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Effective decision making and its impact on social justice:
The Federal and Amhara National Regional Courts of Ethiopia

Law and practice

By

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A thesis submitted in partial fulfillment of the requirements
for the Degree of Philosophy (PhD) in law

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Woubishet Shiferaw

Declaration

I, Woubishet Shiferaw, hereby declare that this is my original work and that no part of this study has ever been presented to the University of Warwick or to any other university or institution for any other purpose.

Woubishet Shiferaw

Executive summary

This thesis examines the challenges that the Federal and Amhara National Regional State (ANRS)¹ Courts of Ethiopia face in the realisation of legal and social justice. The Ethiopia Constitution (1995) under Article 43 declares that Ethiopian people have the right to improved living standards and sustainable development where the basic aim of development activity is to enhance, through their full participation, citizens' capacity for development and the meeting of their basic needs. The Constitution underlined this as the 'North Star' of social justice which would be meaningless unless dispute resolution mechanisms empower litigants and the people in gaining social justice and thus the attainment of the Constitutional objective.

The attainment of the social justice is however problematic as the legal justice the formal court is administering does not meet the people's Constitutional expectations. The mismatch between legal and social justice, coupled with the legal history and the prevalence of justice pluralism, tends to force the People of Ethiopia to use non-formal systems of dispute resolution. Thus, there is a need to refine the formal and non-formal systems and to align them with the Constitutional imperative of social justice. Judicial reform is being implemented, with the help of international institutions like the World Bank, but the underlining concern is whether the World Bank proposals on judicial and legal reform will meet these needs or whether they are too located in Western values, the suggestion being that they may suffer from the same problems as other modernisation projects.

There also lies a tension between the Constitutional expectation, the conceptualisation of justice by professionals and clients, and the overall purpose of securing justice and preventing injustice. Litigants' preference for justice is itself in conflict with other litigants and the diverse institutional understanding of justice that made the attainment of social justice a difficult exercise. The area is found to be so problematic that there is a need to re-connect the practical conceptualisation of justice with the Constitutional conceptualisation of social justice which the Federal and ANRS courts require the redoing of justice so that the conceptualisation of justice would not cause irreversible damage to people's societal, economic, and ecological demands and to the sustainability of justice and development.

¹ The Region is located in Central, Northwestern and Northern part of the Country, population approximations are around 23 million people (the second largest population in Ethiopia), overwhelmingly Christian (over 90%), and determined the present boundaries of Ethiopia.

Acronyms

ADRM	Alternative Dispute Resolution Mechanisms
ANRS	Amhara National Regional State.
BPR	Business Process Reengineering
BSC	Balanced Score Card.
CARP	Court Administration Reform Programme
CBSP	Capacity Building Strategic Programme
CCMS	Court Case Management System
CDF	Comprehensive Development Framework.
CIDA	Canadian International Development Assistance.
CILC	Center for International Legal Cooperation.
CMS	Case Management System
CRS	Case Recording System
DSBP	Democratic System Building Policy.
EACC	Ethiopian Arbitration Conciliations Center.
EPRDF	Ethiopian People Revolutionary Democratic Front
EU	European Union
FDRE	Federal Democratic Republic of Ethiopia
FFIC	Federal First Instance Court.
FHC	Federal High Court.
FSC	Federal Supreme Court.
GTP 2	Growth and Transformation Plan 2.
IBD	International Bank for (Reconstruction) and Development.
ILO	International Labor Organization
IPCC	Intergovernmental Panel on Climate Change.

JLSRI	Justice and Legal System Research Institute.
JSRP	Justice System Reform Programme
JSRPO	Justice System Reform Programme Office
MDG	Millennium Development Goal.
MoCB	Ministry of Capacity Building.
NEP	National Expansion Programme
NJRSC	National Justice Reform Steering Committee
NSHC	North Shewa High Court.
ROL	Rule of Law
UNDP	United Nations Development Programme.
USAID	United States Agency for International Development.
WGHC	West Gojjam High Court.

Introduction

The Ethiopian Constitution under Article 43 of Human and Democratic Rights declares that its people have the right to improved living standard and sustainable development which is envisaged as the enhancement of the capability of citizens for development and meeting their basic needs.

The corollary duty of this right is laid down upon dispute resolution bodies when Article 9 and Article 13 of the Constitution declare that judicial bodies shall have the responsibilities and duty to respect and enforce provisions relating to human and democratic rights. Further the Constitution declares that any decision by a government department and customary practice contravening the Constitution shall have no legal standing. Thus, non-formal courts (non-formal in the sense that they operate outside the formal government structure) envisaged under Article 37 and Article 78 of the Constitution are also expected to contribute positively in sustaining development, or at least are expected not to negatively damage the sustainability of development.

Formal dispute resolution mechanisms may primarily focus on resolving disputes and providing legal justice while non-formal mechanisms may primarily focus on settling disputes. A question that arises is whether the resolution or settlement of disputes has economic, social and environmental benefits to the litigant and the people. Secondly, whether the legal justice provided can provide social justice as per the Constitutional imperative. Thirdly, inquiring whether the judicial and legal reform programme that is being implemented in Ethiopia can end up with the realisation of the Constitutional expectations. Amid the lack of comparable duties imposed on the judicial bodies by the laws establishing them, the formal courts are expected to contribute to sustaining development by gradually reacting to individual cases brought before them.

The law stipulates various incentives and disincentives towards legal and social justice via its litigation administration. The legal incentives include the right to a speedy trial, fair access to justice, low judicial fees, ease of the arrangement of mobile benches, speedy enforcement of decisions, and the upholding of the Constitutional guarantee towards the protection of unlawful deprivation of property rights (particularly land rights) and the use of non-formal systems in resolving certain kinds of dispute. The disincentives include the allocation of burdens and accountability among those making illegitimate use of dispute settlement mechanisms.

The incentives and disincentives have various underlying assumptions towards the realisation of social justice. The basic assumption is that the prevalence of social justice is to lifting people out of poverty.² Secondly, they are assumed to assist market friendly transactions so that investment is attracted towards the economic development of the country. It is assumed that the attainment of social justice via the courts would improve the living conditions of parties, the wellbeing of the community, and create an atmosphere of cooperation to benefit clients socially, economically and ecologically. When the courts' operation is inline, it is hoped, that it would contribute to the prevention of injustice and contribute to the building of an integrated economic and social order of the country. Thirdly, the process and outcome of litigation would generate harmony and peace in the country so that social ties of the litigants would be strengthened and environment would be managed properly and not be degraded.

The assumptions behind the disincentives include the avoidance of frivolous litigation so that litigants would only appear before the formal courts with legitimate and genuine claims, reduction in rent seeking³ behaviour that is revealed in litigation, the production of genuine evidence before the courts and the

² Otherwise poverty would lead to the disintegration of Ethiopia.

³ Rent seeking in this study is understood to mean using government power or getting connected with people in power so as to get profits which otherwise one cannot get in a free market (FDRE, *Struggle to Build Democratic System and Revolutionary Democracy*, March 2007: 2, Addis Ababa).

prevalence of good governance in the country.⁴ The cumulative effect of the assumptions is the realisation of social justice.

Following this objective reform, documents and plans promised the litigants and the people that the formal courts would effectively administer their responsibility in a way which enhances social justice for the economic benefit of litigants and the people and that the formal courts would halt the degeneration of property (such as land) and gives meanings to societal values towards social justice. These benefits and promises call for accessibility, predictability, efficiency, transparency, independence, and accountability on the part of courts that are intrinsically good in themselves but more importantly are instrumental to the basic aims of the Constitution.

This study examines these normative stipulations, various laws and practical applications of the judicial reform programme concerning the realisation of social justice. More specifically it examines how dispute resolution mechanisms procedurally and substantively help to promote capabilities of parties and the living standards of the people.⁵ It also examines the goals of the judicial reform programme in this respect, the opportunities provided by the reform programme and the normative orders and the challenges dispute resolution mechanisms face in the discharge of Constitutional expectations. This necessitates a clear and contextualised reform agenda, legal regimes and a strong body making effective decisions. The study examines these issues in the context of formal and non-formal dispute resolution mechanisms where the people brings claims of litigation that interface economic, social and environmental elements with the corresponding challenges in the process and outcome of the claims.

⁴ FDRE, *Struggle to Build Democratic System and Revolutionary Democracy* (1st Edition, Addis Ababa, 2007).

⁵ Unless otherwise stipulated this is intended to include the formal and non-formal ways of doing justice.

Furthermore it is necessary to consider the extent to which the existing culture of the courts places constraints on these assumptions of the new Ethiopian State developmental role and in particular whether particular interests dominate decision making. Thus, there is a need to address the issue of how the social, economic and environmental equilibrium can be achieved and if the decision making bodies could do so in the current administration of justice networked and connected locally and globally. There is a need to address whether and how the desire to resolve or settle disputes by the dispute resolution mechanisms can target the provision of social justice and whether this goal can be achieved in the current performance of dispute resolutions and the judicial reform programme.

Research questions

This research mainly explores if and how the then and now cry of social justice is being served by dispute resolution bodies. The main focus is how these bodies discharge their responsibilities towards justice. In particular the research involves theoretical and empirical:

1. Examination of the gap between the legal and social justice in the legal history of Ethiopia;
2. Examination of social justice as per the Constitutional imperative and inquiry as to the realization of social justice by the dispute resolution mechanisms;
3. Analysis of legal justice in the principles and practice of dispute resolution mechanisms in relation to the gap between legal justice and social justice;
4. Analysis of the role of aid funded judicial reform programmes in general and the Ethiopian judicial reform programme in particular in improving the gap between legal and social justice and the relationship between formal and non-formal dispute settlement mechanisms;

5. Examination of people's reaction to an ineffective dispute resolution mechanism and the possible harmonization between formal and non-formal ways of dispute resolution mechanisms;
6. Examination of the connection between different factors affecting legal justice (including legal history of Ethiopia, litigation rate and litigation culture, prevalence of legal pluralism, ability of decision making bodies, and global impacts) and the realization of basic needs and standards of living of the people and reduction of poverty.

Theoretical framework

The theoretical part of the thesis is covered in Chapters One to Four. The chapters examine the connection between decision making bodies and social justice. This theoretical part builds upon the conception of development under the Ethiopian Constitution. It considers improving capabilities and living standards as central issues of justice and uses these elements as outcomes to be attained in the activities of decision making bodies.

Accordingly it involves the search for and building able institutions and systems towards effective administration of social justice. This cannot be done without exploring the roots of current thought in justice. Thus Chapter One examines the relationship among decision making bodies, the laws and justice in the context of Ethiopian legal history from two dimensions: the history of reform movements and the history of decision making bodies. It examines the challenges in the making of the legal institutions and laws of Ethiopia and connects the existing challenges of the laws, reform programme and courts with the legal history of the country.

Chapter Two is an attempt to link the past and the present by making clear institutional roles and the understanding of justice. It addresses how the challenges of the past could yield lessons to the judicial reform programmes of the present and the future. It employs various approaches and theories to balance the past and the present. In an attempt to capture an idea of justice benefiting the thesis

(particularly the discussion on the judicial reform programme) it deals with issues of institutions and of justice.

This part of the study benefits from the Constitutional imperative regarding the right to development which encompasses raising the living standards and basic needs of the people. These elements of development would get realized through the judicial reform programme that hopefully benefits institutions in processing and ending litigation towards justice. The discussion benefits from the conceptions of institutions of the old times (Barker 1959, Kraut 2002) and World Bank and economists conception of institutions informed by discussions from (Change 2007, North 1981, Risse 2004 and others). Liberal conceptions of institutions and justice will supplement the discussion on the institutions discourse and serve as a spring board to a discussion on the conception of justice (Sen 2009, Rawls 2005, Pogge 2004, 2005). Some discussion is also made on the critiques of these theory and ideas of justice including Aristotelian notion of living humanly and Nussbaum's capabilities (Chimini 2008 and Nussbaum 1997, 2005).

In the sphere of judicial reform programmes issues of law and development have benefited from informed discussion that makes the discourses on institutional reforms clear. Particularly the involvement of International Monetary Institutions informs the discussion of institutional reforms from an economist perspective (Mattis 2009, Caney 2010, Thorsby 2009, Galenter and Trubeck 1972, Nader 2005, 2007, Tamanaha 1995, Marryman 1977). To this effect law and development movements and the slogan "Institution Matters" enlightens the discussion (Messick 1983, Dokalias 1996, World Bank 2004, Risse 2004, Hammergren 2005, Twining 2007). Sen's comprehensive approach to development provides the view from another angle. In its own way a bottom up approach to institutional reform has made an opposite view of institutional reform possible (Baxi 2007, Faundez 2010, 2011, Pratiksha 2007). Some discussions on the meaning of the developmental state are made to connect the various discourses of reform with the Ethiopian developmental state conception (Evans 1989, Woo-Cummings 1999).

The discussion on the various dimensions of development understood in the Constitutional context includes discussions on discourses of judicial reform programmes and the interconnection between the judicial reform programme and social justice. This part of discussion in particular highlights the various movements in the reform agenda (particularly the law and development movement) and the various approaches to judicial reform programmes that influenced the Ethiopian program. Accordingly it examines the neo-liberal approaches to reform, the developmental theories approach to reform, the institutional role of reform, Sen's conception of capability and functionings, Nussbaum's list of capabilities, Pogge's conception of negative duty on severe poverty and Rawl's conception of the original position. In an attempt to show the connection, reconnection and disconnection of justice reforms and institutions the Aristotelian and other 'naturalists' conception of justice is briefly discussed highlighted.

The discussion on the Ethiopian judicial reform programme takes account of the country's legal history and the theoretical discussion on reforms (Haile 2002, MoCB 2002, CILC 2005). The discussion is informed by the base lines studies conducted in Ethiopia to this effect, the solutions recommended and the contents of the programme. This part of the discussion is an attempt to see the applications of theories in the reform of judiciaries in a country having complex legal system. It is highly informed by local documents and sources and investigates the extent to which the reform programme is disconnected from the challenges raised by the legal history of the country, the extent it is disconnected from the top-down approach to development and reform and the extent it gives meaning to lives of litigants and beyond.

Methodology and methods

The research encompasses the discussion of theoretical, reform, legal and practical issues in the attainment of justice in Ethiopia. The theoretical part mainly examines various theoretical aspects of justice and institutions in line with the laws and

judicial reform documents. It tries to investigate the issue of justice from sociological, economic and environmental context at a wider level and narrows the discussion to the more specific examination of the issues in the Ethiopian context. Accordingly, the discussion is followed by exploration of the Constitutional imperatives of social justice and the laws and reform documents to this effect. It further specifically examines the themes in the context of Ethiopian decision making bodies.

The empirical work covered in Chapters Four to Six supplements the theoretical work in a number of ways. It will be conducted on nine Federal and ANRS courts of Ethiopia located in three areas.⁶

The main focus of the field work is conducting interviews with key informants, administering questionnaires, observing decision making bodies and analysis of cases. The purpose is getting first-hand information on how justice is being understood by different bodies, including the parties, the implication of this in the rendering of justice and its effect on the process and outcome of decision making bodies and investigating how justice is being (not) served by different bodies.

Outline of the thesis

The study is composed of seven chapters. The chapters are arranged logically and help to develop comprehensive contextual argument regarding the realisation of social justice by decision making bodies. The following is a brief description of the general outline of the study.

Chapter One provides a brief account of the legal history of Ethiopia. It categorises the various periods of the history and focuses on the laws and decision making bodies of the country during the various periods. The discussion begins from an earlier era when laws were written in the 'hearts of the people' to ends of harmony and peace in the community and continues to discuss various periods of

⁶ The details about their location and selection as well as method and methodology are given in Chapter Six.

modernization. The study of the modernisation periods explores the attempts to build the empire and institutions matched by the integration of formal and non-formal systems of doing justice. Efforts to connect law and practice and to integrate the formal and non-formal systems of dispute resolution mechanisms will be discussed. The historical roots of current challenges towards realising legal and social justice will be identified.

Chapter Two focuses on the nature and meanings of institutions and justice. It discusses what and how institutions and justice are understood. This chapter mainly explores two meanings of institutions. On the one hand Douglass North's identification of concepts of contract and property as institutions for the market is explored. More broadly and importantly, (administrative) institutions will be qualified as those able to shaping behaviors of people towards social justice. The chapter considers the conceptualisation of social justice by Sen, Rawls, Pogge and Nussbaum, as well as that of Aristotle, towards connecting the legal justice of institutions with the social justice of the Constitution. The chapter also discusses a failed attempt made to make law (one kind of institution) as an instrument of development. Thus the chapter is an attempt to develop a coherent theory of institutions and justice which serves as an underlying basis for judicial reform programmes. The discussion on institutions and justice perpetuate the discussion on institutional reforms and goals of reforms.

Chapter Three is a discussion of reforms in the context of justice. It explores two thematic areas of the study: the attempts to reform the judiciary following the failed attempt to reform laws as instruments of development and the different discourses in institutional reform. The attempt to reform both the laws and institutions mainly suffers from the 'one-size-fits-all' approach that benefits neither the formal courts nor the non-formal systems of doing justice nor the people. This challenge raises the query how reform efforts would be sustainable towards realising social justice and explores different discourses to this effect. This necessitates the need to redesign the approach to reform with the realization of

social justice in a more contextual approach. The chapter develops a coherent approach to effective reform programmes for Ethiopia.

Chapter Four examines the attempts made in Ethiopia to reform its judicial system. The chapter mainly explores two issues. In the first place it examines if the judicial reform programme of Ethiopia solves the challenges that its legal history brought about regarding legal and social justice. Secondly, it examines whether the reform programme is embedded the Constitutional and local values of the country so that it may not suffer from imposed values. As Chapter Three discusses reform programmes lack sufficient theoretical explanations (that is one reason why they fail in a number of countries) this chapter discusses the potential for using lessons from other failures to develop a coherent approach.

Chapters Five, Six and Seven explore the empirical discussion on what and how social justice is perceived in Ethiopia and how is it related to decision making bodies. The chapter carries on the empirically works so that the challenges of the country's legal system are eased through the theories in Chapters Two, Three and Four creating an impact on peoples' live. Chapters Five and Six deal with contextual accounts of the theory developed in the previous chapters.

Chapter Five: deals with the achievements, opportunities and challenges of the Ethiopian judicial reform towards legal and social justice. The discussion is mainly based on litigation profile of the country and performance measurement mechanism developed by the reform programme. It is informed by the data including cases opened, disposed and transferred that are generated from the databases of the courts.

Chapter Six involves a case study concerning whether and how legal and social justice is realised in the formal and non-formal system. It is informed by the earlier discussions but relies on the empirical findings of the study. It provides an empirical account of how the actors of justice give meaning to justice in the day to day activity of disputing in the context of formal and non-formal dispute resolution

mechanisms. It also explores the contextual connection between the reform programme, conceptualisations of justice and decision making bodies. It empirically explores the challenges in the realisation of legal and social justice in this context. The attempt is to see how the performance of the formal system contributes to realising social justice in the context of Ethiopia.

Accordingly it explores achievements and challenges of the dispute resolution mechanism from those involved in its operation and those affected by it. It also considers the success and failure of the ongoing judicial reform programme from these angles. Discussing both procedure and substance, it identifies sites in decision making bodies for an effective delivery of social justice and potential improvement.

Chapter Seven is the concluding chapter and stresses the need to redefine judicial role vis-a-vis the conception of justice developed with two objectives: poverty alleviation and sustainable development. It suggests an open but clustered list of capabilities for court performance, and further suggests the need to give priority to measuring quality to numeracy. Thirdly it suggests the need to sequence and plan reform activities to the benefit of litigants and the people (and a planned developmental state) as one solution to prevent reform failures. It indicates that jam packed reforms yield failures. The fourth conclusion is related to enforcement of contracts and notes that current records in enforcement of contracts discourage investment. The need for judges to engage deeply in the litigation process, the need for disconnecting from a web of de-capacitating attitudes, conviction and beliefs are noted as the fifth and six conclusions.

