

Towards more liberal standing rules to enforce constitutional rights in Ethiopia

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Summary

This article analyses the legal regime governing standing to enforce constitutional rights in Ethiopia. It reiterates the direct link between standing rules and the right of access to justice. It observes that, although the laws of several states still require a personal interest in the action one wants to litigate, there is a developing trend towards the liberalisation of standing rules, particularly regarding human rights issues. It considers the activism of the Indian judiciary and the innovative changes introduced by the South African Constitution, recognising public interest litigation. With regard to Ethiopia, the article considers the rules governing standing in ordinary courts, the House of Federation and the Council of Constitutional Inquiry, the Human Rights Commission and the institution of the Ombudsman. It concludes that the current standing law regime is too restrictive as it requires the actual violation of personal rights and interests in a particular claim. The issue of standing is still governed by archaic rules which do not take into account the interest at stake and the individual circumstances of the victims. It recommends the liberalisation of standing rules to ensure that the constitutional guarantees can be enforced via, amongst others, public interest litigants.

1 Introduction

The Ethiopian Constitution recognises a fairly broad catalogue of human rights. For instance, it is the only African constitution which

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incorporates the right to self-determination, including the right to secede, of ethnic groups (referred to as 'nations, nationalities and peoples' in whose power sovereignty resides).¹ It also recognises the right to development and to a clean and healthy environment. It further widens the scope of human rights by requiring compliance with international instruments adopted by Ethiopia while interpreting the rights in the Constitution (article 13(2)). These constitutional commitments to human rights are, however, nothing but 'printed futility'² unless enforced through institutions established for that purpose, particularly those empowered to interpret the Constitution.³ A strategy to ensure the enforcement of human rights is litigation. The first aspect that determines the enforcement of constitutionally-entrenched human rights through courts and other judicial bodies, however, is the *locus standi* (standing) of the applicant. Standing determines whether an individual or group of individuals or an entity has the right to claim redress on a justiciable matter before a tribunal authorised to grant the redress sought. Standing is a preliminary issue, the lack of which precludes any form of determination over the merits of the case.

The issue of standing is inextricably intertwined with the right of access to justice. Effective access to justice is considered as the most basic requirement of a system which purports to guarantee legal rights.⁴ Access to justice is indeed the conscience of any human rights instrument.⁵ Nevertheless, access to justice will be greatly impeded if the applicable standing rules insulate potential applicants from approaching the relevant judicial bodies. Obviously, the issue of standing significantly determines the reach of constitutional justice.⁶ Hence, while liberal standing rules may enhance an active enforcement of human rights,⁷ prohibitively strict rules, on the other hand, stultify the opportunity of review for constitutionality, and hence condone much unconstitutional behaviour.⁸ Obiagwu and Odinkalu have, for

¹ See C Heyns & W Kagoungo 'Constitutional human rights law in Africa' (2006) 22 *South African Journal on Human Rights* 673 678; art 39(5) Federal Democratic Republic of Ethiopia Constitution (FDRE): Note that the Constitution conflates the definition for 'nations', 'nationalities' and 'peoples'. As such no clear-cut distinction may be drawn.

² See VRK Iyer *Justice at the crossroads* (1992) 59.

³ NJ Udombana 'Interpreting rights globally: Courts and constitutional rights in emerging democracies' (2005) 5 *African Human Rights Law Journal* 47 55.

⁴ M Cappelletti *The judicial process in comparative perspective* (1989) 36.

⁵ Iyer (n 2 above) 59.

⁶ RS Kay 'Standing to raise constitutional issues: Comparative perspectives' in SR Kay (ed) *Standing to raise constitutional issues: Comparative perspectives* (2005) 1.

⁷ Liberal standing rules, eg, have ensured an active role of the Constitutional Court of Benin. See A Rotman 'Benin's Constitutional Court: An institutional model for guaranteeing human rights' (2004) 17 *Harvard Human Rights Journal* 81.

⁸ Kay (n 6 above) 29.

instance, identified strict rules of standing as the major legal constraint to the protection of human rights in Nigeria.⁹

In private matters, the general rule is that a complainant needs to show a personal interest in the case he or she is instituting. However, similar rules generally apply in most jurisdictions, even in cases where the broader public interest is involved. Activist courts and legislatures in some states have, quite innovatively, contoured a distinct standing procedure that determines who might bring an action depending on the nature and scope of the interest at stake as well as the circumstances of the case and the alleged victims.¹⁰

The standing law regime in Ethiopia generally requires a personal vested interest in a particular action. This is true both in ordinary courts as well as in the House of Federation (House) and the Council of Constitutional Inquiry (Council), the two organs entitled to interpret the Constitution. Liberal rules, however, govern standing in the Human Rights Commission (Commission) and the Ombudsman and regarding the right to a clean environment.

It should, however, be noted that the mere fact that the standing rules are relaxed may not lead to a spawning of human rights litigation and, ultimately, constitutionalism. There are a whole set of factors that may compound the process. Socio-economic, political as well as cultural circumstances may affect rights litigation in sundry ways. A major factor could be whether there is a strong tradition of public interest lawyering in a particular state.¹¹ Prempeh, for instance, notes:¹²

Lacking an organised public interest or human rights bar or a tradition of *pro bono* representation, Africa's common law lawyers have generally not seized upon the liberalisation of constitutional standing to seek judicial enforcement of the constitution.

This, Prempeh posits, has created 'a substantive deficit of demand for judicial review'. In fact, an active and relentless engagement of courts and other judicial bodies may result in the abdication or at least the relaxation of an otherwise strict standing rule. Particularly considering the Ethiopian situation, the masses are unfamiliar with the concept of suing the government. The old Ethiopian adage *Semay ayitares, mengist ayikesus* ('You cannot plough the sky, nor sue the government') still rings in the heads of most Ethiopians. Civil society, human rights

⁹ See C Obiagwu & CA Odinkalu 'Combating legacies of colonialism and militarism' in AA An-Na'im 'Human rights in African constitutions: Realising the promise for ourselves' (2003) 233.

¹⁰ For a summary of the advantages and disadvantages of pursuing a more restrictive or liberal approach and the difficulty to distinguish between private and public interest in certain cases, see Sir K Schiemann '*Locus standi*' (1990) *Public Law* 342; and for the reasons why states adopt different standing rules, see Kay (n 6 above).

¹¹ CE Welch *Protecting human rights in Africa: Roles and strategies of non-governmental organisations* (1995) 202-204.

¹² HK Prempeh '*Marbury in Africa: Judicial review and the challenges of constitutionalism in contemporary Africa*' (2005-2006) 80 *Tulane Law Review* 1239 1297.

non-governmental organisations (NGOs), as well as opposition political parties have also generally been reticent to resort to the judiciary and the constitutional review procedure in the Ethiopian Constitution.¹³ Hence, although this article looks at standing rules and calls for its relaxation, it does not conclude, even thinly, that changing standing rules will decipher the perplexing problems that entangle judicial review in general and human rights litigation in particular. The article may be viewed as addressing a drop in an ocean of problems.

