack of witness protection, the lack of specific expertise of judges and lawyers as significant impediments for strategic litigation of human rights.
- According to the study and responses gathered, many respondents expressed the belief that the new Federal Courts Proclamation No. 1234/2021 does not effectively address the challenges related to human rights litigation and strategic litigation as the law requires "sufficient reason**"** and as there is no special procedural rules that expand on the meaning of this specific clause. The respondents noted that the proclamation is inadequate in tackling the issues faced in the area of strategic litigation of human rights.
- The establishment of the human rights bench within the Federal High Court is seen as a positive outcome of the new law. It has opened up possibilities for entertaining cases that were previously not practiced. It also helps to develop the knowledge base and expertise of judges and lawyers litigating on human rights. However, many respondents believe that the adoption is not fully adequate due to various factors, including the attitudes of judges, public prosecutors, defenders, and lawyers. More work needs to be done to improve the knowledge base, and creating some common understanding among and dialogue among judges, lawyers, prosecutors and other stakeholders.
- The lack of effective remedies within the judicial system is considered a significant factor contributing to the lack of effectiveness in addressing human rights violations. The fact that state responsibility for human rights violations has limited possibilities of attributing responsibility also limits the effectiveness of remedies for violations in strategic litigation human rights cases. But all avenues for dispensing justice and effective remedy including compensation, guarantee of non-repetition, restitution and other remedies should be effectively utilized. Given the possibility of reprisals, the existing witness protection mechanism should be enhanced to allow for more robust system of witness protection.

Finally, apart from the above recommendations, the study also demonstrates the need to engage in a number of other areas that help to improve strategic litigation of human rights cases in Ethiopia. The need to consider the adoption of comprehensive legislative framework on strategic litigation of human rights. The importance of creating awareness and sensitization on strategic litigation of human rights and the importance of judicial activism to lawyers, public interest advocates, CSOs and judges. The importance of promoting success story of strategic litigation of human rights cases that can amplify its role for promoting social justice and inspire other organizations and individuals to engage more with strategic litigation of human rights. Considerations should also be made to amend existing laws or red in existing laws to have the flexibility of evidence gathering considering the unique nature of strategic litigation of human rights and ensure equality of arms in the legal process. It is also important to accommodate and encourage the use of *amicus curiae* to enrich the factual and legal basis of the claim and to provide a better opportunity for the judges and courts to have a deeper understanding of a particular issue, which will ultimately help them to reach at a fair and reasonable decision. The existing legal provisions should also create the possibilities for getting effective remedy in terms of compensation, restitution, guarantee of non-repetition and other modalities of relief that are consistent with the principles of international human rights law.

ANNEXES

Interview Guide

Assessment of the Compatibility of Procedural Laws for Strategic Litigation in Ethiopia

Dear Sir/Madam,

Lawyers for Human Rights (LHR) is a non-governmental civil society organization that works on the promotion and protection of human rights in Ethiopia through litigation, research and advocacy. As part of this responsibility, it is undertaking a study on the Compatibility of Procedural Laws on Strategic Litigation in Ethiopia. Strategic Litigation involves a litigation process that intends to endure human rights protection of the larger public rather than individual interests and hence it largely involves issues that have public interest. The objective of the study is to look into how procedural laws in the Civil Code and Criminal and Criminal Procedural Laws as well as the Evidence laws and procedures in Ethiopia affect strategic litigation in Ethiopia. As part of this undertaking, it has prepared questionnaires that can provide appropriate information on the subject. We would like to appreciate for giving us your time and effort to conduct this interview. With this note, we would like to assure you that the information that you provide will only be used for the purpose of the study. Thank You !

Interviewee Name: _____

Profession _____

Institution you work on _____

Age _____

Sex_____

1. What is your understanding of human rights strategic litigation ?

2. How do you generally assess the current situation of strategic litigation in Ethiopian Courts ?
3. What are the Key Challenges for Strategic Litigation in Ethiopian Courts?
4. What are the specific procedural laws in the Civil and Criminal Procedure that hinder the effective implementation of strategic litigation in Ethiopian Court and Quasi-Judicial Bodies?
5. What are the specific laws, regulations and directives in the court system that affect the effective implementation of strategic litigation in Ethiopia?
6. What are the specific legal hurdles for providing effective remedy to victims of human rights violations ?
7. What kinds of Amendments and New Laws are needed to have a Better use of Strategic Litigation in Ethiopia?
8. What other factors do you think affects the effective use of strategic litigation in Ethiopia?

Questionnaire Guide

Assessment of the Compatibility of Procedural Laws for Strategic Litigation in Ethiopia

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Name (Optional):_____

Profession _____

Institution you work on _____

Age _____

Sex_____

1. Compared to procedural and substantive laws, which one do you think is the major reason for the use and effectiveness of strategic litigation cases in Ethiopia?

   A. Substantive Laws B. Procedural Laws

2. Which procedural laws create the most difficult situation for using and applying strategic litigation in courts ?

   A. Criminal Procedure B. Civil Procedure

3. At which stage of the civil proceeding in human rights strategic litigation is the greatest challenge arises ?

   A. Filling a Case B. Providing Evidence C. Hearing D. Decision and Relief

4. From your observation of the judicial practice in Ethiopia, what are the specific procedural laws and rules that hinder human rights and strategic litigation?

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5. New laws such as the adoption of the Federal Courts Proclamation No. 1234 and other laws, regulation and directives have been introduced. Do you think that these laws have adequately addressed the problem with human rights litigation and strategic litigation in Ethiopia?

   A. Yes they have B. No they have Not

6. If you believe that the new laws have not improved the condition for human rights litigation and strategic litigation, why ? What needs to be improved ?

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7. Do you think that the lack of effective remedies in the judicial system is one of the reasons for the lack of effective human rights and strategic litigation ?

   A. Yes B. No

8. What do you think are the most difficult aspects of the laws and regulations that affect the provision of effective remedies under the laws of Ethiopia ?

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9. What are the major legal problems for strategic litigation in each of the phases of the litigation process?

A. Challenges during the filling of a strategic litigation cases ?

B. Challenges During the Oral Hearing Phase?

C. Challenges on the Decision Making Phase and Relief ?

10. What do you think are the major challenges in relation to the rules of evidence in the judicial system that affect human rights litigation and strategic litigation ?

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_____

11. Any other challenges that need to be addressed in relation to improving human right and strategic litigation in Ethiopia judicial system ?

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_____