The attainment of social, economic and environmental justice cannot be attained under the current practice of isolated and disoriented move of the courts. These conclusions indicate that the current reform and change instruments of courts cannot be sustained unless they connect with the real Ethiopian lives. Accordingly the last conclusion pertains to a need to realisation-focused synchronisation between the formal and non-formal systems of disputing. This conclusion in

particular benefits from the pros and cons of the two systems and the great positive attitude in the Ethiopian judiciary towards the non-formal system. The intention is to consider ways in which socio-economic justice can be achieved through the development of a legal system which provides appropriate inter-connection and synchronicity between the formal and non-formal systems. It suggests that this process will involve sharing the deep rooted principles in the non-formal system with and to the benefit of the formal system.

Development of laws and the legal system of Ethiopia in the context of its political history

This chapter introduces the legal history of Ethiopia as one of the causes for the gap between legal and social justice as well as for non-principled engagement of the formal system. In analysing the relationship between dispute resolution mechanisms and social justice, a workable progress cannot be made unless contemporary challenges of social justice are investigated in light of historical experience. The conception of effectiveness as theory of social justice has to base its analysis on the parameters of theories and conceptions of social justice in Ethiopia under its legal history as current problems associated with the judiciary have their roots in the near and distance past. The past can yield some lessons to expand the current “territory of knowledge” to benefit the current effort at judicial reform, conception of effective judiciary and the space that shall be accorded to the non-formal dispute resolution mechanisms dominantly prevailing in the country.

A discussion of Ethiopia’s unique legal history also reveals the emergence of a complex legal system based on a mix of Ethiopian and foreign civilization.⁷⁸ History reveals that third party reliance in settling disputes or for the purpose of getting decision was not uncommon in Ethiopia. There was a merger of formal and non-formal mechanisms of dispute resolution during the period of feudalism and the Empire until the onset of modernisation during the Haile Selassie period. However, the two systems were either isolated or ignored particularly during and after socialism. These facts indicate the lack of principled engagement with the nature and role of dispute resolution mechanisms.

⁷ See Abera 1998: 1, 3. According to Abera, despite non-colonised, its development is relatively autonomous which in many respects ties to the larger family of Romano-Germanic law. The people however developed a culture which ‘may be termed as Ethiopian’ which ‘differed markedly from that of surrounding people.

This chapter has two parts. Following a brief account of the country's political economy and its level of development the first part discusses the history of laws while the second part discusses the history of decision making bodies. This is followed by a brief conclusion.

Country profile in brief: Ethiopia

The first serious problem in discussing the (ancient) history of Ethiopia⁹ is the identification of the exact location of the country and the name it bears thereof.¹⁰ With the lack of consensus as what "Ethiopia" covers, different writers at different times named it either the land of the South, or country of Nhsie, Kush, Punt, Kam, or of Semitic.¹¹ The purpose of the research did not allow us to go into that detail. Currently named as the Federal Democratic Republic of Ethiopia (hereafter FDRE) it is located in what is traditionally called the horn of Africa. Covering 1.1 square kilometers¹² it is bounded by Eritrea (to the north and north east), Kenya (to the south), Sudan and South Sudan (to the west and southwest) and Djibouti and Somalia (to the east).

According to the Central Statistics Agency, Ethiopia has a population of over 81,755,000 (the second largest population in Africa) with a population increase of 2.6% per annum. 83.9% of the total population lives in rural parts of the country. The population consists of the *Oromos*(40%), *Amharas*(30%), *Somaliians*(9%), *Tigrians*(6%), *Sidama*(2%), *Gurage* (4%), and the *Afar* (1%). The country officially

⁹ Ethiopia is credited for being the cradle of mankind. It is "one of the oldest human inhabited areas". *Australopithecus Afarensis* (which means 'southern ape of Afar') is discovered in 1974 by anthropologists in what is now called Afar National Regional State. It is estimated to be more than 3.5 millions year old. Twenty years later a much older fossil, *Australopithecus Ramidus*, believed to be aged 4.4 million years old, is discovered in the same place in 2008 (Library of congress, *Country Profile, Ethiopia* 2005: 1 , Abera 1998: 12, Wikipedia Ethiopia April 2/2010).

¹⁰ This included Tunisia, Morocco, Libya, Egypt, Eritrea, or the present Ethiopia containing "a mélange of Hamitic, Mediterranean and Negroid people' who speak more than 77 different languages (Lewis 1956:257, Tekletsadik 1965: 2-7, Nathan 1974:2).

¹¹ The history of Ethiopia goes back to the days of "antiquity"-its name being referred in the Bible and in Greek literature (twice in Olliad and three times in Odyssey) as a place and people of "burnt face" living south of Egypt. The long history has with it the persistent draught the country was hit by.

¹² This is almost twice the size of Texas.

recognised more than 80 Nations Nationalities and Peoples with their own distinct languages and different dialects. There are 69 Nation, Nationalities and Peoples have seats in the House of Federation.¹³

The country's GDP (for the year 2008-2009) was 2.3 billion USD with a government estimate annual growth rate of 9.9%. Agriculture¹⁴ covers 45% of the GDP while trade and industry cover 13% of the GDP. A total of 42% of the GDP is covered by the service sector.¹⁵ The national life expectancy is 53 years of age for males and 56 years of age for females.

Ethiopia's unique legal system

Ethiopia had developed a unique legal system throughout the ages. Factors including its isolation, topography and power struggles contributed to this development. Ethiopia had remained isolated from the rest of the world for a long period of time. The isolation together with its unique geography (being mountainous with a high central plateau which slopes down through Sudan and Somalia-with a number of rivers crossing the plateau) forced Ethiopia to develop its own geo-jurisprudence.¹⁶ The fragmented nature of Ethiopia highlands played an important part in the country's political and cultural history (Adejumobi 2007: 5). The geographic isolation also created a spirit of relative independence in many areas where the pattern of life has remained unchanged for hundreds of years, and where the central government still has only limited influence (Adejumobi 2007: 5, 6) According to Lewis, despite the plurality in the polity, these features "has permitted the country to maintain its own identity for more than 2000 years" (Lewis 1956: 257). This on its part shaped the kind and quality of Ethiopian laws and the quality of the institutions applying the laws.

¹³ House Federation www.hofethiopia.gov.et, last visited on April 8/2011.

¹⁴ 90 to 95% of the crops grown in the country depends to a large extent on *kiremt* (from June to September) rain.

¹⁵ State Department Report of America, 2008.

¹⁶ The slope range between 1,828 and 3,048 meters, with the longest rift valley and the Danakil Depression to sink to more than 93.5 m-one of the lowest points on earth.

The continuous power struggle between rulers in the polity is another factor that had contributed to shaping the legal system of the country. Despite the continuous power struggle for centuries between the centralised authority and feudal nobility (Doran 1994: 2), the polity was largely based on “social cohesions” and “dynamic political institutions” that made a community based on common economic resources difficult (Lewis 1956: 258). It was Emperor Menelik’s (1875-1898) military conquest that unified and established “a strong central government” and hence a centralised legal system (Lewis 1956: 257). This struggle to maintain centralization with an increase in decentralisation, and the desire to remain united with an increase in diversification, impacted the legal system of Ethiopia to a great extent.

The following sections illustrate the contribution of these factors in shaping the laws, the institutions and the behaviour of dispute resolution mechanisms of Ethiopia. For the purpose of the research the legal history of the country is categorised under four important historical periods. The periods are categorised based on structural changes in laws, the importance given to laws and the purpose of the change. The periods are:

Period of Pre-Zara Yacob (pre- 1468)

Period of Writing (1468-1955)

Period of Modernisation (1955-1991) and the

Period of Post-Modernization (Post 1991).

1.3. The Legal History of Ethiopia

1.1.1 The laws

1.3.1.1 Pre-Zara-Yacob period (before 1468)

This period began when the Sabeans (one of them called Habesha) travelled from South Western Arabia to the present day Ethiopia and established the Axumite¹⁷

¹⁷ Axum was a trading state that dominated the Red Sea and commerce between the Nile Valley and Arabia and between the Roman Empire and India (Library of Congress, *Supra* note 7 p. 2).

State at Adulis in the 750 BC-500 BC. When the kingdom became stronger, its seat of capital shifted to Axum where rock hewn funerary obelisks of Axum (which were built to worship the sun or moon) were built (Atkinson, 3). During this period the legendary Queen of Sheba¹⁸ established the Solomonic Dynasty¹⁹ and Christianity was introduced into Ethiopia at the 4th Century AD. During King Ezana's reign²⁰ Islam was also introduced at the 7th Century AD and Ge'ez spread widely replacing Greek language (Atkinson, 2, 5). Later the power of the Kingdom was usurped by a non-Christian prince, Yodit (Gudit) until her last successor was overthrown by Mara Takle-Haymanot, founder of the Zagwe Dynasty (Bahiru 2002: 7, Adejumobi 2007: 10, 14) who shifted the Kingdom and its seat from Axum to Roha (present day Lalibela). The Kingdom also shifted from Axumite (Solomonic) to the Zagwe Dynasty (Atkinson 8). Though Axum faded, it bequeathed to its successor its Semitic language, Christianity and the concept of a multi-ethnic empire-state ruled by a King of Kings.

The Zagwe Dynasty is well known for its religious and architectural contributions (built the 11 rock-hewn churches at Lalibela in 1250 AD (Atkinson, 9). However, King Yokno Amlak (1263-1278 AD) restored the Solomonic Dynasty and made Tegulet (present day Shewa) the seat of the Capital city. Subsequently Amdetsion (1307-1337 AD) expanded the boundary so far as Awash in the South, Gonder, Gojjam and Shewa.¹

Historic books, religious books and chronicles of the Kings are written during King Amdetsion's era with other key books also translated during this time (Adejumobi 2007: 10).

¹⁸ The *kebra Negast* (Book of the Glory of Kings) describe how Solomon seduced Sheba (who was called to the throne in the 10th Century BC) who felt inadequate to the throne and journeyed to Jerusalem to observe and learn from the wise and beneficent rule of king Solomon, who had relationship with Sheba to produce a son-Menelike the first who was the founder of the Aksumite civilization and Solomonic dynasty (*Kebre Negest*, Adejumobi 2007: 12,).

¹⁹ This was the source of the ruling dynasty at that time. (until the Zagwe dynasty took power from 1143-1263).

²⁰ He is the first African King to embrace Christianity and has made this faith the official religion of the empire (Adejumobi 2007: 13, Atkinson, 4).

This period has significantly contributed to the history of Ethiopia but little is known and written about its legal history. Save for some works on the war and spiritual life of the rulers, work has not been done on the tradition of the people and the administration of justice by the government (Tekletsadik 1965: 31). Except the list of rulers (which at times is incomplete and disordered), it is almost impossible to get information on what the rulers did as judges or the system they established for the administration of justice (Tekletsadik 1965: 14, 17). Therefore, it is necessary to look into different sources to understand what Ethiopians perceive of laws during this period.

Before Christianity, the Kingdom was largely based on “traditional local and mystical beliefs” and practiced “a polytheistic religion.”²¹ Astar was the main god of the pre-Christian Aksumite.²² Homer (9th Century BC) and Herodot (6th Century BC) described Ethiopians as “just and pious”, loved by gods for their justice, as uttering no falsehood (Tekletsadik 1965: 24).

According to the introduction of *kebre-Negest*,²³ Ethiopians’ sense of justice was equated with the punishment of the sinners and acquittal of the “purest.” Those

²¹ The exact date of this is also contested. It is believed to be at the Era of Ezana (325-360 C.E) when he declared to protect *Astar*, *Beher* and *Meder* while he referred in other inscription to “the Lord of Heaven” and made Christianity the state religion. While others held that the time is 333 AB or 356 AB. (Moore, *Christianity in Ethiopia* 1936: 272, 275). The 1955 Constitution declares that it is founded in the 4th Century AD on the doctrine of Saint Mark (Art. 126 of the Constitution, Abera 1998: 6).

²² Like Egyptians the sun (common to all Ethiopians), *warka* (kind of tree), mountains, rivers (Nile), and Eagles were their gods. The most uncivilized worship the tree and the mountain, the civilized one believes in a deity symbolized by the sun or the moon. Ox, Ship, Eagle were also believed as things where the gods dwell (Tekletsadik 1965: 33, 41).

²³ The exact date of its writing is not known. The content of the book reveals that it is written after the New Testament. It was written in a “*kibti*” (a local) language, then translated in to Arabic and then back in to Ge’ez. It has secured high respect among the nobilities and the people. It has got 117 sections. *Kibre-Negest* has served as a national Constitution of Ethiopia for more than 700 years. The power of the kings who ruled Ethiopia from 1270-1966 was delimited as per the dictates of the *Kibre-Negest*. It has got provisions concerning the source of government power, persons eligible to such power, responsibilities of government officials, rights and duties of the people, historical and cultural relationship that should exist between Ethiopia and foreign nations, etc. Accordingly source of power is supernatural (divine) and quotes the Bible (2 Samuel 7: 12-17, Psalms 89: 4, Psalms 132:11) for this purpose.

who transgressed the law shall be punished according to the degree of their sin and the “purest” shall be tried and acquitted.

In the *Kebre-Negest* it was the rule to “do good” and to “preserve the body from fornication” and it was against the law to do what god hated“-pride, boastfulness of speech, self-adulation, calumny, false accusation and the swearing of false oaths.”²⁴ *Kebre-Negest*, under Section 100 (13), also dictates that ‘the demon has no power of commanding, arresting, beating, holding or of pulling other than inserting evil thoughts into the human mind’. These laws were not written but were called *Hige-libona* literally meaning laws written in hearts.²⁵ This was the dominant law despite some laws promulgated by law makers whenever the law maker thought ‘necessary and urgent’ (Assefa 1973: 22). This was the law for social interaction and justice by way of reconciliation was conceived of as administering such “law”.

The *Hige-libona*, especially the duty to preserve the body “pure” implies that humans are assumed to be naturally good according to which a man is expected to cultivate himself before being instructed from outside to be good the breach of which primary duty creates oppositions and made him not good. The people believed in the existence of evil spirits, tempted a man to breach his primary duty towards the Creator and against which one had to constantly be mindful. Those who did evil created disharmony within themselves, the people and their ecosystem. Humans’ adjustment to this ‘harmony’ was suggested to lead to order, happiness and peace whilst acting contrary was suggested to lead to chaos, disorder and misfortune. Their harmonious relationship with the world was conducive to their well-being and this is significant for the resolution of conflicts and oppositions. Oppositions lead to conflict which has to be effectively reconciled.

²⁴ The *Kibre-Negest* Chapter 7: concerning Noah.

²⁵ Interview with Elder ‘A’ on Oct. 25/2015, Bahir Dar. Informants in this research are given codes for the reasons indicated in Chapter six. See also Abera 1998: 27.

In light of this, people were expected to create harmony first with themselves and then with nature. It was suggested that peace in oneself must be extended to others so that people wouldn't be self-centered and conflict wouldn't arise. Selfish pursuit of profit would be the sources of conflict and killings. The rulers responsibility lies in creating this harmony in the changing world. They were responsible for creating harmony in family matters which is the basis for societal harmony. The harmony created paved the way to alleviating poverty, and even to the distribution of material resources and the reduction of possible oppositions (disputes).

Later the introduction of Christianity made the polity to a large extent based on "two pillars": the office of the Emperor and the established Orthodox Church." These were the "jural postulates" or "grundnorm" of the system (Doren 1994: 10). *Kebre-Negest* contains accounts of "conversion of the Ethiopians from the worship of the sun, moon, and the stars to that of the "Lord God of Israel" during this period. An Ethiopian was described in the Old Testament as a "man of high moral standard"²⁶ who had respect for "what is right" and for whom the kingdom of heaven is not closed.

This introduction of Christianity in to the polity added another source of law and looking for laws other than those found in 'hearts' intensified. The church law in the book began to govern social lives together with the earlier natural rules written in hearts. They were believed to maintain social order which was "good" and could be created and maintained through hierarchical control deriving ultimately from God (Gidey 2004:38). There was a belief of "being kept constantly in check." Conflict is thus viewed as destabilising the natural balance. Though conflict is "a way of life" in Amhara society (Levine 1972) it had to be managed in a way as to restore the natural balance among the triumvirate of God, parties and the natural

²⁶ The assumption is that a man is morally good from within which could help him respect what is right from without.

environment. The good spirit acting against the evil is believed to do justice of this sort.

Furthermore the introduction of Islamic law at the 7th Century AD also multiplied the sources of laws that governed the social order in the country. Mohammed is said to have advised his followers, who were prosecuted by Quraish of Mecca, to flee to Ethiopia where they could find the "land of righteousness."²⁷ The implication was that the followers of Mohammed, with their religious laws, could peacefully live with people of Ethiopia.

This period thus witnessed a strongly mystical and religious Ethiopia where the rules, the rulers and the ruled are interconnected with a belief in supernatural forces. There was disparity between converts and non-converts who followed different rules in their life and it is difficult to trace a common authority between them.

There were different opinions as far as the quality of the law before the introduction of religious laws is concerned. One line of opinion correlates the laws with the then civilization. History tell us that during this period (4th-6th Century AD) the country reached its peak of "civilisation". The Kingdom was powerful during ancient and medieval times. During the 3rd Century AD the kingdom of Aksum was "highly developed" and ranked third "among the Great Powers, and was the greatest sovereign state of the world." Having had "very great and powerful" people, the ruler was referred to with the rarely used honorific title of "basileus" (Nathan 1974: 34, Doran 1994: 2, 4).

The Kingdom was "rich in heritage" where through the port of Adulis there were considerable imports and trade. The Kingdom was a "major player in the commerce between the Roman Empire and Ancient India." It was also a center of culture. The wide spread use of different coins, the extent of foreign trade and development of

²⁷ As a land of justice, Justin I (518-65) also requested the kingdom to rescue people who were persecuted for adopting the Jewish faith, Nathal 1974: 12-19.

irrigation systems provide signs of the level of civilization had attained (Adejumobi 2007:30, 39-42). The Kingdom was not only “a rich and well run polity” but strong enough to keep safe vessels dispatched by Emperor Heraclius in 575-641 AD when threatened by the Persian invaders (Nathan 1974:43). Foreign trade and irrigation were widely practiced. Ethiopia was identified with the values of justice, civilization and rightness. It can be presumed that some sort of laws governing the export driven administration, agricultural sector and foreign trade was attracting foreigners and enhancing civilization.

Contrary to this the people were also perceived as ‘savage’ whilst cultivating none of the practices of a “civilised life’ (Nathan 1974: 10-11). During the era of King Solomon (Queen of Sheba-10th Century BC) the country was perceived as a “far-off place” found in the “utter most part” of the world. This perception persisted until the *Aksumite* period (4th Century AD).²⁸ When Christianity was first introduced to the country during this period, the mission was said to be effective “as far away as Ethiopia” (Nathal 1974:46) in terms of space and time. Generally speaking one can hold for this period that:

1. There were no defined set of laws in this period and religious edicts were unwritten and connected to the religious life of the people rather than state legal system. Supernatural forces were believed to be sources of the laws and foreign laws (Christianity and Islam) did not or could not replace the earlier indigenous or mystical beliefs. There was no legal system in the strict sense of the word, rather the *de facto* legal pluralism was the rule of the day (Abera 1998: 2). Later law was only broadened to include other sources of law, such as religious law by using the authority of the Office of the Emperor. Therefore Ethiopia was governed entirely by a set of traditional and religious laws.

²⁸ As much of the beginning of the period in general, and of the Axumite kingdom in particular is not known, its end is also as “much of a mystery”. Some believe, however that the fall of the kingdom could be attributed to one or a combinations of “persistent drought, overgrazing, deforestation, plague, shift in trade route” which occurred during the later period of the kingdom.