With this in mind, the article considers the international trend regarding standing rules to enforce constitutional rights. It looks at traditional, more restrictive standing rules as well as the newly-developing procedure of public interest litigation, considering examples from around the world. It then examines the primary sources of the rules governing standing to enforce constitutional rights in ordinary courts, the House and the Council, as well as the Commission and the Ombudsman. It further looks into the rules governing *amicus curiae* intervention and the possibility of obtaining consultative service from the House or the Council. The article further considers the separate standing law regime for the right to self-determination and the right to a clean and healthy environment.

2 The traditional standing rule – personal interest requirement

Traditionally, only those whose rights allegedly have been violated or are threatened with violation may be granted standing to enforce their rights.¹⁴ Interest represents loss or gain, often of a material nature, out of the proceedings. A decision of the Australian High Court provides an eloquent summary of the requirements of the traditional position. The Court held that interest¹⁵

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

¹³ It is, eg, puzzling as to why NGOs involved in human rights and democracy issues have not challenged the constitutionality of the new civil society law (2009) which has effectively crippled their functions. One possible reason for their reluctance could be the very low prospect of success given the political (hence not independent) nature of the House and the Council.

¹⁴ C Okpaluba 'Justiciability and standing to challenge legislation in the commonwealth: A tale of the traditionalist and judicial activist approaches' (2003) 36 *The Comparative and International Law Journal of Southern Africa* 25 26. For a summary of the international trends on traditional and liberal standing rules, see Kay (n 6 above).

¹⁵ *Australian Conservation Foundation Inc v The Commonwealth* (1980) 146 CLR 493.

observed, or that a conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*.

The obvious impact of this interest requirement is that the law 'regards it preferable that an illegality should continue than the person excluded should have access to courts'.¹⁶ These exclusionary rules are justified by, among others, the idea that judicial action is only necessary to prevent or compensate for a real injury.¹⁷

The traditional approach to standing has been applied and is still sanctioned in several jurisdictions. In South Africa, for instance, prior to the adoption of the Interim Constitution, the standing rules did not recognise everyone's interest to freely challenge the validity of certain acts of the administration particularly those impacting largely on the public interest.¹⁸ As such, there was a need to show a sustained loss or damage (interest which is 'personal, sufficient and direct') as a result of the impugned provision despite the wide public interest that might be at stake. Similarly, in Germany, a complainant will only sustain his claim if she or he can show that their personal rights have been violated or threatened with violation, and hence, one may not act as proxy to others or the public interest at large.¹⁹ In the United States as well, a claimant should generally assert a 'private right' of personal interest in the action he or she institutes.²⁰

This traditional approach is considered an impediment to justice. According to a previous Indian Chief Justice, Bhagawati, the traditional rule is 'highly individualistic, concerned with an atomistic justice, incapable of responding to the claims and demands of the collectivity, and resistant to change'.²¹ The traditional approach may also exclude the majority, particularly the poor and the ignorant, who are often the helpless victims of violations, from accessing judicial bodies. Yet, courts should not become 'an arena of quibbling for men with long

¹⁶ Schiemann (n 10 above) 342.

¹⁷ Kay (n 6 above) 5.

¹⁸ GE Devinesh 'Locus standi revisited: Its historical evolution and present status in terms of section 38 of the South African Constitution' (2006) 38 *De Jure* 28 31; see also C Loots 'Locus standi to claim relief in the public interest in matters involving the enforcement of legislation' (1987) 104 *South African Law Journal* 131 132. Loots notes that there were some exceptions to the general sufficient interest requirement in certain cases.

¹⁹ RA Lorz 'Standing to raise constitutional issues in Germany' in Kay (n 6 above) 174 175.

²⁰ See, generally, HP Monaghan 'Constitutional adjudication: The who and the when' (1973) 82 *Yale Law Journal* 1363; see also JC Reitz 'Standing to raise constitutional issues as a reflection of political economy' in Kay (n 6 above) 261; LL Jaffe 'Standing to secure judicial review: Public actions' (1961) 74 *Harvard Law Review* 1265. The only notable exception to the personal injury requirement has been freedom of expression as it is believed that laws affecting freedom of expression may have a 'chilling effect' on everyone; see Kay (n 6 above) 29.

²¹ PN Bhagwati 'Judicial activism and public interest litigation' (1984-1985) 23 *Colombia Journal of Transnational Law* 561 570.

purses’;²² they should rather be a ‘last resort for the oppressed and the bewildered’.²³ This calls for more robust and inclusive standing rules. Strict standing rules threaten to exclude individuals and groups who might not be aware of their rights, or who might not be able to vindicate their rights for a myriad of reasons.

3 Public interest litigation

A more liberal approach has therefore been developed, especially in cases where the rights of vulnerable groups, who are often disenfranchised primarily as a result of the violation of their rights, are involved and generally when the interests of the larger public are concerned. This liberal approach is particularly called for when the dispute relates to a constitutionally-entrenched right as every citizen is believed to have interest in requiring their government and other constitutionally-bound actors to behave constitutionally.²⁴ Hence, it is suggested that procedural rules should be crafted to be flexible enough to permit adjustments in the face of substantive concerns while at the same time ensuring the regularity and predictability necessary for the integrity of the system.²⁵ Although procedural rules may have relevance in ensuring efficiency and avoiding unnecessary delay, they should not be unduly strict to ‘harden the arteries’ and blunt the judicial consideration of legitimate interests.²⁶

The Indian Supreme Court has been particularly exemplary in incessantly accepting, and even encouraging, complaints from public interest litigants. Public interest litigation in India has created a fascinating jurisprudence, from admitting mere letters as complaints (called epistolary jurisdiction) and adopting flexible standing rules to establishing *ad hoc* commissions, often for investigational purposes and for considering possible appropriate and legitimate decisions and the enforcement of several socio-economic rights.²⁷

A succinct summary of the concept of public interest litigation was provided by the Supreme Court in the *Judges* case where the Court held:²⁸

²² *Keshvananda Bharati v State of Kerala*, 1973 A IR 1461, 1485 (SC) cited in Bhagwati (n 21 above) 567.

²³ U Baxi ‘Taking suffering seriously: Social action litigation in the Supreme Court of India’ (1982) 29 *Review of the International Commission of Jurists* 37.

²⁴ Kay (n 6 above) 28.

²⁵ M Minow ‘Politics and procedure’ in D Kairys (ed) *The politics of law: A progressive critique* (1998) 86.

²⁶ C Theophilopoulos *Fundamental principles of civil procedure* (2006) 181.

²⁷ See AH Desai & S Muralidhar ‘Public interest litigation: Potentials and problems’ in BN Kirpal *et al* (eds) *Supreme but not infallible – Essays in honour of the Supreme Court of India* (2000).

²⁸ *SP Gupta v Union of India* (1981) SCC 87 210.

Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or legal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness, or disability or socially or economically disadvantaged position, 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 [of the Constitution of India] and in case of any fundamental right of such person or class of persons, in this Court under article 32 [of the Constitution of India] seeking judicial redress for the legal wrong or injury caused to such person or determinate class of persons.

Moreover, the Indian Supreme Court generally considers challenges to legislation to be in the public interest. Hence, anyone genuinely interested in the case under consideration may bring ‘the case to the attention of the Court’.²⁹

This remarkable modification of the rules governing standing with regard to public wrongs or injuries has entitled *bona fide* applicants to seek redress on behalf of individuals and groups who for several reasons are unable to seek redress themselves. The Indian Supreme Court has at the same time been cautious to preclude frivolous and gold-seeking litigation and to discourage the pursuit of ‘private, political or publicity’ interest litigation under the guise of public interest litigation and has rejected mere busybodies or interlopers.³⁰ Liberal standing rules have been particularly exploited to ensure the enforcement of social rights, as a result of which the practice has been more prominently referred to as social action litigation in India.

In South Africa, on the other hand, the liberalisation of the rules of standing is a result of their explicit recognition in the Constitution rather than a creation of a progressively activist judiciary. Section 38 of the 1996 (final) Constitution has innovatively expanded the list of individuals and entities that may access the courts, including the Constitutional Court, for appropriate relief if they believe that their rights have been infringed or threatened.³¹ Of particular importance to this study is section 38(d) which grants standing to ‘anyone acting in the public interest’. This has provided an opportunity to burgeoning human rights litigation by members of civil society, particularly

²⁹ Okpaluba (n 14 above).

³⁰ Justice KG Balakrishnan (2008) ‘Growth of public interest litigation in India’ address at the Singapore Academy of Law, 15th Annual Lecture, http://www.supremecourtsofindia.nic.in/speeches/speeches_2008/8%5B1%5D.10.08_SINGAPORE_-_Growth_of_Public_Interest_Litigation.pdf (accessed 7 June 2010). This is achieved through the procedure of preliminary screening of public interest cases and a strict analysis of *bona fide* public interest as well as conflicting interests. Justice Balakrishnan has also identified several public interest cases rejected by the Supreme Court that involved policy choices (disguised political litigation).

³¹ See sec 38 of the Constitution of the Republic of South Africa.

human rights NGOs. The scope of this section obviously depends on the meaning to be subscribed to what constitutes a 'public interest'.³²

While elucidating on section 7(4)(v) of the interim South African Constitution, which was largely similar to section 38(d) of the final Constitution, O'Regan J interpreted this provision as requiring that the person must be 'genuinely acting in the public interest'.³³ She expounded:³⁴

Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court.

This is similar to the approach of the Indian Supreme Court to ensure the genuineness of the applicants' motives by stifling cases brought for personal or publicity or political reasons under the guise of the public interest.

In Nigeria too, until the recent change, standing was only available to those who show some kind of grievance as a sequel of the action or omission complained of. The most prominent case in this regard is the *Adesanya* case,³⁵ where it was held that 'standing will only be accorded to the plaintiff who shows that his civil rights and obligations have been or are in danger of being violated or adversely affected by the act complained of'.³⁶ This requirement has been disparaged and scholars have incisively recommended the adoption of a more liberal approach to standing that takes into account the circumstances of each case, especially when the public interest is at stake.³⁷ Unfortunately, the 1999 Nigerian Constitution (which is similar to article 6(6)(b) of the 1979 Constitution) has elevated and codified the unduly restrictive precedence set by the *Adesanya* case. Section 46(1) of the Constitution provides:

³² C Loots 'Standing, ripeness and mootness' in S Woolman *et al Constitutional law of South Africa* (student ed) (2007) 7-11.

³³ *Ferreira v Levin NO & Others* 1996 1 SA 984 (CC) para 233.

³⁴ *Ferreira v Levin* (n 33 above) para 234.

³⁵ *Adesanya v President of the Federal Republic of Nigeria & Another* [1981] 1 All NLR 1. This case is considered as the *locus classicus* on standing to sue in Nigeria. See T Ogowewo 'The problem with standing to sue in Nigeria' (1995) 39 *Journal of African Law* 1

³⁶ *Adesanya* (n 35 above) para 39.

³⁷ Eg, Ogowewo recommends the abdication of 'one test' for standing that 'applies in all contexts regardless of the cause of action or the remedy sought'; see Ogowewo (n 35 above) 1.

Any person who alleges that any of the provisions of this Chapter [Chapter IV] has been or is being or likely to be contravened in any state *in relation to him* may apply to a High Court in that state.

The traditional approach to standing has, however, been abandoned in cases that involve the adjudication and enforcement of human rights in the public interest after stern scholarly criticism of the prevailing narrowly-tailored rules.³⁸ The new enforcement rules adopted by the Chief Justice in 2009 provide:³⁹

3(e) The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struck out for want of *locus standi*. In particular, human rights activists, advocates, or groups as well as any non-governmental organisations, may institute human rights application on behalf of any potential applicant. In human rights litigation, the applicant may include any of the following:

....
(iv) Anyone acting in the public interest.

This essentially replicates the standing rules in the South African Constitution. It might even be considered to be establishing broader standing rules as it prohibits the dismissal or striking down of a human rights case solely for want of standing.

Article 15 of the Constitution of Malawi similarly entitles those having 'sufficient interest' to institute constitutional complaints. Article 2 of the Ghanaian Constitution enshrines even broader standing rules as it entitles anyone to challenge allegedly unconstitutional acts and omissions.⁴⁰ The Supreme Court of The Gambia has ruled that every citizen of The Gambia has the standing to challenge an allegedly unconstitutional act or omission.⁴¹

4 Standing in Ethiopia

The standing law regime in Ethiopia generally requires a vested/personal interest in the case under consideration. As pointed out above, there are certain exceptions regarding the operation of the Human Rights Commission and the Ombudsman and concerning the right to a clean and healthy environment. There are also certain laws that

³⁸ See, eg, EA Taiwo 'Enforcement of fundamental rights and the standing rules under the Nigerian Constitution: A need for a more liberal provision' (2009) 9 *African Human Rights Law Journal* 546; JA Yakubu *Constitutional law in Nigeria* (2003) 445-474; Ogowewo (n 35 above).

³⁹ Preamble sec 3(e) Nigerian Fundamental Rights (Enforcement Procedure) Rules, 2009 <http://www.accesstojustice-ng.org/articles/New%20FREP%20Rules%20.pdf> (accessed 7 June 2010).

⁴⁰ The Supreme Court of Ghana has endorsed this view in *Tuffuor v Attorney-General* (1980) GLR 637.

⁴¹ *United Democratic Party (UDP) & Others v Attorney-General of The Gambia* (unreported Suit SCCS 3/2000).

anticipate *amicus curiae* involvement in constitutional adjudication. Below is a detailed discussion of all these procedures.

4.1 Standing under the Civil Procedure Code

The Ethiopian Civil Procedure Code exacts a 'vested interest' to stand as plaintiff.⁴² This is understood as requiring a personal loss or gain in the outcome of the case. This may be logical since the Civil Procedure Code is primarily meant to govern cases arising out of private civil relationships and interactions. In any case, courts accept only complaints in which the applicant may prove a vested interest beyond and above others. Complaints involving the enforcement of constitutional or statutory rights in ordinary courts are therefore governed by the 'vested interest' requirement.

4.2 Right of access to justice and standing rules under the Constitution

The Ethiopian Constitution guarantees the right of access to justice under article 37. This article is a broad provision that applies to all actions, whether based on the Constitution or any other legal instrument, and whether the case is a human rights case or not. Article 37(1) provides:

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.