2. Whatever the source of the law, it was too general to bear a single definition. Doing 'good' was the rule of the day. Justice was perceived as a virtue in action and the conceptions of justice, rightness and goodness were more or less complementary terms for the same concept.
3. The Kingdom reached its peak of civilisation while it was conceived to be a seat of culture. It proves the possibility of securing peaks of civilisation and culture at the same time. Though difficult to make a direct link between the law and the civilisation, history shows some kind of correlation between them. The decline of the Kingdom can be attributed to the social and economic problems which the polity faced. The way social and economic justice was balanced was making or breaking of the Kingdom.
4. Since religious edicts were introduced from abroad it can easily be seen how global factors served as one source of law and easily penetrated the system at all levels.

1.3.1.2 Period of writing (1468-1955)

At the beginning of this period Zara Yakob attempted to rule the polity under written law. It marked the underlying bases where one finds a "native ideological and institutional framework for the development of law" in the country. It provides the first modernisation and building effort for the empire and covers much longer period of time. This is because there is greatest similarity in the laws and their application during this period. This period covers the time when King ZeraYakob, Emperor Tewodros, Emperor Yohannes, Emperor Menelik II and Emperor Haile Silassie stand out as key figures in the modernisation attempts of the empire.

The era of Zara Yakob (1435-1469) had caused the production of different books written in Ge'ez (often his time was called era of writings in Ge'ez) and introduced a new tax system (Atkinson 12). In establishing religious nationalism and the

Ethiopian identity, king Zara Yakob was a prolific author of numerous religious and philosophical books (Adejumobi 2007: 22).

After a long period of isolation, the second contact with Europeans happened during this period (Atkinson 13). More importantly contacts began after the middle of the 19th Century AD during which Ethiopia was under “Zemene Mesafint” until Emperor Tewodros (1856-1869) aimed to organize the polity under imperial unification reform. Owing to this, Emperor Tewodros declared himself as the King of Kings in the traditional manner of the Gonder, Gojjam, Tigray and Shewa (Atkinson 22, 23, Abejumobi 2007: 17, 24). Emperor Tewodros moved the seat of the capital to Debre Tabor and began the modern Ethiopian Empire (Atkinson 22, Adjomobi 25). The modernisation effort was continued during his successor, Emperor Yohannes, but he was not as successful in bringing about change.

Tewodros’s efforts to modernize were more effective during the reign of Emperor Menelik II in 1890 (Bahiru 2002: 29, 66, Atkinson 28, Adejumobi 2007: 27, 28). Emperor Menelik’s efforts to get in contact with the outside world resulted in the signing a treaty with Italy whose interpretation on the treaty raised concerns of sovereignty²⁹ and ended up in the battle of Adwa in 1896. The victory at Adwa exposed the country to more global contacts. His seat was in *Ankober* later moved to the present day *Addis Ababa* in 1987 making Addis Ababa the third capital city of Ethiopia in its history.³⁰

In the next ten years after the battle of Adwa, Emperor Menelik opened the country to wider global influences including the development and introduction of electricity, telecommunications, modern hospitals, new vaccination programme, postal services, education, abolishment of slavery, introduction of banking system, new railway links and the creation of modern bridges in Awash and Gojjam (Atkinson 31,

²⁹ The treaty raised issues relating to the disposition of diplomatic relations between the two states. While the Amharic clause suggested that the Abyssinian (another name for Ethiopia) could use Italy as an agent in foreign relations if it desired, the Italian version claimed that Abyssinian was obliged to go through Italy in its foreign relations (Treaty of Wuchale, 1890, article 17).

³⁰ Next to Axum and Gonder, see Atkinson 30, Bahiru 2002, 75.

33-34). Thus he laid the foundation for further development and modernisation. His further expanded the territory and doubled the size of the empire whilst under his control by occupying areas which include north eastern, south western and western parts of modern day Ethiopia (Adejumobi 2007: 28, 29).

A close relative of Emperor Menelik, Haile Silassie (later Emperor Haile Silassie) who had served as a regent³¹ succeeded to the office of Emperor in 1930 following Lij Eyasu (1914-1917) and Empress Zewditu (1917-1930) and began to introduce various western inspired reforms. These modernisation efforts, deemed the second wave of modernisation, were largely underway when Italy controlled the country between 1936 and 1941 but continued after the restoration under a policy of centralisation. His reign tested the theories and practice of domestic and international liberal reforms (Adejumobi 2007: 35). Nevertheless, the slow pace of the reforms led to the 1960 attempted coup which prompted unrest thereafter until the feudal system that had lasted for more than 2000 years was overthrown by the *Derg*³² who introduced a new Marxist model of modernization.

The period is a turning point in the study of the development of Ethiopian law as the quantity and quality³³ of law increased during this period. The written law however existed with other norms of ordering which include natural law, religious law, academic scholars, treaties and customary laws. The following sections take a brief look at the laws and the languages of writing.

1.3.1.2.1. Natural Law

Natural law is recognised by Ethiopians as '*hige-libona*', literally meaning law written in the heart or '*fithe-fitretawi*' literally meaning "natural justice" (Abera

³¹ As Haile Silassie explained in his book he began thinking of having the 1930 Constitution while he was a regent (Haile Silassie 1937: 148).

³² This means Provincial Committee constituting of members from different departments of the military.

³³ As much as hundred written laws and the first written Constitution were promulgated during this period. Subsidiary legislations also emerged-such were issued by the Addis Ababa Municipality and other ministries like Ministry of Agriculture and Finance. The country is also admitted to the League of Nations during this time (1923).

1998: 27). The law can be found in all kinds of right conduct where good is to be done and evil is to be avoided (Abera 1998: 28). This had much continuity from the first period and was believed to be universal, immutable, indispensable and obvious to all. This was the basis of the justice as provided for by man and God (Abera 1998: 29). The law was unwritten and maintained only by *'quene'* (a poem with two or more semantic layers with two-fold meanings) and by idiomatic expressions (Abera 1998: 28-29). It embodied a minimum conception of the idea of natural justice or *fiteh-fitretawi* where everybody could base their claim.

According to Abera this law was applied by the road-side³⁴ judge before the introduction of formal court systems in Ethiopia. Idiomatic expressions by the people like:

"The law ties together the shabby garment of the poor with the finest outfit of the rich"

"A chicken lost without justice is more a curse than a mule gone fairly judged"

"Justice is given by a man according to his own view and by God because He is all-knowing"

"How dare you move when you are requested to stop in the name of law? Even dashing water ceases to flow when so demanded"³⁵

These are all indications of such applications. The expressions indicate that principles of equality, fairness and legality tied-up with elements of subjectivity are some of the principles that decision making bodies were applying. This law was applied before the application of any other 'legal norms' and later became integrated into customary laws (Abera 1998: 28, 31-32).

³⁴ A tradition where a man found on a street was expected to give decision on the matter before him, a subject of discussion in the section dealing with history of dispute resolution below.

³⁵ For further discussions on natural law and customary laws see Abera: 1998 29-31.

1.3.1.2.2. Religious Edicts

Religious books and chronicles³⁶ were another seat of 'legislative' enactments of the period. Christian and Islamic law had much of their continuity from the past. As natural law continued in common usage the continuity of the Testaments and of Sharia law (on areas like marriage, inheritance, maintenance, guardianship, gifts) was visible during the period,³⁷ so did the teachings of religious scholars. The teaching of law was a matter principally within the exclusive competence of the Ethiopian Church and the Mosque (Vanderlinden 1974: 250).

Scholars were experts in interpreting and giving advice to decision making bodies. This can be seen as one of the bridges where by the traditional law and foreign law dynamics become interconnected. Spiritual and mystical beliefs continue to play their role during this period. Despite the hindrance to the "uniform application of secular laws" these group of laws co-exist throughout the period (Vanderlinden 1974: 253, Abera 1998: 34).

1.3.1.2.3. Customary Laws

Customary laws of different ethnic groups were also applied to civil and criminal matters. Customary law also known as 'pure people's law' was a major body of law in Ethiopia at this time. Until the promulgation of the civil code the country 'lived in observance of a wholly customary and extremely fragmented law' (David 1985: 85). These have been maintained 'because of the indigenous Ethiopian sense of justice' (Abera 1998: 11). Moreover Brietzke held that 'effective every day social control was maintained under the traditional laws which are misunderstood and mistrusted by professional and academic lawyers alike' (Brietzke 1974: 155). It was not easily

³⁶ *Ser'ate Mengist* (literally the law of the State) contains twenty-one articles consisting mostly of enactments on the organization of Ethiopia Royal Court and some on matters of civil procedure-which procedure in turn is connected with members of the royal court. According to it when the Queen accuses somebody or is accused by someone, the judge shall be called to sit in court in her house (Scholler 2005: 12).

³⁷ There were also legislative enactments by the Catholic Church which were accepted by the Ethiopian Church (Vanderlinden 1974: 231).

affected by edicts from the capital or by local governors (Perham 1969: 142). Such customary law remained as 'one of the traditional and deeply rooted law traditions of Ethiopia (Abera 1998: 39).

In contrast to the natural law, customary laws were applied to a certain communities and lack national application. Their legitimacy was based on the "participation and consensus" of the community to whom they applied; they were not hegemonic top-down impositions. They would get a status of wider application when applied by higher courts as "good means of solving disputes". They were "unwritten" to a large extent and were 'unknown to most people' including the judiciary (Abera 1998: 39-40). In contrast to natural law, which is believed to be universal, customary laws belong to an ethnic group in the locality to which it is applied. Accordingly customary laws were applied by the traditional institutions like *Gadda*, *Sani*, *Ayyana*, and *Kallu* for centuries (Gidey 2004: 1). "Over 80 kinds of customary law" were applied in over 80 ethnic groups (Abera 1998: Introduction). When the unwritten laws were applied by the people it pulled them in many directions, thus the application of religious, customary and natural law was complex.

1.3.1.2.4 Treaties

This was a source of law to be found during the latter part of the period. It was found in treaties concluded between Ethiopian Sovereigns (particularly local kings) and foreign powers. The Anglo-Ethiopian Agreements of 1841³⁸ and 1849³⁹ were the first among the treaties (Vanderlinden 1974: 230). Some of the treaties influenced the legal structure of the country. For example the 1849 treaty by Article XVII established Consular Courts in Ethiopia. The court had exclusive jurisdiction over British subjects both in civil and penal matters (Vandelinden 1974: 23).

³⁸ This is signed between British Government and Emperor Sahle Silassie.

³⁹ This is signed between British Government and Ras Ali.

1.3.1.2.5. Written laws

A large body of written laws also appeared during this period. These bodies of laws, with few exceptions, were not known to the common people. The laws were found either in religious books or chronicles⁴⁰ or in non-legal texts such as travel reports, newspapers and general studies about Ethiopia; most were very short and optative. The laws were also general in the sense that they were applicable to the whole of the Ethiopian Empire at the time of their promulgation (Vanderlinden 1974: 227, 230); the most important of which are organized and will be explained below.

As a turning period in the legal history of the country this was a period when law began not only to be written but also to be codified. From 1434 to 1960 three important laws and the first written Constitution appeared in the form of codes.⁴¹ The three important laws were *Fewuse- Menfesawi* (literally translated as spiritual remedy), *Fetha Negest* (litarally translated as the Law of the Kings) and the 1930 Penal Code.

Fewuse-menfesawi was the first law in the legal history of the country to appear in a compiled form. It was compiled by the Orthodox Church leaders around 1450 under the order of King *Zara Yakob* (1434-1468).⁴² The main source of the law was “religious precept” from the Church.⁴³ The rules governed more spiritual matters than secular ones, but according to scholars, the purpose of the law was the intention of the King to bring the administration of the Church under centralized

⁴⁰ The most important chronicles of which are four-of Aste Zera Yakob (1418-1452), Aste Be’ede Mariam (1452-1462), Aste Gelawdios and Aste Susinius (interview with Judge ‘Q’ and Priest and Elder ‘A’. Judge ‘Q’ is senior judge at the federal courts and senior student at the theology department of Addis Ababa University, while Elder ‘A’ has served in this capacity as an elder for more than 30 years).

⁴¹ As an exception to this one finds important written laws (like the *Ser’ate Mengist*) during the earlier time of the period.

⁴² The previous kings focused on importing knowledge from abroad by translating foreign books in to Ge’ez. Zera Yakob has got many books written with religious leaders and other personnel around him (Getachew, *Dekike Estifanos* 2010:27). Ge’ez literature flowered during his reign, exerted effort to control highly decentralized administrative system, he himself wrote a book entitled “*metsafe-Milad*” (the book of Nativity) (Abera introductory part).

⁴³ Having 62 articles, Old Testament, Didascalia Apostolorum, The Epistle of Peter to Clement, the Synodos and Canons of Hippolytus are the sources (Abera 1998: 184).

Canon Law or alternatively a desire to rule the “realm by written law rather than by amorphous customary law and oral tradition” (Abera 1998:183-185). Far from being comprehensive, its application on matters it intends to govern “remained uncertain” and was “not able to resolve” many of the legal problems it was intended to resolve. Its impact was short-lived and lacked the far-reaching consequences that were required (Abera 1998: 184).

Dissatisfied with this result, and with a renewed intention to rule by written laws, King Zara Yakob ordered the import of another significant piece of “legal science”, *Fetha Negest*, in the middle of the 15th Century AD (Abba Paulos 2009: xxxvii, Vanderlinden 1974: 250). It was translated from Greek to Arabic and then to Ge’ez⁴⁴ and applied to lead both secular and spiritual life in Ethiopia (Abera 1998: 168, Abba Paulos 2009: xxxvii). It contained 21 religious articles and 29 civil and criminal articles. The secular part of the law had four books, with the source of the fourth being the Old Testament.⁴⁵ While some parts were influenced by Islamic law, Sand suggested that Roman civil law emerged as the dominant source (Sand 1980:71-81). Ethiopian tradition suggests that the book “fell from heavens during the reign of Constantine’ (Sand 1980: 74).

The code (*Fetha Negest*) was originally written to help Christians lead a Christian life in a Muslim society (Redden 1968: 41, Doren 1994: 4). Thus, it did not reflect the realities of the country. According to Abera despite the attempt to ‘incorporate the most suitable legal principles which could be conceived in the epoch of its emergence’ its content had the ‘purpose of keeping Ethiopia under the ecclesiastic jurisdiction of the Coptic Church (Abera 1998: 189).

Fetha Negest was said to be accessible and understandable only to those who continuously studied it i.e. the clergy (Abera 1998: 189). The religious edicts, to which the *Fetha Negest* was accessible were in the service of assisting the decision

⁴⁴ Ge’ez is the predecessor to Amharic and Tigrigna languages.

⁴⁵The source of part three is the “Canon of the Kings”.

making system through their monopolised expertise.⁴⁶ Leaving the controversy to legal historians, it was only readable to the few “educated clergyman” who could read Ge’ez (Abba Paulos 2009: 9). The law was not well organised to locate the most relevant provisions necessary to settle a dispute and thus, the edicts service was required for judges and the Emperors to dispose of a case. This was natural as the non-formal judges were not as equally acquainted with the laws as the religious leaders were.

This may be comparable to the interpretations given by *juris consults* around 3rd Century BC and the Glossators and commentators of Europe in the 11th and 13th Century. As *Fetha Negest* was monopolised by the edicts⁴⁷ the daily life of the common people was regulated by their customary law (Abba Paulos 2009: 9). It could not completely replace the customary laws of the country and its application was ‘partial and random’ (Abera 1998: 186, Doren 1994: 4). It lacked the meaningful impact on the people it was intended to serve. Despite that, Sand held that it is “one of the most striking historical examples of a ‘transplant’ which illustrated the potential trans-cultural migrative adaptive potential of legal systems (Sand 1980: 81).

⁴⁶ This was so during latter times. For instance, during the era of Zera Yakob religious leaders accused of Dekike Estifanos for an alleged preach breaching religious (Orthodox) teachings-for doing not good. Dekike Estifanos was given a chance to speak against the charges which he did elaborately. The king ordered the edicts and monks to give their verdict. Finally the king gave not only his verdict but also passed a promulgation to the effect that anybody wishing to follow the teachings of the accused is not prohibited as the accused is only preaching what the Gospel dictates as loved by the King (Getachew 2010: 82-91). Kings have their own armies to execute decisions. *Zera Yakob* has, for example *Ye’tor Serawit, Ye’bitir Serawite and Ye’alenga Serawit* (Getachew 2010: 215). They execute punishments like *Girfat, Raqut Megiref, Tsegur Menchet, Esir, Banbese ena bewusha Masibelat, Masaded ena Gidya* (Daniel (2015) *Aratu Hayalan*, pp. 92-101).

⁴⁷ For example in the memories of Ze-Aleka Lema Haile, one can see that those experts in the religious knowledge are also experts in the *Fetha Negest*. Their knowledge in the Old Testament was comparable to their knowledge in the *Fetha Negest* (Mengistu Lema, 2nd ed., 2003: 29, 54, 83, 102, 106, 119, 121, 123, 136, 140,148,152, 155, 209). Their interpretation was even required by judges of a high court to dispose of a case. The experts in this respect were called “*Lique*” and use one of the three ways of interpretation-*YandimTirgum* (interpretation by alternatives), *Netela Tirgum* (literal interpretation), and *YemistirTirgum* (idiomatic interpretation) (Abera 1998: 35). It was never promulgated but thought in schools where laws were thought.

However because of its limited accessibility and the lack of meaningful impact it had on the people it is difficult to consider it as a good example of legal transplantation, adaptation or migration. The exact date it had been recognized and applied, and ceased application is not known. It did not establish official recognition of the land for a long time. It received official recognition only in 1908⁴⁸ when Emperor Menelik gave power to the Ministry of Justice (established in the same year) to control “whether every decision by courts was given” in accordance with Article 2 of a Decree in 1908. Its criminal provisions were applied until 1930. According to Vanderlinden the importance of the law was such that it practically precluded any development of legal science outside of its sphere of influence (Vanderlinden 1974 251).

However, during the later part of the period it inspired the promulgation of ‘civil and penal law’ in Ethiopia (Adejumobi 2007: 17). Abera also holds that the book ‘received a prominent place in the legal history of Ethiopia’ as it served as a ‘transitional law’ and contributed ‘a number of principles’ to the civil and criminal law (Abera 1998: 185).

After a long period of time the second serious attempt to modernize the country was made when Emperor Haile Silassie came to power. The beginning of his reign is marked by measures such as incorporation of many western political modernisation ideas. Ethiopia abolished slavery, introduced a two house parliamentary system and ended the practice of brutal punishments for crimes. The promulgation of the 1931 Constitution is particularly significant. This marked the starting point of modernisation and centralisation reform process of Ethiopia.⁴⁹ The Constitution was proclaimed in the second year of Haile Silassie’s reign of his free will without the request from the population or the nobility (Messing 1955: 417). Consisting of

⁴⁸ It was in a very systematic way that the laws played their role in building system (1908), in the enforcement of government economic policies (in particular) and bring about social changes.

⁴⁹ However, the reform was resisted by “provincial nobility, great landlords and the church officials” (Abera 1998: introduction).

55 articles,⁵⁰ the Constitution was adopted from the Japanese Meiji Constitution (Doren 1994: 9). Article 6 of the Constitution dictates that government power in Ethiopia rests in the hands of the Emperor whose power is “indisputable”.

The codification of the 1930 penal code also signifies another serious attempt to modernise the country. It came a year before the Constitution was promulgated and after Emperor Haile Silassie came into power.⁵¹ It runs short of comprehensively defining crimes and penalties but also governs civil matters. Drafted by a Frenchman, it was highly inspired by the *Fetha Negest*⁵² Siamese (the former name of Thailand) and Indio-China penal codes. By harmonizing, adjusting and modernizing the Code was promulgated to lead the development of a modern society.⁵³ It attempted to adapt “tribal law into modern conditions with the preamble of the law clearly indicating that was highly influenced by Western law and the *Fetha Negest* (Perham 1969: 41). In some cases like cases of (like responsibility) the code attempted to follow the declaration in paragraphs 4 and 9 of the Preamble in the *Fetha Negest*. Thus, the *Fetha Negest* was a key constituent of the promulgation in the 1930 penal code (Abera 1998: 191). Ethiopian tradition has also bore its influence. The Code, in its preface allowed judges to decide according to their “conscience”. This wide discretion given to judges is an indication of the influence that the tradition bore on the Code. It came before the 1931 Constitution and was applied until the 1955 Constitution. It had a total of 488 articles and was amended by proclamation Nos. 3/1942, 16/1942 and 86/1947.⁵⁴

⁵⁰It made a distinction between statutes (art.34), decrees (art.9) and orders (art 10).

⁵¹ He immediately embarked on a nationwide modernization programme; however he failed to carry through a major reform and relied greatly on political manipulation and military force. According to Haile Silassie the 1930 penal code has avoided the wide discretionary power of the judges (Haile Silassie 1937: 47).

⁵² See its preamble paragraph 4 and 9 which indicates its intention to balancing the *Fiteha Negest* and the European Laws.

⁵³ Redden 1968: 44, see also the preface of the Code.

⁵⁴ All these laws amended the 1930 penal code. The laws in particular amended the penalties to be imposed on those who committed theft and robbery, damaging vehicles (including ships, airplane) and crimes against foreign state (respectively). The effect of proclamation No. 86/1947 was retroactive.

1.3.1.2.5. Further Developments

As a further development a move towards organising the country's government function along European lines began. A Decree in 1908 defining the functions of various Ministers was the first move. The law making process assumed a more defined function than it had in earlier. Despite that more general imperial declarations⁵⁵ closest in content and design to the ancient law also appeared.

This period is also the time when the foreign laws began to be applied more directly. For example, Emperor Menelik in 1908 promulgated the law of the Administration of Addis Ababa. According to the proclamation, French laws (the Napoleon Civil code) could be resorted into the administration of Addis Ababa when local law was silent. Ministries were also promulgating subsidiary legislations in the form of public notices during this period. These legislation was prepared by foreigners assigned to advise each Ministry thus during this period foreigners began to directly draft Ethiopian law. Another important contribution of this period is the establishment of the first official law Gazzeta of Ethiopia (the *Negarit Gazzeta*) in 1941. Proclamation No. 1/1941 established the *Gazetta* and declared that it shall contain forward all legislative enactments promulgated in Ethiopia. It has been published ever since in English and Amharic.

As shall be discussed in Section 1.4, the institutional weakness and structural arrangement was not in a position to apply these laws. The formal Judges, even in the 1950s, were free to apply their own legal wisdom established by the principles of justice and equity (Vanderlinden 1968: 256) without being tied by the letter of the law. The implication is that the supposed codes designed to modernise and develop the country could then be by passed when justice dictated. Thus, modernisation was not necessarily correlated with the written laws. It was clear to

⁵⁵ For example the regulation concerning *Afer-Sata* on August 4/1933 which restricts the application of the system, and regulation concerning *Wager* on September 21/1908 have similar approaches.

see the continuity of the conception of justice regardless of the written law with the intention to appear modernized and therefore reformed.

Another important development during the period was the introduction of procedural justice. Historians claim that the equivalent of the word "law" in local languages (*hig*, *se'reat*, and *fethe*) had their origins in Ge'ez (Sumner 1973: 159-160). The inclusion of the word *se'reate* (meaning a 'procedure') into the existing concepts of law (*hig*), and justice (*fethe*) shows a new broader conception of procedural justice had developed during the period within the new written law.

The laws so far discussed were enacted to modernise the country. They were written by foreigners and influenced by many foreign sources which made the tracing of a determinable source somewhat difficult. Independent from colonialism and direct rule, the country but voluntarily inherited and depended on foreign law in providing guidance for its written law. Despite that the application of customary laws with its conception of justice remained noticeably present throughout this period (Doran 1994: 6). Thus, the intention of writing laws was to be "better off with the code than was the case without it and the respect was for 'writing' than 'contents' (Doran 1994:5, Sedler 1964: 18).

1.3.1.2.6. Perceptions

The country during this period was perceived in three different ways: just, unjust and as a country impossible to explain. It is not only the 'oldest republic' but also one of the three "independent black nations" during the period (Adejumoy 2007: 2, Abera 1998: 56, Bahiru 2002: 125). This contributed in making the country a symbol of 'identity' and "grassroots activism" for the black population (Adejumobi 2007: 2). The polity remained with in perfect harmony with the free people' and in 16th Century AD Ethiopians were alleged to possess a level of development which was on par with its European counterparts (Diodorus quoted in Nathal 1974: 4-8).

The country was perceived by others as uncivilised and lagging far behind. The Portuguese presence was short-lived due to their intolerance of local beliefs.

Despite the lack of frequent contact and long periods of isolation, traveling to Ethiopia was considered as getting an opportunity to “travel to a distance time” and to a place still in a Biblical era” or into “a medieval world (Nathal, 1974: 3). In 1922 the Italians, viewing Ethiopia as “uncivilized and primitive”, led what was termed as a ‘civilisation mission’ to the country. An application by Ethiopia to join the International Postal Union in 1895 was opposed by Italians using a similar justification (Nathan 1974: 11). While Menelik’s rule was perceived as ‘superhuman’ and the people as ‘civilized’, others were seriously considering the substitution of the rule by a more sensible “human Government” and considered missions to ‘civilise’ the country into how they imaged it should be.

Thus despite the will to rule and/or modernize the country through its law, the reality and the perception of the Country remained contradictory: just/unjust, independent/dependent, civilized/uncivilized, unknown/perfectly peaceful. The legal problems of the past continued to multiply which indicates that the mere arrangement of law could not singularly bring about social justice.

1.3.1.2.7. Remarks

The law of the pre-Zara Yakob period with the exception of the *Fewse-menfesawi*, were imported from abroad, most notably from Romano-Greek influenced countries. While *Fewse-Menfesawi* and *Fetha Negest* were written to rule the polity, all the remaining imported laws were intended to modernise the polity but failed to reflect changes to the Country’s people. The written law was general in its approach and was not restricted in terms of its application to specific regions and groups of the people. For example the *Fetha Negest* governs both secular and religious matters. The 1930 Penal Code governed both penal and civil matters. Thus, the adopted law and treaties led to a further broadening of the sources of law and conceptions of justice.

1.3.1.3. Period of Modernisation (1955-1991)

This was a period when the pre 1945 global 'civilisation' missions moved forward with revised impetus, thereby entering the "decade of development" by the UN, "socialism" by the Soviet Union, "dependency" by Latin Americas and the rapid economic growth by the USA (Wallerstein 2005). In the context of Ethiopia large swaths of laws "were imported" from Western countries (Doran 1994: 5) during this period.

By the 1950s, Emperor Haile Silassie embarked on securing his political administration through a balancing act that consisted of gradual integration into the world capitalist system whilst holding onto the conservative trappings of an autocratic empire (Adejumobi 2007: 97). Accordingly the polity, through a desire to modernize develops the country through legal reform and took serious actions to modernize including the enactment of the Second Constitution. This is reflected by developing the country's long term plans and by adopting the Six Codes. The period marked the start of a 'real legal science' and establishment a law faculty at the Addis Ababa University (Scholler 2005: 20). The main efforts of law reform are indicated in the following sections.

1.3.1.3.1. The 1955 Constitution

Inspired by the USA Constitution, the 1955 revised Constitution suspended the 1931 Constitution and devoted more than a quarter of its provision to matters of imperial secession and powers of the Emperor. The drafting committee of the Constitution was comprised of three American advisors and two Ethiopians. The source of power for the Emperor was a legitimate claim to be a direct heir of the "Solomonic dynasty" who would then be anointed by the Ethiopian Orthodox Church (Doran 1994: 10). Articles 126 and 127 of the Constitution affirm this source of power in clear terms.⁵⁶ The Emperor was duty bound to profess the Orthodox

⁵⁶ The 1955 Constitution, See also Doran 1994: 10 who argued that this was the rule and the 'jural postulate' throughout the Monarchical regimes.

faith and defend the Church. It made the classification of law more precise and defined laws under Article 88-90, Decrees under Article 92 and Orders under Article 26-28, 33, 34 and 36.

With the lack of focus on social justice, the main purpose behind the Constitution was the “consolidation of absolutism”. Human rights provisions were “inserted for the sake of form” rather than to reflect any desire in standards (Bahiru 2006: 206). John Spencer, the American member of the drafting committee, held that the Constitution was a “screen behind which conservative positions were entrenched” (Bahiru 2002: 206). The power of the Emperor was made to be “absolute and above the law” (Abera 1998:17). In its language and content the law was a ‘Trojan horse’ and as far as social justice was concerned it was not “worth the paper it was written on” (Doran 1994: 10).

1.3.1.3.1.2. Government Plans

The polity developed consecutive plans to effect modernisation. The development plan (1957-1961) hinged on development with a special emphasis on transportation, construction and communication, although “development was restricted to the major cities thus ignoring the much needed improvement in the quality of life for people in disparate and peripheral areas (Abejumobi 2007: 100). The second plan (covered 1962 and 1967) focused on changing the agricultural economy into an agro-industrial one. The third and final plan of this era ran between 1968 and 1973 and included the same goal. Critics argue that the strategy led to the “systematic marginalisation of its denizens by starving them of economic and political opportunities (Abejumobi 2007: 101).

It was for this reason that the “Land to the Tiller” campaign was triggered by the wide spread poverty, Ethiopia was experiencing. Chronic underdevelopment manifested in violent competition for scarce resources, peasant rebellions and an increase in the population (Abejumobi 2007: 230-236). The modernisation and reform efforts left the hereditary nobility, most notably in relation to land rights,

contracts, and appointments contributed to the prevalence of weak institutions and a stagnation of economic growth (Abejumobi 2007: 101).

1.2.1.3.1.3. Adoption of (six) Modern codes

The period involved the adoption of a series of modern codes.⁵⁷ Hence a second wave of legal reform took place: the commercial code promulgated to “assist in the swift and orderly development of Ethiopia’s economic life, the Civil Code aimed “to facilitate further growth and development and to contribute to the progress” of the Empire and the people (described in the Preamble to that code). However, the laws were not to establish the meeting of the country’s aspirations. Much to the contrary, the results (coupled with other causes) were disappointing and resulted in the downfall of the State. The modern codes failed to reach “the hearts” of those to whom they were addressed and the much needed development of the peoples’ needs, custom including the improvement of natural and social justice.

All the codes were inspired and drafted by foreign parties. While the Penal Code was influenced by the codes of various countries (Switzerland, Italy, France, Yugoslavia, Norway, Denmark, Poland) its primary source was the 1937 Swiss Penal Code and the pre-1957 Swiss jurisprudence (Abera 1998: 197). This was mainly because it was drafted by Jean Graven, a Swiss draftsman. It was acclaimed as one of the most “modern and sophisticated criminal codes in the world” (Abera 1998: 197). However it exposed inconsistencies in the system. The Code’s concept of crime, its purpose and the definition of suitable punishment was individualised, whereas the people’s conception of crime was traditionally communal. Customary dispute resolution mechanisms of investigation, policing and decision making were dominantly throughout the time the code was promulgated and enforced.⁵⁸

⁵⁷ The codes are the 1960 civil code, the 1960 commercial code, the 1957 penal code, the 1962 criminal procedure code, the 1960 maritime code and the 1960 civil procedure codes.

⁵⁸ For an elaborated discussion on this see Fisher 1971, *Traditional Criminal Procedure in Ethiopia*, African Studies Series.

The most important code governing the civilian life of the people, the 1960 Civil Code, was drafted by a French comparative lawyer Rene David. The source of the code was from the civil law countries of France, Switzerland, Egypt, Portugal, and Israel and the common law countries of the UK, USA and India. As it was inconsistent with the prevailing customary norms, it tried to replace “customary laws and enactments.”⁵⁹ Accordingly, Article 3347 of the Code repealed customary laws and reserved limited discretion to customs. Custom could, for example, be applied when the law is silent or only when the law expressly permits its inclusion. It was designed as a means to “regulate relationships” so as to “guide social development” (Abera 1998: 200). According to David Ethiopians were looking forward to the “total transformation” of the legal landscape and this was, according to him, a point well taken while drafting the Code. Thus, it was aimed ‘at the perfection of society and tried to renew the “frozen social level” of the people and create the “material conditions for economic development” (David 1962: 204). This contradicts with what Abera held as the purpose of the Code. According to him the Civil Code of 1960 was of French origin with two missions: the modernisation drive of the Emperor coupled with the desire to “remain faithful to a venerated tradition”. It was also a “blend of modern civil law jurisprudence with traditional Ethiopian concept of justice (Abera 1998: 200). The preamble of the code re-enforces this when it declares the code to be in line with the well-established tradition of the Empire.

In reality the Code did not reflect the Ethiopian reality and did not promote development, in fact rural development in its country of origin (France) or in Ethiopia (Brietzke 1994: 49, 123). Just as with the Penal Code, the people neglected the civil code and adhered to prevailing customary norms.

The other codes also suffered from similar inconsistencies. In a mostly agricultural society, the commercial code (one of the best of its time) was “ineffectual, and

⁵⁹ That is one reason why the civil code of 1960 boldly declares that “all rules whether written or customary previously in force concerning matters provided for in this code shall be replaced by this code and are hereby repealed”.

proved to serve only the “tiny commercial elite” in the country.⁶⁰ Inconsistency also lay among the codes themselves. While the substantive codes were “received” from civil law countries, the civil and criminal procedural laws were influenced by the prevailing common law countries of the time.⁶¹ The inconsistencies made the people “confused and cynical” after being pulled in many directions by the new and poorly understood laws” (Briezcke 1994: 49: Doran 1994: 5). Thus, the new rules proposed by the Government were disposed by the people.

1.3.1.3.1.4. Remarks

Generally speaking the modern codes were eclectic “western flavored”, “fantasy laws” which were “nominal, semantic and unauthenticated according to scholars (Abera 1998: 1, Fisher 1971: 709). They proposed to create wealth and engineer the society towards modernisation, but failed to satisfy the expectations of the Ethiopian people. The law and its application failed to create among the people the “deference, sympathy, fear and reason” towards the law and made the job of the judiciary difficult to enforce compliance. The codes were not even physically seen by “some judges and administrators” up to 10-13 years after promulgation and, as there was no promotion or attempts at engagement, and as such they were resisted by the people and decision makers (Beckstrom 1973: 701). They also lacked the internal wisdom to force the Government to act and the external wisdom to account when there was inaction. Rather lacking the “internal morality” and the “quantum variance” (or the ‘inarticulate major premises” of Holmes)⁶² in application, state laws closed the way to development and paved the way to material under development in the country.

⁶⁰ Doren 1994: 4, most provisions of it remained unapplied so far.

⁶¹ The law of loans, the decree on concession, the law on companies, the law of bankruptcy, the law of nationality (all of which from 1924-1933), the law of Addis Ababa city promulgated in 1908 were closely modeled on French law (Abera 1998: introduction). The civil procedure code is influenced by the Indian (who in turn is influenced by England civil procedure).

⁶² The idea is taken from Kales, Albert (1917), “Due Process,” The Inarticulate Major Premises and the Adamson Act, Vol. xxvi, No.7, <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

Neither were they able to bring about social justice and development. As the country suffered from the “transplant-effect” a mismatch between pre-existing conditions and institutions and the transplanted law the justice it meant to serve went clearly in contradictions to the justice the people imagined or for that matter the intended consequences of the rule makers themselves conceived. The customary conception of justice and practice prevailed despite the fact that the civil code bars the application of customary laws in matters covered by the civil code (Doran 1994: 8, Briesztk 1975: 58). Contrary to the formal institutions the “social cohesion” among the people was created and maintained by tribal rules. Minas argued that save for Saudi Arabia and the Vatican, there was no “oneness” in the world between the people and the countries ruling elite (Minas 2005: 2). It is easy to agree as far as the formal system and as far as the people were concerned that the “oneness” in Ethiopia was visible in the inter-connection between the people and the non-formal ways of life. These problems were to persist during the *Derg* Regime.

1.3.1.3.1.5. The *Derg* (lit. the council, the committee)

The slow pace in the reforms of the Emperor Haile Silassie regime led to an attempted coup in 1960s and a popular revolt by the people that included the peasants, students and taxi drivers.⁶³ This resulted in the usurpation of Emperor Haile Silassie in 1974 and brought about an end to the lineage of the oldest Christian theocracy in the world (Adejumobi 2007: 116). This revolution was not organised and left a vacuum which looked to be filled by young military officers, none above the rank of major (with those above this rank are believed to be associated with the old regime), drawn from the main unit of the army (Air Force, Navy, and the Police). The composition was like a “military parliament” known as the Provisional Military Administrative Council, known simply as the *Derg*, forming a

⁶³ In 1973 draught was sever in central and Northern Ethiopia (particularly Wollo) which consumed the lives of 200,000 people and was one cause of dissatisfaction by the people against the Feudal Regime.

military-socialist republic that took advantage of the power vacuum (Bahiru 2002: 242-244).

In the same year Mengistu Haile Mariam was elected leader of the *Derg* and commenced 17 years military rule. This being so the people and the adversary speak in terms of a “burst of revolution” and the *Derg* lacked “a coherent ideological platform” but practically judged and appropriated the “revolutionary ideas of the Ethiopian leftist intelligentsia” and declared a ‘commitment to Ethiopia socialism’ (Abejumobi2007: 119, Bahiru 2002: 237). According to Bahiru the revolution transformed the judicial and legal process and the dictatorship from 1974 to 1991 is an era of destruction (Bahiru 2002: 238).

During the *Derg* regime a Constitution and special laws were proclaimed. It adopted the 1987 Ethiopian Democratic Republican Constitution which was highly influenced by the Socialist Constitution. With a difference in the office and power of the President, the Constitution was similar to the Soviet Constitution. It was aspiration window dressing (Doran 1994: 10). A referendum, a unique occurrence in Ethiopian history, to adopt the Constitution was held. However the government was ousted from power before it was implemented. The *Derg* era also indicates the continuity in adopting laws from abroad to modernise the country.

Other important laws of the regime included proclamation No. 1/1974 and 47/1975 and other socialist oriented laws. Proclamation No. 1/1974 was promulgated the moment *Derg* seized power and suspended the 1955 Constitution. Proclamation No. 47/1975 was proclaimed to nationalise private property. The proclamation simply declared the government as an owner of land. The *Derg* nationalised and redistributed land without due process. The people were then permitted to the right to use the land. This measure was supposed to have “created the legal and institutional conditions for accelerated rural development”.

In the eyes of most observers, the legal reform was a step in the right direction (Brunal 1974: 260). Although the Government succeeded in rectifying the injustices

in land ownership and the allocation of resources, agricultural output stagnated shortly after. The parceling of land led to inefficiencies in farming practices. The quota system also took a significant part of the output from the farmers to be put into national schemes. This was so because the law failed to be applied fairly and equitably.

Another remarked law of the *Derg* regime was the Special Penal Law. The law was promulgated in 1974 and was to be applied by the Special Court-Martia. It amended the penal and procedural laws to increase the speed and certainty of convictions for “enemies of people”. with elements of vengeance, increased draconian penalties not requiring the prosecutor in many cases to prove “state of mind”, was used retroactively to punish all acts against *Ethiopian Tikdem* (literally Ethiopia first).

Despite the laws most activities of the *Derg* were conducted on a campaign basis. The first of these was the 10 year (1985-1994) National Revolutionary Production Campaign. The campaign planned projects between 1985 and 1994 with the objectives of accelerated economic growth.

1.3.1.3.1.6. Further Inconsistency

The laws proclaimed during the *Derg* period embedded important socialist ideas of modernisation. The socialisation, or more precisely intensive sovietisation, demanded clear law making but persisted side by side with the application of the six previous Capitalist Codes. Though the *Derg* introduced Marxist ideology “in the ‘unprepared soil’ of Ethiopia” (Abera 1998) and enacted some laws to this effect, the commercial code, the law of property, contract and tort which had significant liberal developmental ideology remained largely intact.