Hence, *everyone* may access courts or any other competent body with judicial power (including the Council and House) to obtain a decision or judgment over a *justiciable* matter.⁴³ Apparently, the Constitution gives everyone the widest possible right to seek redress in any issue irrespective of their personal interest in the particular case. Some scholars have understood this literally as referring not just to those interested, but also to everyone else, and hence as an entry point for, *inter alia*, human rights NGOs interested to employ litigation as a strategy for achieving their objects.⁴⁴ Obviously, this conflicts with the narrow 'vested interest' stipulation in the Civil Procedure Code. As such, the

⁴² Art 33(2) Ethiopian Civil Procedure Code (1965).

⁴³ The Constitution does not, however, define, or provide criteria for defining, what a 'justiciable matter' is. Some scholars have concluded that all human rights, including socio-economic rights and the right to development, are justiciable in courts. SA Yeshanew 'The justiciability of human rights in the Federal Democratic Republic of Ethiopia' (2008) 8 *African Human Rights Law Journal* 273.

⁴⁴ YM Badwaza 'Public interest litigation as practised by South African NGOs: Any lessons for Ethiopia?' unpublished LLM thesis, University of Pretoria, 2005 40; G Kassa 'Mechanisms of constitutional control: A preliminary observation of the Ethiopian system' (2007) 20 *Africa Focus* 75 86.

latter rule should be void as incongruent with the supremacy clause of the Constitution (article 9(1)) to the extent of inconsistency.

It has also been suggested that the rest of article 37 of the Constitution further complements this broad understanding of article 37(1).⁴⁵ Article 37(2) grants standing to:

- (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.

It is, however, debatable if article 37(2) indeed supports the standing rules as formulated under article 37(1). It may, quite to the contrary, be argued that, had article 37(1) not been referring to entities having an interest in a case, article 37(2) would have been redundant. If the first article is wide enough to include individuals and entities without any kind of attachment to the case, then certainly an association or a group or members of a group referred to in article 37(2) necessarily fall within its ambit (in fact, these are entities which arguably fulfill the interest requirement). As such, it can equally strongly be submitted that any attempt to save article 37(2) from becoming superfluous requires a narrow understanding of article 37(1).

Moreover, it is not wise to argue that anyone can bring complaints regarding any cause of action, even purely private ones. There might, therefore, be a tendency towards a narrower understanding of this right of access to justice provision, which also incidentally deals with issues of *locus standi* (presumably in recognition of the inextricable link between access to justice and the governing standing law regime alluded to earlier).

4.3 Standing to enforce rights enshrined in the Constitution

There are more specific provisions in the Constitution and other domestic legislation that govern issues of standing to sue in cases involving the interpretation and enforcement of the Constitution.

The Ethiopian Constitution grants the power of interpreting the Constitution to the House, an entity composed of representatives of ethnic groups.⁴⁶ Since the members of this House are not required to have knowledge of the law, including the Constitution, the Constitution also establishes the Council, composed largely of legal experts

⁴⁵ Badwaza (n 44 above) 41.

⁴⁶ Arts 62 & 83 FDRE Constitution. For a discussion of the power of interpretation of the Ethiopian Constitution, see YT Fisseha 'Judicial review and democracy: A normative discourse on the (novel) Ethiopian approach to constitutional review' (2006) 14 *African Journal of International and Comparative Law* 53; A Fiseha 'Federalism and the adjudication of constitutional issues: The Ethiopian experience' (2005) 52 *Netherlands International Law Review* 1.

to provide recommendations to the House.⁴⁷ Any complaint allegedly requiring constitutional interpretation has to first be directed to the Council which will then either reject the case, if it concludes that there is no need for constitutional interpretation, or submit recommendations to the House for a final decision if there is a need for constitutional interpretation. If the Council holds that constitutional interpretation is not necessary, the applicant may appeal to the House (article 84(3)). It is, however, not clear whether an appeal is allowed to the House if the case is rejected for want of standing, since the question of whether there is a need for constitutional interpretation, which unavoidably involves some sort of analysis of the merits, is obviously different from the question of whether the complainant has the standing to request redress in a particular case.

The main constitutional provision that addresses issues concerning standing to enforce constitutional rights in the Council and the House is article 84(2) which provides:

Where any federal or state law is contested as being unconstitutional and such a dispute is submitted to it [the Council] by *any court or interested party*, the Council shall consider the matter and submit it to the House of the Federation for a final decision.

This provision incidentally answers the question as to who might initiate a case before the Council. Hence, 'any court' has the standing to set the Council in motion. The provision assumes that a case before a court of law may not be resolved without first determining the constitutionality of the applicable law. A court may refer a case to the Council either of its own motion, or at the insistence of one or both of the litigants. It is, however, not clear what 'court' stands for. Obviously, it includes those courts that the Constitution establishes or authorises the House of Peoples' Representatives to establish as necessary (see article 78(2)), namely, Federal First Instance, High and Supreme Court, and State First Instance, High and Supreme Courts. Does it also include Shari'a or customary courts, administrative tribunals, the Labour Board and other similar entities with judicial power? It is debatable whether these latter entities may also initiate cases before the Council if they feel there is a need for constitutional interpretation at any stage of their proceedings.

As considered earlier, the right of access to justice enshrined under article 37 refers to courts of law or other competent bodies with judicial power. This might imply that 'courts' under article 84 include other entities beyond the federal and state hierarchical courts, as long as they

⁴⁷ The Council has 11 members. It is composed of three representatives from the House, the President and Vice-Presidents of the Federal Supreme Court of Ethiopia (who serve as Chairperson and Vice-Chairperson, respectively, of the Council), and six legal experts appointed by the President of the Republic on recommendation from the House of Peoples' Representatives (the law-making body composed of elected representatives).

exercise judicial power. However, the Council so far has not received any case referred by such other entities.

The Constitution entitles ‘interested parties’ to lodge complaints before the Council. ‘Interested parties’ may be understood to refer to the litigants in a case pending before a court of law. It can also refer to anyone interested in the particular case he or she is complaining about, whether or not the case is pending before a court. The latter interpretation should generally be preferred as constitutional disputes may, and often do, arise out of court. This interpretation is supported by the practice of the Council as it has entertained claims of the unconstitutionality of legislative acts outside the context of courts.⁴⁸

It should, however, be noted that this provision applies to challenges against ‘federal or state law’ only. Again, the Constitution does not define as to what ‘law’ stands for (see below for further discussion). The proclamations adopted to give effect to the Constitutional provision on constitutional interpretation have better elaborated on the issue of standing, as discussed below.

4.4 Standing under the Proclamations for the consolidation of the Council and the House

To further elaborate on the general provisions of the Constitution on standing in the Council, and generally to facilitate the proper discharging of the constitutional mandate and responsibility of these institutions, two Proclamations have been adopted.⁴⁹ The Council has also adopted its Rules of Procedure as mandated under the Constitution. The Council’s Proclamation anticipates two sets of constitutional complaints: one regarding cases pending before courts of law, and those human rights cases that arise outside of the context of courts (direct access, referred to as ‘constitutional complaint’). The individuals and entities entitled to institute cases differ accordingly.⁵⁰

In cases where the constitutional challenge relates to a pending case, the court or one or both of the parties to the case may approach the Council for constitutional determination.⁵¹ The court may decide to submit the case to the Council of its own volition or upon being requested by the parties. However, the court can refer the case ‘only if it believes that there is a need for constitutional interpretation in

⁴⁸ I Idris ‘Constitutional adjudication under the 1994 FDRE (Federal Democratic Republic of Ethiopia) Constitution’ (2002) 1 *Ethiopian Law Review* 63 84.