The co-existence of socialisation of firms with the capitalist oriented Commercial Code, privatization of the commercial Code with the Nationalization policy and laws, state ownership of land with freedom of contract and with the unequal distribution of land were being in conflict. This was one of many inconsistencies created by the co-existence of socialized and capitalist ideas. The Codes have

survived the *Derg* regime and still are applicable in the free-market economic system. With the growing civil and common, substantive and procedural tension, the adoption of the *Derg* socialist oriented laws intensified the already competing tensions.

Other contradictions lay between modern and traditional laws. The “jural postulate” of the country during the regime was “*Ethiopia tikdem.*” (Brietzke 2006: 1). Initially a slogan, then a motto, and later translated in to a vague philosophy⁶⁴ which not only suspended the entire legal system but also made law the weapon of choice for the military elite to strengthen state authority; with the undesired albeit foreseeable effect of increasing political repression. While the *Derg* resorted to using public law as a weapon of development, the vast majority of the people “subscribed to the values embedded in traditional law chief among which was the non-interference of Government in the daily lives of the population (Scholler 2005: 121). The *Derg* in its urbanised, paternal, and factional approach was out of touch with the rural people with drove dissatisfaction amongst these communities. The traditional laws of the past which tried to harmonise society in an ever changing world survived the *Derg* ideological belief in eradicating class struggle.

The lack of clarity with the *Ethiopian Tikidem* left inevitable contradictions in the judicial system. One of the proponents of the postulate, the then chairperson of the *Derg*, Lt.General Aman Andom, presented a recommendation for administrative and economic reforms. But his quest came to an end when he was “silenced” by the *Derg* the same year on a fatal November evening (Bahiru 2002: 207). Thus it poses the question of what was *Ethiopia First* without progressive economic and institutional reform.

⁶⁴ As containing the tenets of Ethiopian Socialism: self-reliance, respect for hard work, elimination of the “limitless idolatry of private gain”, and public participation in local administration. Accordingly Banks and insurance companies are nationalized in 1975 and other largest companies attempting to capture the “commanding heights” so as to monitor the rest of the economy (Scholler 2005: 110).

With the new laws, Ethiopia remained one of the least developed countries in the world. Notwithstanding the law and the campaigns yielding land rights, illiteracy reduction and popular participation in politics the *Derg* was challenged from many corners. The GDP (lowered by 0.8%) with its economic crisis, the 1985 famine, the widely hated villagisation programme, issues of ethnicity and national identity and attacks (from inside and outside) weakened the country and forced the leader to resign in 1991 (Bahiru 2008: 275-276). At the end of the era, agricultural productivity could not match population growth and land reform was condemned as being antithetical to modern motivations and method with the imposed communisation stifling the spirit of competitiveness and individual contribution (Scholler 2005: 129). The *Derg* land policy stifled individual and communal creativity and removed incentives for successful farmers. The social services that were promised in the plan simply failed to materialise.

The lack of social justice caused resistance in all corners of the country, notably from the North, and resulted in uninterrupted war in the country. Coupled with global movements the challenges forced the *Derg* to replace its militaristic-Socialist policy with the Mixed Economy System on March 6/1990. Despite that the resistance groups, led by TPLF (originally fighting for regional autonomy) formed the Ethiopian People Revolutionary Democratic Front (hereafter known as the EPRDF) in the 1980s and defeated the *Derg* army in 1991 (Bahiru 2008: 276, 277).

1.3.1.4. Post 1991

The *Derg* was overthrown in May 1991 by the Tigrean People Liberation Front (TPLF) led coalition of the EPRDF. The TPLF group took the name "*Woyane*" of the 1935s peasant protest in the Tigray Region and organised itself under the Leninist banner of "self-determination up to secession." According to Bahiru (2002: 271) the group opportunistically used the slogan to get support from people in the periphery.

The EPRDF, led by Meles Zenawi, set up a provisional administration comprising of all opposition fighters, from which the Oromo Liberation Front and the Ogaden National Liberation Front soon withdrew and resorted to armed insurgency. Eritrea voted for independence in 1993 and had a bitter war with Ethiopia from 1998 to 2000 over a common border.

The EPRDF committed itself to multi-party democracy and economic reforms largely assisted by foreign assistance. Post 1991 is the time when sustainable development is topical and this concept is regarded as the “jural postulate” of the country. The EPRDF adopted the Constitution of 1995 and pledged to commit to the respect of human and democratic rights and to uphold the rule of law. All customary laws were allowed to be applied within the framework of the Constitution.⁶⁵

Based on the shift and the commitments in the Constitution, policy documents were adopted and many reform programmes were launched. One such reform programme was the Comprehensive Justice System Reform Programme of which the Judicial Reform sub-programme is the main component.⁶⁶ Many laws are promulgated to give effect to the Constitution and policy direction of the country. In particular the Penal Law, Tax Law, Land Law, Family Law, and Labor Laws have been amended or repealed. The laws are promulgated by Federal or Regional states under their jurisdiction. Together with the new laws, all the law of the earlier periods, including the civil, commercial and procedural law continues in operation. Thus, it is a period of reform, and of formal and non-formal legal pluralism.

Legal reform has the directions of sustainable development and good governance. Despite a claim that the development in the country was erratic and lacked equitable distribution of the income generated (John Wings 2008: 2-4), the World Bank and IMF stated that the economy of the country is improving. It is the period when the relationship between legal reform and growth is positively correlated.

⁶⁵ See article 9(1) of the Constitution.

⁶⁶ This is adopted in 2002 and will be dealt with in Chapter four in detail.

Since development could call for further action, it can also be argued that it is the period where the law is seen to possess the potential to help sustain development.

This period has inherited many of the complex legal problems which have lasted for centuries. It is not clear whether and to what extent these problems are resolved. Having the promise of development in the economy one may suggest that the period has proved that home grown law, as a means to sustain development, could potentially develop the country. The social side of development remains to be seen. In this respect the author will continue to investigate in the next chapters whether the judicial and legal reform programmes are working in the right direction towards realising social justice.

1.4. Ethiopian history of dispute settlement

People everywhere have their own way of practicing, symbolising, giving meanings to events, judging right and wrong, good and bad and other ways of life. Schwartz has identified basic values and many orientations in culture. The first one is an individual's "embeddedness" in society where members of that society are committed to maintaining the *status quo*, propriety and restraint of action that might disrupt group solidarity or traditional order. The second one is "hierarchy" where role obligations within unequal distribution of power is obeyed. Accepting the social and physical world as it is, trying to comprehend and fit in rather than to change it (harmony) is also another orientation of culture (Schwartz 2002: 1-7). These characteristics, with variations in degree from country to country, are in contrast to what characterises developed countries -autonomy, egalitarianism, mastery and individualism.⁶⁷

As shall be explained in Chapter Six values (including collective ways of life, relationships with authority and respect for the elderly, preference to avoid uncertainty, affection to modest relationships, caring for the weak and

⁶⁷ The idea is taken from Zartmen (ed.), 2000. Abu-Nimer, *Mohammed, Contrasts in Conflict Management in Cleveland and Palestin, Traditional Cures for Modern Conflicts: African Conflict Medicine*, Lynne Rienner, Boulder London and USA.

interpersonal harmony) were some of the characteristics of Ethiopian society that is in contrary to life in the West. This was true for the philosophy behind the traditional way of decision making in Ethiopia. The following sections discuss the institutions which have prevailed in the legal history of Ethiopia as to how they apply the law.

Two initial thoughts worth consideration include the fact that there was no significant change in the institutions of dispute settlement for many years and it is important to note that the periods so far discussed do not match the period that is concerned in the following discussion. The discussion that follows focuses on three key periods: pre-1941 post 1941 and post 1974.

A further reminder on the source of the discussion includes the fact that the discussion on ways of doing justice in Ethiopia relies to a large extent on foreign sources. Local sources of information are scarce. Chronicles, as source of legislation, are of limited use although one can find important decisions by contemporary Kings. Thus, it is necessary to rely on the travelers account to get an idea of the way in which cases were decided.

1.4.1 Pre-Zara Yakob (1941) Period

Generally speaking dispute settlement mechanisms before the 1955 modernisation wave can be categorised in three categories: the traditional dispute settlement mechanisms (with varied versions), Imperial courts (formal courts) and special courts. Let us have a brief look at them in turn.

1.4.1.1. The pre-1941 Non-formal Institutions

Before the establishment of formal courts in 1941 there was no separately structured judiciary to dispense justice and enforce decisions, reliance was instead on non-formal methods of dispute resolution. Abera discusses such non-formal

institutions found in *Tigray, Amhara*,⁶⁸ *Oromo, Kunama, Garage, Somali, Afar, Wolita, Kefecho* and *Annuaak* areas. With some changes in some values, norms and attitudes of the polity, this was the mechanism by which the people view as the proper and prevailing disputing resolution mechanism (Doren 1994: 5, Beckstrom 1973: 704). This system was believed to yield better results than force and the formal system. It involved various modalities that included village elders, spiritual ways of settlement and a passer-by judge.

1.4.1.1.1. Village Elders as Arbiters

Dispute resolution mechanism using a committee of village Elders has been widespread throughout Ethiopia. The elders are trusted and selected for being firm, strong and knowledgeable of right and wrong. They serve on *ad hoc* basis and strive to arrive at the truth of the dispute even if their own initiatives and would consider guilty plea as “conclusive” evidence.⁶⁹ An elder’s main function was settling disputes in order to establish harmony (Doren 1994: 4-5). The harmony supposed to be established was among the people, the environment and the Creator God. As communal values had priority over modern laws, the main aim was reconstituting and re-integrating deviants in to communal life (Gidey 2004: 5). That is why the elders’ involved themselves in the settlement process at the earliest possible time

⁶⁸ According to Abera the most traditional institution in Amhara were the *Abat, Ye’gobez-Aleqa, Chika Shum* and *Ye’zemed Dagna*. The laws these institutions applied were unwritten, and dominated some part of Ethiopia and the codified laws-of usucaption, of family arbitration, equal sharing of property by female descendants. *Abat* (People’s Nominee) discharged judicial and administrative functions from the *quere* (locality) to the *Awraja* level. They are elected by the community for their intelligence, respect and fear by the community, are as many as seven, mostly elders. They are responsible to make law, administer justice and execute decisions. They also serve as the last resort when other apparatuses fail. *Ye’gobez-aleqa* is to lead a revolt against unbearable government while *chika Shum* (literally judge appointed over the soil), whose primary task is administrative, also served as a government appointed institution to adjudicate cases like divorce, battering, trespass, and other minor cases. *Ye’zemed Dagna* was locally elected for every dispute to arrive at an amicable solution. In this respect Family Arbitrators, Elders and *Chika Shum* served as institution as first instance. Even after a case was instituted in a court, elders would secure permission to settle cases instituted in a court and would get the permission. The adage “even a swarm of bees wouldn’t leave their hive and go to a new one before they settle down on a nearby tree or fence” had run to this effect (Abera 1998: 46-49).

⁶⁹ Abera 1998: 83.

and tried to settle the problem as quickly as possible so as to reduce the damage done in the interim to the community.

Depending on the type of a dispute, elders use different mechanisms of settlement. They negotiate most disputes particularly minor cases. Mediation and arbitration are employed to disputes pertaining to economic and other cases disturbing the communal peace. Thus the procedure are not predetermined and not fixed and resolution depends on the kind of dispute and the parties involved.

1.4.1.1.2. Spirit Mediums and Religious Leaders

While elders were dominant mediators or arbitrators other actors were also involved in dispute settlement. Supernatural forces were believed to be part of dispute settlement mechanism. Before the advent of Christianity spiritual means of settling disputes had been the predominant mode of settlement. Justice was done in accordance with such customary ways of dispute settlement which persisted in the pre-Aksumite period.⁷⁰ As part of the custom, dispensing of justice was also dependent on “traditional local and mystical beliefs (Abera 1998: introduction, Fisher 1971: 723-728). This included the use of *tenkuay* (sorcerers), the Coptic Church (*sabate-masdefat*) and other spiritual means of dispute resolution.

As a matter of uninterrupted continuity, one account of such practice was witnessed by Portuguese explorers in the 16th Century AD. The Portuguese were shortly expelled from the country for their “arrogance and insensitivity towards the rituals and traditions” of the country (Penrose et al 1987: 85). The same way of dispensing justice still prevails in some part of contemporary Ethiopia.⁷¹

⁷⁰ As a matter of uninterrupted continuity, supernatural means of identifying unknown offender which was prevailing during the first period is still operational (See Getachew and Pankhurst A (ed.), 2008. Woubishet S and Melaku A, *Customary Dispute Resolution Mechanism in Amhara Region: the case of Wofa Legesse in North Shoa*. Center francasid’Etudes Ethiopiennes.

⁷¹ A significant number of cases are being settled by these kinds of institutions today. For example, see the work cited on *Supra* note 61 where it was discovered that a single non-formal institution has more cases in a year than cases entertained by a first instance court of same area and most other first instance courts of the region.

Later Churches⁷² and religious leaders (of Christianity and Islam) were serving as one means of dispute resolution. For example Churches were used as an institution of sanctuary for those who committed serious offences. Taking sanctuary conveys the message that the offender is demanding the involvement of religious leaders to set a reconciliation process in motion. Violating legitimate sanctuary was a serious offence. Church authorities took active part in promoting the peace process (Fisher 1971: 724-726).

Some of these mechanisms became formalised. Formal recognition was given to some spirit mediums⁷³ and Church and Sharia Courts. However, the jurisdiction of the Church Court was abolished by a decree in 1942. Despite this litigants continued to make use of the Church "Court" for family divorce and inheritance cases. Even later Emperors like Emperor Haile Silassie were referring cases to such courts (Doran 1994: 6, Gidey 2004: 47-50).

1.4.1.1.3. A Passer-by Judge

As disputes were matter for everybody, societal pressure and communalism made every person an arbitrator in the case. This arbitrator could be a person who was a witness (in contractual cases), a selected arbitrator by the litigants, a relative to the parties (in family cases), a resident of a locality (hence the names *yehagerlij*, and *yewonzelij*) or a person who was just passing by when the dispute occurred.

⁷² When it is thought that religious rules are breached, the king himself could prosecute a defendant at a bench where the aristocracy, the clergy men and the monks preside. In one case they passed a death penalty against whom accused by king Zera Yakob. However the prosecutor, the king did not agree with the decision and asked for an explanation by both sides. The king asked the accused if he understood why he came to face the trial and why he couldn't cooperate with the monks. He and the monks explained on these points. The king then demanded their verdict which they still insisted that the accused shall deserve death penalty as he "annul Sabbath, did not obey the kings order and did not bow down the king". The king however ordered 46 lashes of flowing which was effected immediately. The accused took the flogging as a martyr (Getachew 2010: 92-95). The same king also ordered another religious father not only to be to be flogged 40 times but also to be sent to a mountain (being tied with robes) being imprisoned for not bowing down to him. Three months later the king pardoned them and then asked them not to petty against him as he only intended to maintain what he inherited from his ancestors (Getachew 2010: 105).

⁷³ For example Wofa Legesse, *Supra* note 62, has been given Certificate by Emperor Haile Silassie to give his service throughout Ethiopia.

A passer-by who is not close to the disputants could be stopped and asked by the disputants to settle their case in the name of an Emperor or some other royal personage. The passer-by could either escort or send the parties to the nearest magistrate although such a judge was expected to accept the duty as a civic obligation and would be offered a small fee for the service (Fisher 1971: 728). The person so approached had to convene a tribunal on the spot, typically under a tree and was supposed to be open, hence the name Open Air Court; the object being to hear the case and settle the case on the same day. If the passer-by cannot settle the case he had the power to arrest a suspected law breaker by ordering the latter to submit to custody in the name of the Emperor or some other royal personage (Fisher 1971: 726). If he refused he could be apprehended by force. The dispute could further be sent to the formal or non-formal body.

This kind of settlement was described by foreigners visiting Ethiopia as “road-side court” or a “tough-man” system and the judges as a “passer-by judge” (Abera 1998: 19, Clapham 1969(87): 111, Fisher 1971: 721). Travelers also witnessed arbitration by “road-side judge” at various times. Farago reported on the “justice” that he personally witnessed in the late 19th Century. According to him litigation was oral and could take place in the streets at any time any place. In a case he came to witness a “police man” in the street was immediately promoted to the rank of a judge and gave the decision (Farago 1935: 31).

More or less the same fact is recorded by Monroe for the medieval period. According to him, justice was highly centralised. He quoted Alvarez as reporting justice as “rough” and “ready”.⁷⁴ In minor cases, decisions were final and when appeals were allowed, appeals to the Emperor would pass through a “notary” (Monroe 1935: 69). The whole procedure was entirely oral. Customary law was applied as the *Fetha Negest* was “unsuitable to Ethiopia as it was inaccessible, difficult for the local people to comprehend the content and the purpose it was

⁷⁴ See Getachew 2010: 82-111, for details as to how justice (for example by King Zera Yakob) was rough and ready.

drafted (Monroe 1935: 70). Flogging and awards were the usual remedies. Alvarez witnessed the flogging of judges at the spot “for miscarriages of justice” although it was not clear who judged them (Monroe 1935: 70). This same practice continued during the 17th Century but with more brutality (Monroe 1935: 125). With an eye for an eye, the same practice continued during the reign of the last Emperor Haile Silassie (Monroe 1935: 170).

The passer-by judge would arbitrate based on his own conscience and according to the dictates of natural law (Abera 1998: 31). Under customary law (particularly in Amhara) the involvement of this kind of person as an arbitrator was common and maintained the balance in the application of natural law and customary law in the system. As every man was a judge Brietzke criticized the passer-by judge as an evasion of the “ legal profession” (Brietzke 1974: 30).

1.4.1.1.4. General Remarks

The traditional methods, spirit mediums and passer-by judges have qualities worth summarizing. Procedures in all cases were simple. There was no specific procedure except oral accusations and denials. Litigation was spontaneous and both civil and criminal remedies could be given in a day.

Non-formality, free debate by parties, pleaders and bystanders, reliance on arbitrator knowledge of the facts as the basis of decisions, some supernatural mode of proof and consensus judgments were common place in Ethiopian justice. In addition, extensive use of personal sureties and apparently elaborate regulation of witness evidence was also common. The non-formal procedures were also much influenced by lay audiences who were free to “interject their own questions, comments, and even wager on the outcome of a suit (Fisher 1971: 730-732-732).

The institutional arrangement in the non-formal sector and the wider involvement of the community in dispute settlement mechanisms indicates the philosophy behind disputing. Disputes which are negative to harmony are believed to damage not only the parties in dispute but also the entire community and had to be

avoided. As disputes arise owing to conflicts over scarce resources, honor, dignity, fame, religion, or blood revenge which were believed to escalate unless effectively settled, mediators usually focus on problems over parties, and the future is maintained by maintaining the status quo.

The benefit from harmony was established amongst men, the environment and the Creator. That is why mediators, elders, and spirit mediums frequently referred to societal norms (by way of proverbs), their ancestors, and their Creator when necessary or when they come across hard cases.

1.4.1.2. The pre-1941 Formal courts

There were no formally established courts until 1941. Before the establishment of formal Imperial courts in 1941 the administration wing of the government acted as the judiciary. Thus an administrator of a locality was the judge of the administration. The *Chika-Shum* (parish headman-literally judge appointed over the soil) was an administrator and a judge at the lower level of administration. Above him in the hierarchy was the *Woreda-gaz* (literally District Governor) to administer the area and heard appeals from the *Chika-shum*. The Provincial Governor, who sat with uncertain number of *Wonbers* (judges), heard appeals from the *Woreda-gaz*. A king appointed Ras (administrator and governor of the locality) was a judge. Finally, the Emperor could review cases from the Provincial Governor. Much latter the *Afa-Nigus*⁷⁵ was mandated to receive appeals on behalf of the Emperor.⁷⁶

Though formal, litigation was entirely oral. As a result when a party brought an appeal to the higher court in the hierarchy, his opponent and the judges who gave the decision were required to appear before the appellant court. In 1908, Menelik decreed that decisions of judges should be registered by the registrar of judgments.