⁴⁹ Council of Constitutional Inquiry Proclamation 250/2001; Consolidation of the House of Federation and Definition of Powers and Responsibilities Proclamation 251/2001.

⁵⁰ Arts 21-23 Council Proclamation.

⁵¹ Arts 21 & 22 Council Proclamation.

deciding the case'.⁵² Mere qualms over the constitutionality of the impugned law or a possibility of unconstitutional legislation do not suffice. Hence, the court should obviously be engaged in a preliminary interpretation of the Constitution to determine whether there is a case for constitutional determination. It is, however, not clear if the court would have to explain, in the submission to the Council, why it believes that there is a need for constitutional interpretation. It is submitted that such a requirement is implicit in the Proclamation. The principle of constitutional avoidance, as implied in the requirement that the referring court should believe that there is a constitutional issue, similarly dictates that the Constitution should be interpreted only when necessary, further reinforcing the duty of the referring court to explain why it believes that constitutional interpretation is indeed imperative. This gives courts an opportunity to safeguard the Constitution as required. The duty to explain may also serve as a filter to preclude possible ill-considered and inappropriate submissions, as well as avoidance of cases. Moreover, the Council will benefit considerably from the discussions of the issue at hand by the court in arriving at an appropriate decision.⁵³ That is why the Council's proclamation requires complaints to be in an 'elaborate writing'.⁵⁴ 'Elaborate writing' should be understood to require courts, and any person or entity approaching the Council, to explain why they believe the Council should be seized of the case.

The parties to a court case may also initiate a complaint to the Council.⁵⁵ It is likely that most cases to be referred to the Council will be at the initiation of the parties to the case rather than initiated by courts. However, the parties to a case pending before a court may only refer a complaint to the Council through that court. Hence, the party or parties will have to first apply to the court, which then has to be convinced that there is a need for constitutional interpretation before transferring the case to the Council. This procedure may serve to streamline frivolous complaints, maliciously intended to distract or filibuster court proceedings. If there is no case for constitutional inter-

⁵² Art 21(2) Council Proclamation. This is in line with the approach of the German Constitutional Court, which requires the courts to be 'convinced' that there is doubt as to the constitutionality of laws, compared to the Italian Constitutional Court, which only requires referral if the courts have the 'slightest doubt' about the constitutionality of the impugned legislation. See F Ferejohn & P Pasquino 'Constitutional adjudication: Lessons from Europe' (2003-2004) *Texas Law Review* 1671 1688.

⁵³ The South African Constitutional Court has similarly held, in relation to direct access, that '[i]t is ordinarily not in the interest of justice for it to sit as court of first and last instance and that direct access should only be granted in exceptional circumstances'. *Van Vuren v Minister of Justice and Constitutional Development and Minister of Correctional Services* (CCT 15/07); *S v Zuma* 1995 2 SA 642 (CC) para 11. One of the reasons for such reluctance to grant direct access is to benefit from the legal analysis of lower courts.

⁵⁴ Art 24 Council Proclamation.

⁵⁵ See art 22 Council Proclamation.

pretation, the court will reject the invitation to refer. The decision of the court is, nevertheless, not final. The party or parties may launch his or her or their complaint to the Council. If the referral is accepted, the Council may invite the parties for a hearing. But this procedure is purely discretionary and there is no duty to hold an oral hearing in the Council or the House.

In both instances, if the complaint reaches the Council, the case before the court will be stayed until the Council decides on the complaint. It is provided that 'it is only the legal issue necessary for constitutional interpretation that the court forwards to the Council of Inquiry'. More specifically, the Council will only determine whether the challenged law is constitutional or not generally and not necessarily regarding its applicability to the case pending before the court. Constitutional interpretation is therefore essentially incidental to the determination of the case pending before the court.⁵⁶ However, the requirement that the court may only refer the constitutional issue so long as it is necessary to resolve the dispute at hand concretises the incidental and largely abstract nature of the constitutional determination.

Unlike the Constitution, the Council's Proclamation establishes separate procedures for the enforcement of human rights provisions in the Constitution in cases arising outside the context of the courts. It provides:⁵⁷

Any person who alleges that *his fundamental rights and freedoms have been violated* by the final decision of any government institution or official may present his case to the Council of Inquiry for constitutional interpretation.

We can clearly observe that this provision upholds the traditional standing rule which only allows those whose rights have been violated to have the *locus standi* to apply for constitutional interpretation. This standing rule also does not distinguish between the sources of violation, ie whether or not the challenge is against legislation or any other action or inaction. The mere fact that a person is adversely affected, directly or indirectly, by a particular act or omission does not suffice unless he or she can show that they have a constitutional right which has been violated. Moreover, this provision only anticipates cases where a right has actually been violated and does not include cases of threats of violation. As such, individuals and entities would have to face the risk of violation and suffering the consequences, which might be dire, before asserting their constitutional rights. For instance, in the Ethiopian anti-terrorism legislation, there is a provision which

⁵⁶ See A Mulatu 'Who is "the interested party" to initiate a challenge to the constitutionality of laws in Ethiopia (under the 1994 FDRE Constitution)' (1999) *The Law Student Bulletin* 2 3 4.

⁵⁷ Art 23(1) Council Proclamation (my emphasis).

criminalises publishing anything *likely* to encourage terrorism.⁵⁸ This provision potentially unreasonably restricts freedom of expression and press freedom and hence might be challenged as unconstitutional. Yet, under the current procedure, only those who have already been charged or convicted under the provision may challenge the law. Individuals or publishers may not dispute the constitutionality of this provision without subjecting themselves to a potential criminal prosecution. This unreasonably restricts access to the Council and hence access to justice. The view taken by the Constitutional Court of South Africa which has noted, regarding a case instituted by the Centre for Child Law against a minimum sentencing regime as applied to children aged 16-17, should have been adopted:⁵⁹

To have required the Centre to augment its standing by waiting for a child to be sentenced under the new provisions would, in my view, have been an exercise in needless formalism.

The procedure does not, moreover, grant interested entities, such as human rights NGOs who work in the area under consideration, other than the victim of a violation standing before the Council. The Council has, for instance, rejected a case submitted by the Islamic Affairs Supreme Council on whether final decisions of Islamic Shari'a courts are appealable to ordinary courts under the Constitution.⁶⁰ The Council ruled that only the parties to the case have standing to refer the case to it. Also, since this provision specifically applies to allegations of violations of human rights provisions of the Constitution, the 'interested party' requirement, which could possibly have been construed widely, may not apply.

The adoption of restrictive standing rules regarding constitutional complaints may have been motivated by the need to screen the flow of cases to the Council which is an *ad hoc* institution. The Council meets only quarterly and may also hold extraordinary sessions. This makes the Council incapable of addressing a large case load when it meets. Given that constitutional complaints have constituted a significant majority of cases involving judicial review, it would have been unwise to adopt a relaxed standing rule which will add to the inherent inefficiency of the Council. However, it would have been better to reconstitute the Council as a regular organ than limit standing rules in view of its *ad*

⁵⁸ Art 6 Ethiopian Anti-terrorism Proclamation No 652/2009, which provides that the crime of terrorism is committed by anyone who 'publishes or causes the publication of a statement that is *likely* to be understood by those addressed as a direct or indirect encouragement or other inducement for the commission or preparation or instigation of an act of terrorism'.

⁵⁹ Para 12 *Centre for Child Law v Minister for Constitutional Development & Others* Case CCT 98/08 [2009] ZACC 18.

⁶⁰ The case was submitted to the Council in October 1999 and the Council delivered its decision on 17 January 2001. See Fiseha (n 46 above) 26-27.

hoc status. Restrictive standing rules should not be adopted to address a self-created limitation—the *ad hoc* status of the Council.

It should be noted that neither the Constitution nor the enabling statutes anticipate and explicitly address the possibility where a constitutional issue was not raised during the court proceedings, but one of the parties wants to challenge the final decision of a court as unconstitutional. It does not appear from the proclamations whether the Council or the House will receive complaints after a case has been resolved by the courts without the parties raising a constitutional issue during the proceedings. It is not clear as to whether the failure to raise a constitutional issue during the court proceedings should preclude the parties from raising it in the Council or House if they realise that the final decision of the court was unconstitutional because the law on which the decision was based is incompatible with the Constitution.⁶¹ There is, however, no justification for insulating judicial decisions from constitutional scrutiny as even courts are bound to observe and ensure compliance with the Constitution, especially the human rights provisions therein.

The Council is, nonetheless, a forum of last resort concerning cases arising outside the context of courts. Hence, the party invoking the Constitution should first have attempted to exhaust all available remedies in the ‘the government institution having the power with due hierarchy to consider it’.⁶²

Another important novelty in the Council’s Proclamation is the definition provided for ‘law’ and ‘courts’. Earlier in the article, it was indicated that the Constitution does not define ‘law’ or ‘courts’ as such. This Proclamation clears up the confusion by defining law to mean ‘Proclamations and Regulations issued by the Federal Government or the states as well as international agreements which Ethiopia has endorsed and accepted’.⁶³ This provides a very robust definition of ‘law’ and apparently contradicts the Constitution, especially the Amharic version which limits laws, the constitutionality of which may only be challenged in the Council and the House, to proclamations of the state and federal legislative bodies. Some scholars are adamant that this definition itself is unconstitutional and takes away the implied residual power of ordinary courts to determine the constitutionality of regulations and directives issued by the

⁶¹ Note, however, that there is a procedure to the Cassation Division of the Federal Supreme Court where one can complain against a final decision of courts on questions of law, once appeal on the issue has been perfected. This still raises questions as the constitutionality of the interpretation of the Cassation Division may itself be challenged. Since the Cassation Division decides on a particular interpretation of laws, and not the constitutionality of that interpretation, the decision of the Cassation Division cannot be a substitute for decisions of constitutionality by the House or the Council. There is therefore no clear mechanism of challenging decisions of judicial bodies unless the constitutionality issue has been raised during the proceedings.

⁶² Art 23 Council Proclamation.

⁶³ Art 2(5) Council Proclamation.

executive.⁶⁴ Quite interestingly, the proclamation enacted to consolidate and provide for the powers and responsibilities of the House extends the definition of law to include directives issued by government institutions, which might include codes of conduct and guidelines or standards.⁶⁵

On the contrary, the Proclamation defines a 'court' very narrowly. Accordingly, 'court' refers to 'federal or state courts at any level'. This excludes Shari'a courts as well as other entities with judicial power from referring cases to the Council in cases where they are convinced that a pending case raises the constitutionality of an applicable law.

Just like the Constitution, the Council's Proclamation does not provide a clear answer as to whether a person may appeal against a decision of the Council to reject a case for want of standing.⁶⁶ This Proclamation provides for the right to appeal against the decision of the Council to dismiss a case for lack of a need for constitutional interpretation.⁶⁷ As mentioned earlier, this does not include the right to appeal in cases where a case is refused for want of standing. The House's Proclamation, however, establishes a right to appeal to any 'party dissatisfied with the decision of the Council of Constitutional Inquiry of rejection of case relating to review of constitutional interpretation'.⁶⁸ The phrase 'rejection of a case relating to review' is wide enough to cater for decisions to discard a case for lack of standing to sue.

4.4.1 Standing to enforce the right to self-determination

The Proclamation providing for the powers and duties of the House establishes separate procedures for the enforcement of the right to self-determination of nations, nationalities and peoples (ethnic groups) in Ethiopia as entrenched under article 39 of the Constitution. The Proclamation provides:⁶⁹

Any nation, nationality or people who believes that its self-identities are denied, its right of self-administration is infringed, promotion of its culture, language and history are not respected, in general its rights enshrined in the Constitution are not respected or, violated for any reason, may present its application to the House through the proper channel.

This provision is an extension of the traditional rule that authorises only those whose rights have been infringed to approach the relevant entities for enforcement of their rights. As such, it is only ethnic groups whose rights allegedly have been violated who may institute action in the House. This contradicts the opinion of the House regarding the resolution of questions of identity where it observed that 'anyone' can

⁶⁴ See, eg, Fiseha (n 46 above) 1.

⁶⁵ Art 2(2) House Proclamation.

⁶⁶ Mulatu (n 56 above) 12.

⁶⁷ Art 18 Council Proclamation.

⁶⁸ Art 5(2) House Proclamation.

⁶⁹ Art 19 House Proclamation.

raise this question as long as it complies with the definition of ‘nations, nationalities and peoples’.⁷⁰ According to the law, neither the federal government nor regional states may institute action on behalf of ethnic groups. In any case, applications to the House for the exercise of the right to self-determination, including secession, may only be admitted if a genuine attempt to exhaust available solutions within the regional state in which the concerned ethnic group is situated has been made.

4.5 Standing to seek ‘consultancy service’

The Ethiopian Constitution does not establish any procedure for seeking a consultative opinion, whether before or after the enactment of a law. Article 84(2) nevertheless refers to ‘laws’, portending that the Constitution only anticipates challenges after the enactment of laws. However, the jurisdiction of the House is not limited to disputes over the constitutionality of legislation and extends to other constitutional issues. The Constitution empowers the House to ‘interpret the Constitution’ and to adjudicate upon ‘all constitutional disputes’ with the support of the Council.