⁷⁵ The *Afe-Nigus* (lit. mouth of the king) was the President of the Emperor Supreme Court (see for example proclamation No. 2/1942 article 3). Before 1908 *Afe-Nigus* was responsible to hear any complaint, except complaints on death penalty, and used to give final decisions.

⁷⁶ Regulation issued on December 1/ 1934 gives the *AfeNigus* power to hear appeals from special court with power to preside over litigation between Ethiopians and Foreigners. See also Monroe 1935: 69.

Later on a Decree on March 22/1922 abolished this system and introduced the court record system.

In 1908, Afa-Nigus (literally translated as the ‘mouth of the king’) was appointed as head of all judges in the country and according to part II of a Decree in 1908 was empowered to check whether decisions were given according to the *Fetha Negest*. All the judges were under a duty to send all copies of their files (*Gilibach*) to the *Afe-Nigus* for purposes of inspection. When the backlog increased, Emperor Menelik established six special tribunals comprising of 12 judges (*Wonber-rases* literally principal judges) to be appointed by the Emperor to receive appeals on behalf of the *Afe-Nigus*. However appeals from the *Wonber-rases* still could go to the *Afe-Nigus* under part IV of the Decree in 1908. However that arrangement the prerogative discretionary power of the Emperor to receive cases for revision was also preserved (Fisher 1971: 714).

Prior to 1941, judges were performing multiple tasks. Judges were administrators and arbiters as well as investigators.

1.4.1.2.1. The Judges as Investigators

A judge at *Awraja* (administrative hierarchy above *Woreda*) level was mandated to investigate homicide cases under Decree No. 21/1937. In being an investigator, they were to be assisted by four assessors and the Governor General⁷⁷ of the locality. The finding of the investigation would be sent to a criminal court for sentencing that could pass criminal sentences aside from the death sentence. Judges at lower level were also expected to investigate unknown offenders using the *Afersata*⁷⁸ procedure.

⁷⁷ Is a Governor higher in the hierarchy than Aweraja.

⁷⁸ This was a government sponsored criminal inquiry into a crime. In conducting the *Afersata* all the local people gather to pick up the perpetrator of an alleged offence. One of the people inform the judge in private as to who committed the offence and the judges declared the end of the gathering as evidence is provided with by a ‘wof’ (Litarally bird).

Some trace the origin of *Afersata* system to 1781 when it was instituted to help the King police-the *Leba-adagn*⁷⁹ (thief hunter or seeker administered by a *Chika-shum*). In *Afersata* all the local people would gather in the forum where the “judge” sat with seven or eight *Mirtoch* (Literally translated as ‘selected’) to investigate a crime where the offender was unknown. The investigation could take days. Being informed by a member of the gathering the judge would pick one of them as the perpetrator of the offence. The informant would remain anonymous and the judge would pick the offender as if informed by a “*Wof*” (literally a bird). The accused in this system could appeal to the Governor on the testimony of the “*Wof*”. In the same way the *Chika-shum* would be involved in the investigation of a crime using the *Leba-shai* procedure. Both the *Afersata* and the *Leba-shai*⁸⁰ were believed to identify an unknown offender. These practices had elements of the past where decision makers investigated and reached for the truth of the case with the help of supernatural forces.

Non-formal systems had penetrated the formal system in other more formal ways as when laws allowed the direct application of non-formal systems. For example a proclamation on July 28/1932 mandated the courts to base their decision on the established custom (*Ende-Sir’atu*) of their locality. The proclamation empowered *Emagnoch* (literally assessors) from the non-formal sector to assist the formal system in the discharge of its duties. The application of customary laws with the aid

⁷⁹ Literally it means a thief-seeker who serves to find a fruit of an offence. The process of searching is as follows. The person to serve as a *leba-shai* has to be a young boy aged from 14-18 and should not have commuted sexual intercourse. A victim of the offence would complain to the administrator of the locality. The person would receive the *leba-shai* and took him to his house where he would be served with local drinks and seep a smoke through a pipe. After he became unconscious a person delegated from the administration would tie his flank up with a girdle and give him a flog using a switch. The young boy then would wake up and run. The person delegated would hold the girdle and follow the *leba-Shai*, protecting him not to touch water and any person otherwise he would be antidote. The *leba-Shai* finally would get into the house of the offender or sleep under the bed of the offender. The owner of the house or the bed would thus be the offender (Kebede 2011: 72-78).

⁸⁰ The civil codes did not recognize the system as a result the profession fallen in to disuse (Messing 1955: 422). *Afersata* and *leba-shai* are abolished during the reign of Haile Silasie not for adhering to the bottom up approach but the desire on the part of the “ruler to be seen modernized by westerners” (Alexander 1994: 269).

of *Emagnoch* made customary laws more discernible (Fisher 1971: 712). The non-formal system of settling disputes were penetrating the formal system and contrary to the formal courts, non-formal systems were omnipresent and omnipotent. Formal laws couldn't ignore this fact.

1.4.1.2.2. Zufan Chilot (Emperor Bench Jurisdiction)

As part of both the formal and non-formal system the Emperor had exclusive Prerogative to preside over cases (*Chilot*) and was the apex of dispute settlement. Similar to the local administrators, Emperors who throughout history were taken as the ultimate source of justice were capable of trying cases they deemed important and exercised judicial function as one of the duties of Kingship. It formed part of the ancient institutions and was firmly established in the Ethiopian legal system and was one of the most fundamental parts of the legal institutions in Ethiopia (Sedler 1964: 59, 76). Even during the time when political power of Emperors declined, Emperors were recognised as the ultimate source of justice (Sedler 1964: 59). According to Sedler Emperors⁸¹ of the country have been looked upon as the "ultimate source of justice and as part of this tradition, Emperors were empowered to exercise prerogative sovereign power to do justice in the country (Sedler 1964: 60-61, 76). It is a long history and one of the reasons that sustained the monarchical system for such a long period. According to one source, it was more than 3000 years old (Redden 1968: 146).

The Emperor at the apex had original jurisdiction⁸² in the more serious cases. For example one can find in the chronicles the famous condemnation to the death of Zara Yacob's sons and daughters by their father for idolatry (Vandelinden 1974: 245-246). In the 16th Century Alvarez recorded that "important cases" were entertained by the *Nigus* (King) and Abera lists commercial cases tried by Emperor

⁸¹ As fountains of justice their power with respect to life, land, property of the people was unlimited and unquestionable. These were not recognized by a law.

⁸² The Emperor's power to appoint, dismiss, arrest, release, kill and pardon was more of an exercise of original jurisdiction than administrative power (Zikre Neger 1946: 52, Fisher 1971: 71).

lyassu (1730-1755), of cases of liquidated sums, homicide, theft, robbery and liability for animals irrespective of fault by Tewodros (1855-1868) (Sedler 1964: 60). A Decree on 23 Jan. 1883 by Menelik provided evidence of how he gave serious decisions on theft cases. According to Abera, Emperor Menelik also entertained cases of defamation (through incriminatory letters) and perjury (Abera 1998: 83-89).

Despite its significance, the old system of Emperor justice was a “wandering” one. The Capital City was in a continuous state of motion. While Aksum and Lasta (for Zagwe Dynasty) were relatively permanent, the seat of the Ethiopian court moved from Aksum to Gonder, Lalibala, Tigray, Shoa and many other places in between. At times the shift was twice a week (Horvath 1969: 210). In order to initiate a change in the location of a capital city or camp, Emperors had only to mount their horse or mule and ride out of the settlement (Horvath 1969: 211). As Emperors were the final arbiters and the fountain of justice throughout ages, the judicial body and justice they served was also wandering. It was during the reign of Fasiledes (1632-1667) that the quasi-nomadic mode of the Ethiopian monarchy was abandoned and the royal court came to rest at the city of Gondar (Adejumobi 2007: 24).

In the exercise of *zufan's* appellate jurisdiction the Monarch spent a good part of their time in personally dispensing justice to litigants who came from far and wide (Markakis and Asemelash 1967: 196). According to the system the tradition is that every Ethiopian had the theoretical right to appeal to the Emperor. In the past appellants did so by throwing themselves in the Emperor's path and shouting “*Abyet*” literally “hear me” or appearing before the Emperor palace and shout the same way (Messing 1955: 418).

More recently a part VIII of Decree on Oct. 21/1928 and a proclamation on July 28/1932 allowed aggrieved parties to speak (*Mechoh, Abyet Malet*) to Emperors when dissatisfied with lower court decisions. Emperor Haile Silassie exercised this power despite the fact that the 1931 Constitution did not formally recognise this

jurisdiction.⁸³ The Emperor was believed to exercise their discretionary power to do justice and mitigate the rigors of law when courts failed to do so (Sedler 1964: 72).

The Emperor's *Chilot* jurisdiction was assisted by officials. During the earlier period the *Afe-Nigus* assisted the Emperor. In his travel report Monroe recorded an Emperor presiding over cases with two "chief justices" (Monroe 1935: 69). Later on two important institutions named *Fird-Mirmara* and the *Seber-Semi*⁸⁴ were introduced to assist in making recommendations to the Emperor in the exercise of His *Chilot* jurisdiction. *Fird Mirmara* used to screen and refer cases that demanded the *Zufan Chilot*. It could also establish a commission to assist the office. On the other hand *Seber-Semi* was to give opinions on questions of law on those cases being entertained by the Emperor. These institutions could also recommend another court to hear the case (Sedler 1974: 73).

Changes in form and extent, the underlying rationale for the *Chilot* jurisdiction remained the same for so long.⁸⁵

1.4.1.3. Pre-1941 Special Courts

Special courts of various kinds were operating in Ethiopia before 1941 under treaties, decrees and traditions. The treaties in 1849 and 1908 established special courts for British and French citizens. According to Article 7 of the treaty of 1908 the law of the defendant country was to be applied unless both subjects were foreigners. The Franco-Ethio treaty of 1922 also established the Special Court of Ethiopia to try cases arising between Ethiopians and foreigners.⁸⁶ The courts had jurisdiction concerning all conflicts (civil and criminal) where a foreigner was

⁸³ This was also so for the latter part of the legal history. Thus, art. 182 of the criminal procedure code allow *Chilot* Jurisdiction despite the 1955 Constitutions did not recognize it.

⁸⁴ This had been recognized by a proclamation dated on December, 6/1932.

⁸⁵ Even Emperor Haile Silassie held that he used to preside over this *Chilote* on every of Wednesday and Friday as this had been the norm that has come from earlier days (Haile Silassie 1937: 46-47). See also Sedler 1974: 73, 67.

⁸⁶ Later on the jurisdiction was extended to other foreigners not benefiting from similar agreements between their government and Ethiopia. This extension of jurisdiction was based on the principle of "equal treatment" to all foreigners in the empire (Vanderlinden 1974: 248).

involved. These Special Courts exercised jurisdiction when foreigners demanded in which case their consul sat as a member of the court and foreign laws applied.⁸⁷

Save for appeals in homicide cases, the Decree of July 4/1930 improved the earlier treaties so that the *Afe-Nigus* was delegated to hear appeals on behalf of the Emperor. The decision of the *Afe-Nigus* was to be executed after the Emperor gave his consent. However principles developed by the court are not available (Abera 1998: 82).

During the 1930's the special court was more actively sitting nearly permanently and made important decisions (Vanderlinden 1974: 249). The Court ceased to function with the Italian occupation of 1936 and was not revived after the restoration of Ethiopian independence in 1941, the original treaty having been abrogated as a result of French recognition of the Italian conquest (Peters 2000: 56).

Another special court which had jurisdiction on cases regarding the security of the country was also established by Decree No. 87/1939. The court had nine judges- four of which were from the high court, three from the military with a rank above Lieutenant Colonel and two from the civil administration with a rank above *Hagergezi*.⁸⁸ All the judges were appointed by the Emperor. Decisions were appealable to another special court having five judges: The *Afe-Nigus*, presidents of the houses, one official chosen by the Emperor from those who were advisors to the crown and one person from the military who as the most senior General were members of the special appellate court.

There were also other special courts like the market courts which were functioning outside the formal court system. The market courts were supervised by the "market master" who could sit on cases along with a special judge (Fisher

⁸⁷ This special court had a foreign advisor. According to Emperor Haile Silassie the Swiss Musie Abierson was assigned as an advisor to the court (Haile Silassie 1937: 42-48). See also Monroe 1935: 170.

⁸⁸ According to the *Afersata* Regulation, dated August 4/1933, this is the governor of a locality who is also the judge of the locality (article 10th of the regulation).

1964:716). In his account Farago recorded the existence of a court of appeal presided by the Minister of Justice and a Court of Justice presided by the Minister of Trade (Farago 1935: 30-32). As the "market courts" were not recognised by formal laws, the appeal system was interconnecting the non-formal and the formal system.

1.4.1.4. Attempts to Integrate the Formal and Non-formal Systems

There were attempts to reform some of the dispute resolution mechanisms, such as *Afersata*, *Atbia-dagna* and *leba-shai* (Literally a local judge) during this period.

Regulation dated July 26/1932 identified two reform areas in *Afersata*: the need to reduce the number of people gathering in the *Afersata* and the need to rectify the miscarriage of justice under the guise of "wof". The regulation limited the size of the arrest and the days of collective confinement. *Afersata* was more formalized so that it could be held once in a month on either Saturday or Sunday (as prescribed by Article II), the investigating judge could sit at a place where the parties and witnesses did not need to travel for more than three hours and could investigate under oath, the administrators who were responsible for sending the parties to the judge for investigation, and the investigative judge would be appointed by the administrator upon recommendation by the *Shaleka*. The judge could arrest the guilty and send him to the judge next in the hierarchy (who according to Article X was the Governor of the locality). The undisclosed witnesses who were called *wofas* indicated above were required to be known and named as witnesses of the judge under Article XII of the Decree.

Another institution that had been established to reform the traditional system was the *Atbia-dagna*. The *Atbia-dagna* was established by the Central Government as per proclamation No. 90/1947. Its establishment was an attempt to combine the local traditional with the new formalised traditional means of settling disputes (Singer 1971: 327). An *Atbia-dagna* was a local judge appointed as a judge in the rural areas. Each *Atbia* (locality) would have one *Atbia-dagna*. The *dagnas* (judges) entertained *tinish-neger* (small claims) and settled (*erq*) disputes on the basis of the

local tradition. If mediation was unsuccessful, they could arbitrate. Their decision was appealable to *Mikitle-Woreda* (sub-woreda) courts. If the *Mikitle-Woreda* courts varied the decision the *woreda* court could hear the appeal and its decision was non-appealable as specified in Article V. Two *Emagnote* also advised such courts under Article IV. These attempts to reform were resisted by the people who neglected the *Atbia-dagna* and “often used customary law or equity” (Doren 1994: 5). Other means of settling disputes were often more “effective” than the *Atbia-dagna* (Singer 1971: 327-328).

An attempt during the Menelik era to limit the practice of *leba-shai* is another example of re-formation. An initial attempt to abolish it shifted to limit the exercise of the *leba-shai* as the *leba-shai* discovered a ring which Menelik had hidden in order to test the effectiveness of the system.⁸⁹ *Leba-shai* too was resisted (especially in the Southern part of Ethiopia) as a centrally imposed system.

1.4.2. Post-1941

1.4.2.1. Formal Courts

For the first time in the legal history of Ethiopia Proclamation No. 2/1941⁹⁰ established formal court systems constituting the Imperial Supreme Court, High

⁸⁹ For this and further discussions see Fisher, work cited at note 52.

⁹⁰ It was after the Italian occupation when the country began everything a new. Though three important changes took place during this time (established the court, established the law school, and promulgated lasting codes), the judiciary especially at the lowest level hasn't been significantly changed from what has been during the earlier times. The people still serve subpoena and is the police judge, use intercession, lodge complaints against the court before the administration, practice *Awchachign* (another name for *Afersata*). The main reasons were judges being alien to the new laws, the lack of independence and their organization, progress in the modern courts being evolutionary, the educated not joining the judiciary and lack of training centers for judges (this is based on the earlier belief that Ethiopian, acting as a passer-by judge, are specialized judges), the new laws proclaimed in a hurry (which do not have traditional laws ready to base upon) became a burden to the already problems, lack of institutions (registry for example) to fully implement them, lack of trust upon the modern courts even from the government side, all made the laws seem fiction than a law to be enforced (Assefa 1973: 19-29).

It is only if the modern courts (treat parties equally, independently, competent) are trusted that there would be peace and security, healthy developed society, that the new laws would thus be customized by the people. Then after the police and court would only become nominal institutions.

court, *Ye'awraga* or Provincial Court and *Woreda* or *Kebele* Courts. The organisation of the courts followed the organisation of the administration. Accordingly all powers were merged at the top in the person of the Emperor, at the bottom the executive functions were combined with the judicial functions. Local governors were presidents of their respective courts.⁹¹ In the 1960s the civil and criminal procedural codes reorganised the courts but the four level hierarchies of courts⁹² and the *chilot* jurisdictions were retained.

Alongside the formal courts, the *Chilot* jurisdiction of Emperors still continued in this period. The Emperors were given formal power of appellate jurisdictions as per the Civil Procedure Code of 1968 and Article 168 of the Criminal Procedure Code of 1961. Accordingly he could give decisions as justice and common sense dictated rather than the directive provided by the law. So the law could simply be put aside by the judiciary and the Emperor in the interest of "justice" (Clapham 1969, 1987: 111, Abera 1998: 5). The earlier institutions and *techiwoch* (literally translated as Assessors) continued to assist him either by screening the cases or by giving legal opinions.

Despite the Constitutional guarantee that judicial power could only be exercised in accordance with the law and that judges were personally independent, as specified by Article 110 of the Constitution,⁹³ judges of all levels were to be appointed by the Emperor and were responsible to administer justice "in accordance with the law and in the name of His Majesty Haile Silassie" as set out in Article 48 and Article 111 of the Constitution of 1955. One of the then judges, Gebrehiwot, noted how

Being the custom, the people like the earlier times would then respect the laws without them (Assefa 1973: 33).

⁹¹ See for example article 10 of a proclamation dated on August 4/1933 which states that the governor of a locality was also the judge of the locality. Kebele throughout the thesis represents the lowest form of government administration in Ethiopia.

⁹² The criminal procedure code, under article 223, even maintained the *Atbia-Dagna* courts to entertain cases including damage to property cases or cases of theft whose value worth less than Ethiopian Birr 5.

⁹³ Thus the Ethiopian judiciary were capable of assuming a capital role in the development of the national legal system if the court respect article 110 of the Constitution which declares that "in the administration of justice, they submit to no other authority than that of the law" (Scholler 2005: 17).

inaccessible and dependent the formal courts were. He remarked how busy he had been working as an administrator in the morning and as a judge in the judiciary in the afternoon (Gebrehiwote 1990: 34).

Furthermore the institutional incapability of the formal system to implement the modern codes was visible at the conclusion of the period when there “were no professional judges and institutional setups to comprehend the modern codes” (Abera 1998: 17). There was no finance and the majority of judges did not have formal, let alone legal, education. After 30 years of the Codes’ promulgation, 90% of the population was still illiterate (in 1994 it was 85%) and 5th grade was the maximum level of education for the judges (Beckstrom 1972: 701, Doran 1994: 5). These judges were expected to apply the most developed codes requiring expertise, for instance, in mathematics and accounting⁹⁴ for tax, and other business law.

The Imperial courts were supposed to administer other relevant Imperial orders as laws and later the *Fetha Negest*. The law, however, was not uniformly and consistently applied by the courts (Beckstrom 1973: 74). The *Fetha Negest*, for example, was an “esoteric document hardly known or used outside of the highest court”. By the 1950’s it was considered outdated and the Civil Code of 1960 under Article 3347 repealed it (Doran 1994: 4). Thus formal courts lacked a jural postulate and the attainment of modernisation or development or civilisation or sustainable development was not thought of as a task for which the judicial body bore responsibility.