The House’s Proclamation provides that ‘the House shall not be obliged to render a consultancy service on constitutional interpretation’.⁷¹ The opposite reading of this provision seemingly implies that the House may, when it so wishes, provide an advisory or consultative opinion, though no entity has the right to demand a consultative service on any constitutional issue. This means that the House has the right to choose in which cases it may give an advisory or consultative opinion. The issue of standing in such cases will also be determined by the House itself on a case-by-case basis as part of its discretionary assessment. The House may also decide to give an opinion on legislation before or after its enactment.⁷² This procedure will enable the Council and the House to consider the constitutionality of a law by considering all the possible consequences of the impugned provision and not necessarily regarding the constitutionality of the provision as applicable to a specific case and party. Due to the broad impact and politically-intrusive nature of consultative or advisory opinions, the entities that may apply for the review of a bill should be limited.⁷³ The Council and the House have

⁷⁰ Decision of the House of Federation regarding Claims of Identity (April 2001). It is not clear whether the decision is only referring to anyone claiming to be a member of the concerned ethnic group.

⁷¹ Art 4(2) House Proclamation.

⁷² Eg, the House gave its opinion on whether the federal government may enact a federal family code (as this is expressly granted to the regional states) upon request of the office of the Prime Minister (see constitutional inquiry raised regarding the promulgation of a federal family code (House of Federation, April 2000)).

⁷³ In the case of South Africa, eg, only the President of the Republic (against federal bills) and the premiers of the provinces (against provincial bills) have the standing in prior control (to challenge a bill for constitutionality).

an absolute discretion to decide who has standing and in relation to which issues.

The Council's Proclamation, moreover, provides that cases which may not be handled by the courts and which require constitutional interpretation may be submitted to the Council by at least one-third of the members of the federal or state legislative councils, or the federal or regional state executive bodies (article 23(4)). This provision, besides anticipating the existence of disputes which may not be handled by courts (hence non-justiciable), opens a vista of opportunities for the Council to engage in abstract or advisory review.⁷⁴ This is so because there is no clear requirement that the dispute be based on legislation or regulation which is in force, or be a concrete dispute. Hence, the entities listed in the provision may possibly even take a bill to the Council for constitutional determination before the bill is enacted. This provision allows the submission of cases on the constitutionality of policies and practices which have not been expressly catered for in other provisions as well.⁷⁵

4.6 Standing under the Rules of Procedure of the Council

The Council adopted Rules of Procedure in 1996 upon their approval by the House as required under 84(4) of the Constitution. The Rules (article 7) provide that (a) the House, (b) federal and state legislative and executive bodies, (c) courts of any level regarding pending cases, and (d) an interested party or body, have standing before the Council.

The fact that Rule (d) grants standing to interested parties and bodies clearly signifies that the entities listed from (a) to (c) do not need to show an interest in the case concerned. It is as if these entities are granted free access to the Council. The fact that the House is also mentioned as a potential entity that may institute action in the Council is a paradox given that the House is the final umpire of constitutional disputes upon the recommendation of the Council. Moreover, the granting of standing to all legislative and executive bodies establishes the widest possible standing rules. Apparently, the Rules of Procedure widen the scope of entities entitled to set the Council in motion compared to both the Constitution and the Proclamations of the House and the Council. Some scholars have argued that this expansion is illegitimate and hence susceptible to constitutional challenge.⁷⁶ However, this argument is overstated, given that the Ethiopian Constitution

⁷⁴ There is, however, no indication as to what kind of cases may not be handled by courts. This provision might as well be creating its own version of the political question doctrine as developed by the US Supreme Court. Cases concerning, eg, policies or foreign relations may fall in this category.

⁷⁵ The House has, eg, developed guidelines on who may raise a claim regarding identity and who may decide on the questions for the right to self-determination. See Decision of the House of Federation regarding Claims of Identity (April 2001).

⁷⁶ Mulatu (n 56 above) 8.

recognises the right of access to justice, which is related to the issue of standing. Moreover, the Constitution merely establishes the minimum standards and building upon such standards is not necessarily illegitimate or unconstitutional.

The rules do not clarify whether the reference to interested parties or bodies relates to parties in a court case or even to cases outside court. Hence, the proposed constructions of similar provisions under the previous sections apply *mutatis mutandis* to our understanding of these rules. Hence, particularly concerning human rights cases (constitutional complaints), an interested party or body is one whose 'fundamental rights and freedoms have been violated' as required under the Council's proclamation. One must therefore assert entitlement to a particular right which allegedly has been violated to have standing to sue.

4.7 The procedure of *amicus curiae* and standing to be *amicus*

The Constitution does not include a provision dealing with the possibility of joining a case as *amicus* or addressing *amicus curiae* submissions. The two proclamations providing for the House and the Council, however, anticipate procedures whereby the Council or the House may be engaged in 'gathering professional opinions' on the issue under determination. The Council or the House may therefore 'call upon pertinent institutions, professionals and contending parties to give their opinions' on the issue(s) under consideration.⁷⁷ A pertinent federal or state government institution, particularly the institutions which consult the government in adopting laws, may also be required to explain controversies over relevant issues.⁷⁸ As such, we can observe that oral hearings are not mandatory and may only be conducted when the Council or the House decides to hold them.

The power to choose which institutions or professionals may give their views over a disputed constitutional issue lies solely with the Council and the House. Hence, there is no right to stand as *amicus curiae* before the Council or the House. The laws are not clear on whether the institutions or professionals may apply (or take the initiative) to stand as *amicus* in a particular case. No procedure exists to this effect though, implying that it is possible only when the House or the Council of its own motion approaches a relevant professional or institution. This understanding may, however, narrow down the opportunities for the House to benefit from the expertise of individual professionals and institutions, particularly regarding issues of human rights. Hence, these provisions should be understood as allowing professionals and institutions to apply to be joined in a case that relates to their expertise

⁷⁷ Art 27 Council Proclamation; art 10 House Proclamation. The House has collected views of experts on some occasions.

⁷⁸ Art 26 Council Proclamation; arts 9(2) & (3) House Proclamation.

as *amicus curiae*. This is important as these professionals and institutions are better suited to determine the relevance of their expertise to a particular case. This does not, however, exclude the possibility of the House or the Council making general calls for contributions.

4.8 Standing before the Human Rights Commission and the Ombudsman

To further enhance the proper enforcement and realisation of the human rights recognised therein, the Constitution establishes the Human Rights Commission and the Ombudsman.⁷⁹ Accordingly, the House of Peoples' Representatives has enacted enabling proclamations to establish these institutions.⁸⁰ The Commission is established with the objective 'to educate the public [to] be aware of human rights, see to it that human rights are protected, respected and fully enforced as well as to have the necessary measure taken where they are found to have been violated'.⁸¹ The Ombudsman is established with the aim 'to see to bringing about good governance that is of high quality, efficient and transparent, and [...] based on the rule of law, by way of ensuring that citizens' rights and benefits provided for by law are respected by organs of the executive'.⁸² Essentially, the Commission has a broader mandate, relating to all government institutions. On the other hand, the Ombudsman has the power to investigate cases concerning the action and omissions of the executive only.

The rules of standing before these institutions are more liberal than those before ordinary courts or the Council and the House, and understandably so. Hence, 'a complaint may be lodged by a person claiming that his rights are violated or by his spouse, family member, representative or by a third party' to the Commission.⁸³ This establishes the most extensive standing rules as 'third party' includes 'a deputy, an association or an NGO representing an individual or a group'.⁸⁴ The Commission may even accept anonymous complaints depending on the seriousness of the alleged violations.⁸⁵

Similarly, the right to lodge complaints to the Ombudsman accrues to a wide range of individuals and entities. There is no special interest requirement as such. Hence, 'a complaint may be lodged by a person claiming to have suffered from maladministration, or by his

⁷⁹ Art 55 of the Constitution requires the House of Peoples' Representatives to enact enabling laws for the establishment of the Ethiopian Human Rights Commission and the institution of the Ombudsman.