1.4.2.2. Post 1941 Customary and Special Courts

Customary courts of the earlier times were operating after 1941 in a number of ways. The incapability on the part of the formal courts was forcing the people to resort to its established forms of dispute resolution such as negotiation, arbitration, lodging complaints to the Emperor, and to self-help. A study in 1968 indicated that

⁹⁴ Though Beckstrom (1973: 703-708) held that the judges were serving “visceral service” Paul Brietzke challenges this. He argues that the civil and commercial codes are “neither for the most part oriented towards traditional laws nor do they promote development” (Brietzke 1974: 149-167).

customary dispute resolution mechanisms applied by local elders were very much alive despite the attempt under the Civil Code to curtail them (Doran 1994: 5). During the era of the modern codes the people rarely made use of Government courts (Doran 1994: 5).

Moreover the non-formal system penetrated the formal system in a number of visible ways. At first the proclamation establishing formal courts for the first time allowed the traditional courts to hear and settle minor disputes “until such time as regular courts can be established” to decide cases.⁹⁵ It was to this effect that local judges (*Atbia-Dagna*) were established by proclamation No. 90/1947 until the procedural codes were promulgated.⁹⁶ All the courts were permitted to have two *Emagnoch* (assessors) who could question witnesses or give opinions on judgments although the courts were not duty bound to follow the advice of *Emagnoch*.⁹⁷

As in the earlier days, the ordinary court judges used to refer matters to the village elders which again applied the customary court and kept its influence in the formal system (Doran 1994: 5, Gidey 2004: 47-50). This was so as judges were not well acquainted with the local custom despite their claimed selection based on factors such as sympathy for the poor, truthfulness and knowledge of custom. As judges were referring cases to the traditional system the “modern” law lost the opportunity to be judicially applied and serve the modernisation they promised (Singer 327-328).

A significant change in this period occurred when the feudal system was ousted from power by a military junta; known as the *Derg*.

⁹⁵ Article 23 of Proclamation No.2/1942.

⁹⁶ The two procedural codes also changed the structure of the courts by establishing the *Woreda* (the lowest level in court structures), *Awraja*(above *Woreda*) and High courts while at the same time impliedly abolishing or limiting the power of *Atbia Dagna*, *mikitil woreda* (Communal court) and *Teklay Guazat* Court. Actually the *Atbia Dagna* was an elder to mediate, a police to enforce in a locality where there were no police force, an administrator, and a judge to decide (Assefa 1973: 19).

⁹⁷ See for example article 19 of Proclamation No.2/1942 to this effect.

1.4.2.3. Formal Courts during the Derg (1974-1991)

During the *Derg* era courts were mainly organised in accordance with the two procedural codes. The most significant change was the erosion of power of the formal courts. The regime proclaimed 'Ethiopia First' the moment it came to power and executed more than 60 former government ministers and senior officials without trial by the ordinary courts. Thus, the judiciary was effectively subject to a forced abduction of responsibility from the very beginning.

During the *Derg* regime most of the powers of the judiciary were taken away from the court and given to either the executive or some other committee. Special courts were established at the highest level to entertain important economic and other "revolutionary" crimes (Proclamation No. 214/1974). Military courts were also established to entertain Constitutional issues. *Kebele* courts (at the lowest level of administration) and *kenema*⁹⁸ courts were established to entertain the most important cases for the public like housing and immovable property (Proclamation No. 11/1980).

Thus the ordinary courts were entertaining less significant cases.⁹⁹ That was one of the reasons why the courts were not as visible as they should have been. The Courts were also organized under the Ministry of Justice (Proclamation No. 11/1980). Later on the courts were able to secure their separate administration but remained within jurisdictions which were not considered important by the Government. Judicial appointment was based on loyalty to the then single party (Workers Party of Ethiopia). Judgeship was for a term equivalent to the term of a national council (*Shengo*).

⁹⁸ An administration in the cities set up above *kebele* (the lowest level of administration).

⁹⁹ District and General Special Martial Courts were more important than the ordinary courts. More minor cases were entertained by the ordinary courts and conflicts between the courts were resolved by a ruling from the special court (see Proclamation No. 9/7194, 7/1974, 7/1975, 323/1973, 185/1961 get more information as to how the power of the ordinary courts were curbed).

The judiciary of this time was also seen as an integral part of an oppressive regime.¹⁰⁰ When the *Derg* was ousted the judiciary was found to be inefficient, inaccessible, biased, lacked systems of accountability and ineffective according to the Justice Reform Programme of Ethiopia in 2004. The cumulative result of the system was “low per capital productivity, income, consumption and saving” (Briesztk 1975: 40-49).

1.4.2.4. The Era of EPRDF (Post 1991)

The discussion on the judicial system of post-1991 is the subject of Chapter Six. Here follows only a brief introduction to the system.

After the downfall of the *Derg* the age old central system of administration gave way to a nation nationality and peoples based on a policy of federal decentralization. The arrangement of the judicial system automatically followed from the federal arrangement. Accordingly, there are two tiers of court: the Federal Courts and the Regional Courts. The Federal and State Courts have their area of jurisdiction and have independent structures, administration and accountability system. The Supreme Courts have power to give final decisions only in areas of their jurisdiction.

Proclamation No. 25/1996¹⁰¹ established the Federal courts. The courts are vested with power based on three principles: law, parties and place. Federal courts have jurisdiction over cases arising under the Constitution, federal laws, international treaties and other parties and places identified in the proclamation. The Supreme and High Courts have appellate and original jurisdiction.

The Federal Supreme Court includes a Cassation bench with the power to review and over turn decisions issued by all other courts (including cassation benches of

¹⁰⁰ World Bank, Legal and Judicial Assessment Report 2004: 15; also CIDA 2008: 101.

¹⁰¹ Central courts were established by Proclamation No. 40/1993. The courts were organized to administer justice. Under article 4(1), 4(2) the central courts were mandated to “safeguard individual and democratic rights, freedoms, and interests guaranteed by the Constitution and ensure the maintenance of law and order and the prevalence of peace and justice”. The courts were replaced by the Federal Courts (Proclamation No.25/88) without comparable mandate.

regional courts) containing fundamental errors of law. The interpretation of law rendered by the cassation division of the Federal Supreme Court is binding on all other courts as provided under Article 2 of Proclamation No. 457/2005.

Federal judges are appointed by the House of Representatives (HOR) after being selected by the Judicial Administration Council and submitted for appointment by the Prime Minister. Since there is no jury system in the country an appointed judge in every court is a judge on disputed social facts and law. The ordinary courts are declared to be independent, accountable to the House of Peoples Representatives (HOR) or to their respective regional councils and they are duty bound to adhere to the Constitution. The regional courts have jurisdiction on matters not under the federal court system's jurisdiction. The ANRS¹⁰² courts also entertained Federal cases as per the Constitutional delegation.¹⁰³ The ANRS¹⁰⁴ has established its own cassation bench that does not establish precedence in the region. The regional judges will also be appointed by the regional council after being submitted by the judicial administrative council.

These formal courts inherited all the judicial problems of the past. Despite remarkable improvements in access, efficiency and independence the judiciary still remain ineffective. There is overall acknowledgement of the need for certain reforms within the judicial system. According to the World Bank priorities of reform in the country included quality of justice, access to justice and commercial justice (World Bank: 2004). Legal and judicial reform constitutes one of the main pillars in the World Bank's Comprehensive Development Plan (CDP) to promote economic growth and alleviate poverty. It requires among others improving institutions and their capacity and integrating efforts into the overall national strategy (World Bank: 2004).

¹⁰² The same holds true for Tigray and Oromia National Regional States Courts.

¹⁰³ See article 80 of the Constitution.

¹⁰⁴ Other regional states including the Oromia, Tigray, Harrari and the SNNP region states also established regional cassation benches.

Owing to the lack of quality in decision making and the unresolved problems in efficiency, access, independence and accountability the Federal and the ANRS¹⁰⁵ reorganized the process of decision making into what is commonly known as Business Process Engineering (hereafter BPR). The USA was the origin of the BPR. After reorganizing the procedures the expected main focus would be effectiveness. How far was contemporary reform free from Westernisation? Would procedural reforms result in social justice? What was the reform programme meant for? These and related questions would be entertained in Chapters five and Six.

1.4.2.5. Other Decision Making Bodies

Other formal and non-formal ways of doing justice are operating along with the formal systems (Getachew and Alula 2008). In this respect special court and customary courts are significantly in operation. The special courts of the previous era had not only continued but multiplied during this era. In addition to the Constitutional Court (House of Federation under Article 84 of the Constitution), other special courts of this time include social courts, administrative tribunals, military courts and religious courts.

Proclamation No. 311/2005 Article 50 established social courts for Addis Ababa. The court is a two level court with first instance and appellate jurisdictions. There is no municipal supreme court although the cassation bench is included in the appellate court. Cassation review from the decision of this bench can be brought to the Federal Supreme Court (Article 41 the Charter). The proclamation also established two levels of kebele (social courts) to hear civil matters worth 5,000 ETB. Appeal and cassation revisions from social courts could be lodged to the municipal courts (under Article 50(1, 3 and 4) of the Charter). Social courts are also established in Regional States¹⁰⁶ to handle small claims and minor disputes (MoCB 2007: 89). Appeals from the decisions of such courts to the respective regional supreme

¹⁰⁵ Including Tigray, Oromia, South Nation Nationalities and Peoples Regional States.

¹⁰⁶ They are also established in Tigray, Oromia, Southern Nation Nationalities and People, Harrari Regional States: In some states like Tigray they have significant jurisdiction on land and family matters.

courts, then to the Federal Supreme Court, are allowed on grounds of fundamental error of law.

Procedurally and substantively social courts were expected to look more “social”, flexible and non-formal than formal. Despite that the ANRS identified the following problems in the way the social courts discharged their responsibilities: contrary to their expectations they were found to follow too formal and rigorous procedures, applying substantive law rather than the traditional norms and rather than settling cases, they were authoritatively declaring decisions. As a study in ANRS identified these problems, the courts are being restructured to settle cases using traditional means of dispute settlement.¹⁰⁷

The Constitution also recognizes religious courts under Article 34 and 78. However their jurisdiction as limited to personal and family matters.¹⁰⁸ Today the Sharia Courts are the only religious courts established at the federal and regional level. They exercise jurisdiction on personal matters when parties consent to their jurisdiction. They apply Sharia Law and have an appeal system. However they are required to follow the civil procedural laws that formal courts apply (Proclamation No. 188/99). The Courts are accountable to the Federal Judicial Administrative Council. All states have given same recognition to *sharia* courts and arranged the courts in a more similar way.

Further, the Constitution recognizes every national and nationality the right to develop their own culture. This presents the Government with the corollary duty not only to protect these cultures but also to recognize the customary ways of dispute resolution mechanisms as an integral part of the judicial system. Despite the Constitutional recognition of such customary courts under Article 78(5) in practice no customary courts is given such recognition and no customary courts are

¹⁰⁷ See Proclamation No. 151/2000 of the region which gives priority to the traditional system in the selection of judges, the procedural and substantive law they apply, the use of traditional ways of summoning witnesses. Though they are constituted formally they are expected to act non-formally. Their power is, however, limited to civil cases worth Ethiopian birr 1500 and to petty offence selectively indicated in the proclamation.

¹⁰⁸ See art.34 of the Constitution and art 4 of Proclamation No.188/1999.

yet established. Nevertheless, these non-formal mechanisms are prevailing as they were in the earlier periods. They serve as primary decision making mechanisms. They are found throughout Ethiopia. According to the World Bank report they are the “real judicial world’ for most Ethiopians (World Bank Legal and Judicial Assessment Ethiopia 2004).

The current system also recognizes or establishes other forms of dispute settlement. Such systems include Conciliation and Compromise under Article 3318 and 3307 of the Civil Code, Arbitration under Proclamation No. 377/2003 for labor disputes, amicable settlement by Ombudsman and Human Rights commission under Proclamation No. 211/2000 and Proclamation No. 210/2000.

Conclusion

Amorphous but less influential legal system

The Ethiopian legal system had been an amalgam of “civil and common law” tradition, “modern and secular” and “traditional and religious” law. These produced an amorphous legal system. While “the judeaean-Christian and Greco-Roman elements of Ethiopian civilisation preclude a consideration of its problems in a purely African customary context” her isolation for ages (and absence of colonisation) and the topography of the country contributed to the localisation of the judicial system (Krezecunovitz 1963: 173). Despite that the laws were globally produced and induced the judicial system was entirely localized. That being so the periodisation of law and decision making bodies could not fit. The attempt to impose law from the above resulted in inconsistencies, rejection and other ways of resistance on the part of the people. These created opposition as a source of conflict which in turn was balanced by the non-formal systems in operation in the formal arena. The result had been much of the continuity of the non-formal system hitherto. The resistance to an ever ending imposition of globally produced laws created and widened the sharp dichotomy between law and dispute settlement bodies. The dichotomy has to date not been fully harmonised. Accordingly the laws to the benefit of Ethiopian growth couldn't halt the country's impoverishment.

The judiciary (with the Emperor at the top and the people at the bottom) had been multiple tasked but could not influence Ethiopian growth. It didn't rectify the failures-political, market, institutional or socio-cultural-in the system.

Ethiopian modernisation efforts failed because all the efforts ignored the people's ways of doing justice. Later efforts (for example the sovietisation effort of the *Derg* regime) also failed for they ignored the true wishes of the people. The Ethiopian experience is a typical example of what a centralized, modernising and social coordination of interactions yield nothing if laws did not mirror the society while engineering it. This created the dichotomy between the people and the executive.

The laws also served to consolidate power in the inside while to look modern to the outside. As the laws lack such “compatibility” and are ‘bad-laws’, the costs, to use Buscaglia’s (1996: 566) phrase of complying and enforcing the laws became higher and higher. The laws might have benefited either the ruling or the commercial elites high up in the hierarchy. As the people are pulled in many directions owing to the amorphous laws, the result had been as the old adage runs ‘the rich get richer and, the poor gets the children’. Accordingly the decision making bodies could not serve either legal or social justice.

Absent or fluid jural postulate

In Ethiopian legal history contradictory or inconsistent norms (local vs. national, customary versus religious and the natural, the socialist versus the capitalist, the global versus the national) historically co-existed. This produced diversified decision making bodies both horizontally and vertically. One reason for such diversification is the lack of jural postulates for which decision making bodies should follow so that a common good for all should be realised. Accordingly the most appropriate role for the court was not clearly stipulated either as positive or negative duties. Until the establishment of the State Courts in 1941, there was no such minimal duty on the part of the judiciary to “say what the law says”. Judges applied their “legal wisdom” and principles of justice without being tied by the letters of the law (Vanderlinden 1974: 256). It was not clear how the judiciary perceived and assessed its own responsibilities.

As everyone could be a judge, the formal courts were not separated from the people. They were accordingly, able to give decisions based on individual values irrespective of the law. Public values were defined in such loose terms as “justice”, “good”, “right” and “equity” which may be subject to abuse. As such individuals could base settlements on their ideological attitudes and values (under the guise of justice) and preferred their individual conception to reach at a settlement which Winter called “result-oriented decisions” or they could be of “attitudinal model” (Winter 2002: 694).

Despite the recognition of justice as a virtue, meanings of “the good”, “the just”, “the righteous” or justice were vague and fluid and unable to measure the quality of decisions so that they were susceptible to individual preferences of justice and wisdom.

While the original Ethiopian idea of justice was one of equalising power and maintains harmony, with the emergence of the Emperor as a ‘fountain of justice’ the power is shifted. Justice was ‘atomized’ at top among the rulers and at the bottom among decision makers. It focused power at the top of the hierarchy amongst the ruling class and the courts did not and could not effectuate just development of the population.

Most Dependent Court

Until the promulgation of the Constitution in 1955, there was no conception of separation of powers in either words or practice. All administrators were also the judges in their respective jurisdictions. Thus the courts had all the power that the executive had which hindered checks on administrative abuse (misuse) of discretion, action and inaction. As politics and courts were not separated, the formal courts were susceptible to political pressures. Thus, the executive could use the court to legitimize and promote its administrative decisions. With a long history of the country’s independence the court thus paradoxically remained dependent.

As the people (as a passer-by could have been a judge) at the bottom and the executive (the King or the Emperor) at the top were the judges, the court could have influenced development through either broad based rule making at the apex or through its case-by-case “gradualist and particularistic approach” (Peters 2000: 1458) at the grassroots. The Emperor’s role of rulemaking was highly influenced by the effects of their judicial rule making process.¹⁰⁹ The merger at both ends maximized power without the judiciary and made the judiciary not only what Hamilton described as the “least dangerous branch of power” (horizontally) but

¹⁰⁹ See Meneike’s Decree matters of theft whose base are theft cases.

also the detrimental branch thorough its vertical arrangement against social justice and development.

The fact that the Emperors who-were considered the fountain of justice-did not perform justice eroded the people's trust and confidence in all other decision making bodies. As justice had been 'wandering' together with the Emperor this had created lack of focus and direction. This shift in the geography of justice had important implications in the development of the law and the courts. The 'wandering' made the legal environment unstable. It also burdened the executive with caseloads, resulting in lost opportunities for justice at the bottom. This created a unitary mentality towards justice and may have led to burden highest courts with increased caseloads. There cannot be legal development or development in the wider sense, when the legal environment is unstable.

The three core points indicated above exemplify that despite the theoretical regime changes in Ethiopia not much had changed in practice as far as realising justice was concerned. This was mostly visible in the ways disputes were settled by the various regimes. When the formal system was constituted it distanced the non-formal system despite being penetrated by the non-formal system in various ways. Later efforts had never given enough space to the non-formal ways of doing justice as a result of which the way the people institutionalized the non-formal justice system and the way the people conceptualized justice was accorded little space in the formal systems institutionalization and conceptualisation of justice. The mismatch between what the two systems understood by institutions and institutional role and justice disconnected the people from the very ability to contribute to development. Where in a system where pluralism is wide spread the ideology of choice that can be a basis for deliberative choice of justice and institutions to serve justice

determines the country's development path. These had not been conceptualized in the legal history and the next chapter explains how these elements of development should be conceptualized.

On Institutions and Justice

The previous Chapter demonstrated that the modernisation efforts of Ethiopia at various times and forms did not bring about the economic growth it promised. Radical changes in the regime did not alter the actual practices within the justice system. One of the reasons for the failure of political reforms to establish free technocratic institutions was the tendency to impose reforms from a top-down approach and deny sufficient space for non-formal systems to prosper. This denied possible harmonisation between the formal and non-formal systems. The lack of comparable space given to dispute resolution mechanisms signified weakened institution building that had become a challenge to current institutions. The Chapter also demonstrated that the mismatch and disorientation of the two important institutions (law and dispute resolution organs) meant prevalence of injustice, under-development and poverty. Institutional mismatch had been characterized by disorientation in functions, impositions of modernisation efforts without pre-engagement and the lack of local innovative adaptability. In other words, the consecutive failures were related to the lack of theorisation involving institutions to effect modernisation, and the definition accorded to institutions, their nature, form and functions. The chapter underlined the need to orient institutional action towards the cultural norms of the country.

This chapter explains institutions and demonstrates the relationship between institutions and justice. Accordingly, it examines the relationship between judicial institutions and poverty which identifies that institutional strength is directly related to realizing social justice and alleviating poverty. The chapter identifies law (beyond the law of contract and property) and dispute settlement organs as institutions in so far as they bear influence on the behaviour of the people towards social justice. In this respect identifying the proper institution (serving social justice) is important as reforms of institutions cannot be durable, focused, legitimate and

feasible without such identification. Justice reform programmes arise from such need to orient the dispute settlement body towards social justice. This chapter thus connects the challenges identified in the legal history of Ethiopia with the remedy of the judicial reform programme of the country which is the subject of the next chapter.

Accordingly the first part of chapter defines and explains the relationship between institutions, their forms and functions and explains global attempts made to reform the legal institutions. Though institutional discourses have long histories their study has been marginalized by major financial institutions. When institutional studies come to the center, their role has been narrowed as merely serving the Market and economic growth. This part argues that institutional role goes beyond the market towards impacting social justice.