⁸⁰ Human Rights Commission Establishment Proclamation 210/2000 and the Institution of the Ombudsman Establishment Proclamation 211/2000.

⁸¹ Art 5 Commission Establishment Proclamation.

⁸² Art 5 Ombudsman Establishment Proclamation.

⁸³ Art 22(1) Commission Establishment Proclamation.

⁸⁴ Art 2(9) Commission Establishment Proclamation.

⁸⁵ Art 22(2) Commission Establishment Proclamation.

spouse, family member, his representative or by a third party'.⁸⁶ This proclamation does, however, not define 'third party'. Nonetheless, considering the fact that the two proclamations were adopted on the same day, we can safely borrow the definition provided in the proclamation establishing the Commission. Hence, it may include human rights NGOs and other entities. The Ombudsman may also accept anonymous complaints considering the gravity of the impugned maladministration.⁸⁷

The two enabling proclamations are silent on whether the Commission or the Ombudsperson may investigate cases *suo moto*. However, it appears that the empowerment to consider anonymous complaints may be widely interpreted to legitimise instances where the Commission or the Ombudsperson investigates cases of its own volition based on information from, for instance, the media.

4.9 Standing to enforce the right to a clean environment

Article 44(1) of the Ethiopian Constitution establishes the right to a clean and healthy environment. The Constitution also reiterates the right in the section dealing with National Policy Principles and Objectives (article 92). The environmental policy objective requires that the implementation of programmes and projects do not destroy or damage the environment. Moreover, it establishes the right of all people to 'full consultation and to the expression of views in the planning and implementation of environmental policies and projects that affect them directly'.

To give effect to this constitutional guarantee, several laws have been enacted. The main such law establishing the general framework for environmental standards is the Environmental Pollution Control Proclamation 300/2002. The Proclamation establishes several environmental standards to ensure that socio-economic development activities may not become counter-productive by inflicting irreversible and disproportionate harm on the environment.⁸⁸ It further enjoins everyone to refrain from polluting the environment by bypassing the relevant environmental standards.⁸⁹

In order to ensure the effective enforcement of environmental standards and in recognition of the broad, indiscriminate and boundless impact of environmental pollution on everyone, the proclamation establishes a separate standing regime. It sanctions the right of 'any person' to lodge a complaint at the Environmental Protection Authority (Authority) 'against any person allegedly causing actual or potential damage to the environment' 'without the need to show any vested

⁸⁶ Art 22(1) Ombudsman Establishment Proclamation.

⁸⁷ Art 22(2) Ombudsman Establishment Proclamation.

⁸⁸ Para 1; art 6 Preamble.

⁸⁹ Art 4.

interest'.⁹⁰ A similar broad standing right exists to access the courts 'when the Authority or regional environmental agency fails to give a decision within thirty days or when the person who has lodged the complaint is dissatisfied with the decision [of the Authority]'.⁹¹ The right to a clean and healthy environment therefore stands as a notable exception to the recognition of public interest litigation in Ethiopia.⁹² This wide standing rule is, however, only applicable to courts and the Environmental Protection Authority (EPA), and there is no similar generous right to access the Council or the House concerning the enforcement of the right to a clean and healthy environment as recognised in the Constitution. Note, however, that courts and the EPA may engage in incidental constitutional interpretation in ensuring compliance with the pollution laws. Hence, only those who have a direct interest in a case may, for instance, challenge the constitutionality of a law for alleged incompatibility with the right to a clean and healthy environment enshrined in the Constitution.

5 Concluding remarks

Rules of standing are intimately connected to, and can profoundly impede or facilitate access to justice. The courts and legislatures of several states are moving away from the traditional exclusionary standing rules to more liberal and even inviting rules that prioritise the enforcement of human rights. This is particularly so in the case of constitutional rights, the enforcement of which everyone may be said to have an interest in. The activism of the Indian Supreme Court, the progressive Constitution of South Africa and the inspirational move of the Chief Justice of the Nigerian Supreme Court, have all effectively inaugurated a new liberal model of standing in human rights cases involving the public interest. This approach is in line with and reinforces the supremacy clauses of the respective constitutions. In this regard, the Canadian Supreme Court ruled that standing may at times be granted to any person to enforce 'the right of the citizenry to constitutional behaviour

⁹⁰ Art 11(1).

⁹¹ Art 11(2). The appeal may, however, be brought only within 60 days from the date a decision was given or the deadline for a decision has elapsed.

⁹² Action Professionals' Association for the People (APAP) instituted the first public interest litigation based on this provision against the Environmental Protection Authority. The issue was whether the EPA could be sued based on art 11. The court held that art 11 of the Environmental Pollution Control Proclamation does not grant standing for suits against the EPA (the law only allows action against polluters and potential polluters which the EPA was established to control). See *Action Professionals' Association (APAP) v Ethiopian Environmental Authority* Case 64902, Federal First Instance Court, 31 October 2006.

by parliament where the issue in such behaviour is justiciable as a legal question'.⁹³

However, except for the right to a clean environment and only in ordinary courts, and except for the Commission and the Ombudsman, the traditional standing rules are applied in enforcing the Constitution as well as ordinary laws in Ethiopia. The fact that clear rules exist in instances when the legislature wants to provide for broader standing, while similar provisions abandoning the traditional rule in the Constitution are absent, reaffirms restrictive traditional standing rules.

The procedure currently available does not allow human rights NGOs and other entities to challenge laws or government action or inaction in discharging their constitutional duties. These restrictive rules have partly contributed to the very low frequency of constitutional human rights litigation. When seen in light of the fact that most Ethiopians are not aware of their rights, even less so about the existence and procedures of the Council or the House, a more liberal approach to standing would be justifiable. The experience of other countries indicates that constitutional human rights litigation is often spearheaded by public interest groups and human rights NGOs. Hence, procedures to create access to such entities must be crafted through, amongst others, more liberal standing rules. The procedure is further complicated by the fact that both the Council and the House are located only in Addis Ababa, too remote and inaccessible for most Ethiopians. There is therefore a need for broader standing rules concerning human rights cases involving the public interest, including cases where legislation is challenged. Such broader standing rules will be more in line with the supremacy clause of the Ethiopian Constitution. More specifically, Ethiopia should adopt the standing rules currently in operation in India, South Africa and Nigeria, at least regarding the enforcement of human rights provisions in the Constitution.

Admissibility also should not be limited to cases where there are actual violations. As it stands now, it is only complaints that allege actual violations that are admitted. Applications that allege threats of violation of a constitutional right should also be entertained. The Council and the House should further provide for clear procedures for *amicus curiae* submissions and should allow applications from NGOs and other professionals to be joined as *amicus curiae* even when the Council and the House have not called upon pertinent institutions and professionals for such a purpose.

⁹³ *Thorson v Attorney-General of Canada* [1975] 1 SCR 138 162 163.