The second part briefly addresses the various meanings and aspects of justice in relation to institutions. The sections recognize that conceptions of justice and role of institutions is not confined to the mere administration of the written laws that does not impact real lives. It argues the need to see beyond mere formal arrangements.¹¹⁰ The chapter explains that justice demands considering the positive or negative contributions of the non-formal sectors. This will be followed by brief conclusion.

¹¹⁰ For example Ethiopia, while poor, registered an average double digit growth for a decade now. Even if some rapid growth is registered for the last consecutive years some claim that the growth is erratic and lacks equitable (re)distribution of the per capital income generated (John Weeks et al 2008: 2-3). This economic achievement has to be seen in light of the contribution of decision making bodies vis-a-vis the realization of meaningful life in the context of Ethiopia. It has to be seen if political stability and social justice is secured and other spheres of public lives is impacted positively. In the context of Ethiopia, the economic achievement cannot be detangled from the various aspects of the human elements of growth.

2.1 Institutions: The What

Institutional studies have been unable to establish a consensus as to what these institutions are, what their role is and how to build or form (reform) them.¹¹¹ Black's law dictionary defines institutions as "an elementary rule, principle, or practice or an established organization". Though this might be broad the current mainstream thinking, harmonized by economists studies in new institutional economics identify contract and property rights as institutions. Nevertheless this would not serve much unless the conception includes administrative institutions.

Douglas North is dominant in this discourse and identified institutions as humanly devised constraints that structure political, economic and social interaction (Douglass North 1991: 97). These are the rules of the game- "a set of rules, compliance procedures, and moral and ethical behavioral norms designed to constrain the behavior of individuals in the interests of maximizing wealth or utility of principles"-and consist of both non-formal constraints (sanctions, taboos, customs, traditions, and code of conducts) and formal rules (Constitutions, laws, property rights) (Douglass North 1991: 97). In his analysis of institutions North raised important points which include non-formal constraints governing social behavior. The constraints (formal, non-formal) vary radically through time and across different economies and he acknowledged that changes in formal and non-formal institutions are slow and largely incremental.

Douglas North however narrowed institution as conception of contract and property rights constraining behaviors towards lowering economic transaction and productivity costs. The interest on lowering costs would arise especially when long distance trade raises issues of costs pertaining agency and contract negotiation and enforcement. Long distance trade expanded the market that necessitated more

¹¹¹ For example in the views of Plato institutions are thought of as an "expressions of" man's mind (thought and habit of mind) whose expression gets an "outward and visible sign" through a written code and judicial branch (Baker 1959: 103). For Plato common property and the family are institutions (Baker 1959: 103). Van Arkadie points out that institutions are both the rules of the game" and the "organization" (In Chang, notes 2).

specialized producers, lowering information costs, increasing mobility of capital, innovations to spreading risks, standardisation of trade, lowering information exchanges and provisions of incentives for contract fulfillment (Douglass North 1991: 97).

According to North under such conditions institutions of contract and property are devised to “create order and reduce uncertainty” in exchanges and solve problems of human cooperation especially under conditions of games where plays are repeated, when there is lack of information on the other players and when there are large number of players (Douglass North 1991: 97). Effective institutions reduce transaction and production costs per exchange so that gains from transaction are realisable. Thus, institutions are defined and understood as concepts of contract and property rights incentivizing structure that shape economic change towards economic growth.

Accordingly the central issue in defining institutions is “creating an economic environment that lowers transaction costs and induces increasing productivity” (Douglass North 1991: 98). Societies in distance and repeated trade need effective, impersonal contract enforcement to the improvement of economic actor material status, in the absence of which ‘defection are great enough to forestall the development of complex exchange (Douglass North 1991: 100). Thus contract law, the enforcement of contracts and the protection of property rights constitute lowering these costs.

In the eyes of North’s identification of institutions dispute settlement organs are some where away from being considered as institutions. They are in fact products of institutions as he held that “the development of enforcement mechanisms that is developed by merchants themselves was more significant than a variety of ways courts handled commercial disputes (Douglass North 1991: 107). He further held that the presence of a state in its various forms is in fact to lower transaction costs and “take over protection and enforcement of property rights as impersonal

exchange makes contract enforcement increasingly costly for voluntary organizations which lacked effective coercive power” (Douglass North 1991: 110).

Identification of contract and property rights as institutions for economic growth is however problematic for a number of reasons. In the first place the discourse is some way away from identifying which institutions in which forms are necessary for economic development. With the exclusive focus on property rights, it does not answer what property right is in fact causal to economic growth. For example it does not answer why Ethiopia registered double digit economic growth for a decade now where land, unlike the western-style private right ownership, is owned by the government. In most cases dispute settlement organs entertain property cases of various kinds including land, family property, and intellectual property, crimes against property, company property, communal property, and common property. North’s identification of property excludes these groups and leaves the relationship between these rights, the dispute settlement organs and economic development untouched.

Secondly the emphasis on private property right assumes individualized materialistic incentives towards economic growth. But real life experience may not always work in this manner. As Chang pointed out human motivations are multi-faceted and there is just too much non-selfish human behavior for us to explain without admitting a range of non-selfish motivations and without assuming a complex interaction between different types of motivations, both selfish and non-selfish (Chang 1991: 23). As the legal history of Ethiopia and the discussion in chapter six reveals Ethiopians were costing too much to secure fair justice so that the selfless meanings of life and their agency were given prevalence over self-centered private materialist gains. Technical crafting in contract and property rights would not suffice without administrative institutions harmonising selfish and non-selfish ways of life.

Thirdly a strong protection of contract and property rights is not always true as a general proposition. As the growth-impact of protection of private property rights

may not be constant over time too strong protection of property rights is not good as too weak protection is not good (Chang 1991: 24). Too much protection may be to the disadvantage of the property owner or the environment. For example land had been privately owned in Ethiopia long before the nationalisation policy of the *Derg* regime. Too much protection of privatisation did not warrant economic development, nor did the *Derg* nationalization. It is after these policies of land that double digit economic growth is registered.

North's linear identification of contract and property with economic growth fits the one-size-fits-all approach to economic development. A lack of an independent mono-visioned institution makes a "one-size-fits-all" of institutional reform problematic. The enormous increase in the harmonisation of institutions has prompted debate on the suitability of the so-called 'global-standard' institutions for developing countries (Chang 1991: 2). Thus institutions have diversified tasks towards and beyond contract enforcement and guarantying property rights. In the context of Ethiopia different institutions were seen to perform different functions. Formal courts were meant to serve justice while non-formal ones were meant to establish harmony in the community. At the same time the same function can also be performed by different institutions. Harmony can be established by the criminal administration tasks of the formal courts as it can be established by the non-formal bodies. The prevalence of multi-tasked institutions makes linear relationship between institutions and economic growth difficult.

Far from real life impossibility, this institutional mono-tasking has other intended and unintended consequences, particularly when adapted without proper scrutiny by other countries like Ethiopia. According to Chang mono-tasking institutions is favorable for particular interest groups to hijack certain institutions and make them work mainly to their advantage, increases the danger that countries import certain institutions for one function and do not carefully think about their 'other' functions and creates problems of incompatibility with the local ones (Chang 1991: 55-6). The adoption of Ethiopian Constitution of 1955, for example, was 'hijacked' to effect

power centralisation while the 1960 civil code did not give room for non-formal systems of doing justice in matters covered by the code, which should have been the other equal function of the code in the context of Ethiopia.

These problems leave the how of building institutions (importing standards, cultivating context specific innovations or hybridizing) to effect economic growth as un-answered questions. If, for example, we decide to reform Ethiopian dispute settlement bodies so that contract enforcement is efficient, we need to sort out ideas like how much of the reform is to courts (including independence, accountability and access), how much is up to the litigant's behaviour, how much is to learned experience from the non-formal sectors and abroad. Which kinds of social, economic and political contexts matter, what kinds of resistance may be encountered by debtors and how effective institutions of contract enforcement can be built?

This would force a wider look at the institutions and identify institutions as basic structures of society rather than the narrower form and function they assume. In this regard Rawls considers institutions as "a public system of rules which defines offices and positions with their rights and duties, powers and immunities and the like. Games and rituals, trials and parliaments, markets and systems of property are examples of such an institution (Rawls 2005: 55). Rawls however meant institutions of "decent people" and excludes the non-formal, the traditional, system of the poor countries in particular from being considered as an institution. Still a much more comprehensive understanding is needed.

Formal contracts are in fact corollaries of well-specified and well-enforced property rights. This is a right that developing economies lack. The enforcement of these rights is "only possible as a result, first, of the development of a third party (Government) to exchange, specify property rights and enforces contracts, and second of the existence of non-formal norms of behavior to constrain the parties. Thus more is needed than the clarification and enforcement of property rights towards rapid and frequent market transactions. Social justice demands more

optimal institutional role than securing expectations of contract and property rights.

Thus as institutions have to be identified with a social purpose they commonly apply to a particular formal organisation of the Government and public services as well as the non-formal systems operating within societies.¹¹² Accordingly, the law guarantying political rights and duties and dispute settlement organs were to be seen as shaping behaviour towards social justice and were identified as either basic (constitutions) or derivative (dispute resolution bodies) institutions.¹¹³ This goes

¹¹² They are stable, valued, recurring patterns of behavior and govern the behavior of a set of individuals within a given community (<https://en.m.wikipedia.org/wiki/institutions>), last visited on 12 Dec. 2014.

¹¹³ Basically constitutions people make are basic and are meant to express basic thoughts of the people. It would be the product of people's "mutual recognition, mutual consent" and "mutual continuity" to mirror their basic thoughts based on concrete, reasoned (and emotion loaded) and aggregated debates. In such formulation the procedure the people follow to adopt basic institutions and the content of the debate matters if institutions are to matter. Constitutions are thus basic and primary institution people make as a rule of the game and to rule the game. It is meant to be time and place specific and stable "often have in-built mechanism against change (Chang 2010: 490). The constraints and expansion of freedoms therein would thus be known ahead of time so as to shape behaviors of individuals and groups. It is the basic to other institutional way of thinking and acting.

The basic institution does not have a life of its own unless secondary institutions are formed or given space. Secondary institutions are structurally constrained to think within the permits of the basic institution. To be just, secondary institutions should expand choice of freedoms and constrain behaviors against such a choice. All such expansions and contractions are derivative of the constitution and get their guidance from this basic Institution. Hence in the procedure they follow and the substantive laws they apply, secondary institutions are duty bound to give life to the dictate of the basic institution.

Establishment of derivative judicial bodies and recognition of non-formal system are such expressions as secondary institutions. As non-formal system exists with or without the constitution, a Constitution could only be judged in accordance with the space it rendered to such institutions. Hence, they are secondary non-derivative institutions.

As expressions of human mind secondary institutions too is time and place specific. They exist at a certain time and place when the actions specified by it are regularly carried out in accordance with a public understanding that the system of rules defining the institution is to be followed (Rawls 1999: 55). Once radically formed or recognized to be in tune with the basic norms, reform of secondary institutions would be slow, predictable and non-erratic so that every imposed reform wave could not de-form them. Stable as such, institutional reform need to be designed when the interest to constrain powers curbing capabilities and relax those which enhance capabilities towards social justice arises.

beyond Douglas North's concept and includes administrative institutions of both formal and non-formal institutions constraining and expanding behaviors. Institutions therefore constrain and expand the real freedoms that the people had towards the values they hold dear to them.

As expressions of human thought, institutions are expressed not only to constrain (which otherwise would be top-down imposed) behaviour but also expand horizons of human freedoms. Institutions, thus, are expressions of human thought both to constrain measures restricting justice and encourage measures realising justice. The ability to constrain as well as expand human political, social or economic behaviors (capabilities) towards social justice qualifies them as institutions. As structures or mechanisms of social order, they govern the behaviour of a set of individuals within a given community. As such they are different from organizations and are visible as courts or invisible as markets (contract and property rights) or semi-visible as non-formal ways of decision making.

When they shape recurring patterns of behaviour, they remain stable and their reform would be slow and staged. Institutions that at one point were beneficial can (with passage of time) become roadblocks of development. As Chang put it "institutional overdose", be it formal or non-formal, is nowhere great as in the mainstream discourse on private property right (Chang 1991: 12). Accordingly, the demand for social justice would leave us with some common principles among these institutions one of which is the point to start the process of institutional reform by introducing desired elements of social justice than by introducing the desired institutions.

2.2. Arrangements of Decision Making Bodies in the Administration of Justice

According to Norrie, the administration of justice is applied differently in authoritarian and democratic systems. Whether a society is just or unjust depends on “the organization and power structure of institutions”. Of these institutions the judicial ones- as bastions of justice, are central to the understanding of how justice is administered (Norrie 1989: 395). As there cannot be a singularly definitive institution in terms of importance and therefore there cannot be a “one-size fits-all” solution, the quality of the administration of justice in a specific country’s context determines whether the country is widely considered a success as against raging famine and poverty and determines where the world places the country within its own development cycle.

As has been discussed in Section 2.1 the central point of the administration of justice demands mono-visioned independent but multiple-tasked institutions. The discourse which resulted from the partially successful attempt to singularly task institutions, was caused by the design to effect forced integration between the different institutions. As there is no what I call automaticity of singularity of institutional functions, multiple-tasked institutions work in an environment where they interact vertically and horizontally with other institutions in a complex but dynamic way. Judicial bodies, for example, interact with the basic institution (the constitution), the subject (parties), and the object of litigation (such as the land) in such a way. In an effort to make effective decisions, the same interaction applies to non-formal ways of settling disputes. Effectiveness, thus, demands prevalence of formalized multi-functional institutions operating on principled based integrating approach.

The interwoven interaction helps decision making bodies (for example in handling issues of wealth) to raise the level of trust between parties in dispute, fastens exchange between parties, raises the level of cooperation between parties in

economic exchange and lowers risks in such exchanges. If this is guided by the principle of justice, the inter-action promotes social justice in a more comprehensive and meaningful way. Decision making bodies could in more general terms establish social justice as they could redistribute resources as effectively as possible. That is why legal reform must work with institutional pluralism. In doing so each institution may look inward towards its procedural and substantive law and outward towards other mechanisms of doing justice.

This leads naturally to a utopian identification of institutional arrangements as just or unjust and effective or ineffective irrelevant. Sen rightly pointed out that the “identification of fully just institutions is neither necessary nor sufficient, it rather is redundant” (Sen 2009: 5). Institutions can be effective or not effective when justice is maximized. This would mean, for example, that if there was a demand to choose between different dispute settlement institutions to handle a case the one which applies the principle that enhances basic justice (and reduce injustice and sustain justice) prevails.¹¹⁴ The realisation demands the institution to assess what constrains and expands the exercise of basic freedoms. An institution, not just by mere arrangement, but by realising social justice shall effectively be the proper institution for realising justice.

As the inter-action and intra-action is a complex and dynamic, institutions often fail to live up to their expectations. As this could spread injustice against the demands of social justice this is the point where the demand to reform them arises. Thus there has to be a constant, periodic and regular check on the prioritisation of tasks assigned to them and the way they do justice and reduce injustice towards halting injustice which should be the primary triggering force for a judicial reform in poorer countries like Ethiopia. In this respect the demand with regard to formal institution is more acute than the non-formal ones.

¹¹⁴ A case like inheritance of a flute case that shall be dealt with in chapter six.

Accordingly the central role of decision making bodies in enforcing the norms of society either through but not limited to retributive justice, sanctioning norm violations, corrective justice, distributive justice and/or restorative justice is a major concern to be maximised to realize social justice in basic institutions (Scherre 1992: 13). This can be done first by connecting the institution with the basic institution and with other institutions within the dynamics the relationship allows.

This calls for a discussion on what justice is, how to serve it and measure it. As shall be discussed in the next section justice involves realising the capabilities of persons and groups. Persons by default include both artificial ones as no less than natural ones as far as justice with lives is concerned. Comprehensiveness demands the enhancement of capability of groups as real experience in poor countries involves group lives. The starting point for a discussion of institutional effectiveness is the capability of persons and groups. Other means of measurements like "institutional quality, government effectiveness, measures of the limits of executive power" (Botero et al 2004: 275) are thus to be measured by the level of capability they realize.

2.3. Justice and Functions of Institutions

Lack of agreement on what institutions are meant by ends up in the lack of agreement on what their role (example advancing economic growth or serving social justice) should be and when and why to reform them. As has been indicated above an institution can serve more than one function while many institutions can serve similar function. Functions of institutions however need not be confused with their form. Functions of dispute resolution mechanisms (like realising social justice or enforcing contracts) are different from forms of dispute resolution mechanisms (like independence and accountability). The Ethiopian experience demonstrates that forms of institutions do not guarantee specified or certain outcomes. The guarantee to judicial independence did not necessarily realize social justice as other less or no independent or non-formal dispute resolution mechanism could

guarantee social justice without being independent. This means that the same function can be achieved by an independent court or by a dependent non-formal dispute resolution mechanism. This, however, does not mean that “form” is irrelevant. The same function cannot be performed by making the court dependent. Thus one need not impose too much fixed institutional values of one institution upon another without proper scrutiny. The function and form of institutions however have to be seen in relation to the different conceptions of justice.

Justice has played a role as “a fundamental and indispensable organizing principles for any kinds of human association” (Scherer 1992: 2). Ever since the beginning of human concern with a desirable form of organisation, justice has been one of the essential postulates for utopia, the ideal state (Scherer 1992: 3, 5). Aharon Barak (1992: 66-67), the ex-president of Israel Supreme Court, attaches the value of justice to almost everything. Justice is the basis of democracy: is the goal of law: is the standard for evaluating the law; indeed, it is one of the central values of a legal system. The general purpose of every statute is the realisation of justice. Justice is the appropriate value with which the judge should decide-justice for the parties, justice for society, and justice in law (Barak 1992: 66-67). It plays a significantly a mobilizing role in restoring justice to the parties.

As Charles Dickens, quoted in Sen says in *Great Expectations* “there is nothing so finely perceived and finely felt, as injustice (Sen 2009: preface). If justice is “removed, the great, the immense fabric of human society must in a moment crumble into atoms’ (Mattis 2009: 94). Tyrants even justify their political action within the prevailing social context, provoking feelings of injustice. If justice is everywhere, where and what is needed is sensing it out of poverty.

2.3.1 Justice in Ancient Times

Aristotle had related capability to the idea of justice. He argued that truth is the end of theoretical knowledge while action is the beginning of practical knowledge. We do not know truth without its cause. It is impossible to know poverty, the highest

degree of severity as it is a cause to other impoverishments, and without the knowledge of its causes (Aristotle Rethoric: 14). If so, what is the cause of poverty? How would poverty form the requisite basis of knowledge in providing justice? Can we automatically say that there is no justice when poverty prevails? If, according to the social psychological definition, justice is a “basic component of any human society”, how do we sense or perceive its prevalence or absence? How shall we understand it? In this respect ancient thinkers attached the idea of justice with the realization of different interests. Plato and Aristotle are pertinent regarding this point.

Plato considered the aim of a ruler as the welfare of its citizens. Citizens are committed to the care of the “absolutely unselfish” ruler.¹¹⁵ So the theory goes that those who lived by obeying the wishes of justice of unselfish ruler will satisfy their justice interests and become just themselves. The just man is wiser (as he acknowledges the limits of his action to a definite guiding object imposed by reason), stronger and happier than the unjust (Barker 1959: 97). The just man will discharge his function (of living) well and “live well” and be happy. Hence, happiness had been a mechanism used to sense and measure justice.

The justice that Plato proposes exists in two forms. It exists on a larger scale, broadest, strongest, simplest, and clearest in a more visible fashion in any state. Given by a state, a state being a product of the human soul, justice has three elements; first an element of desire, second an element of reason, lastly an element of spirit. Besides the implied psychological basis, there is also an implied conception of the true nature of justice presenting from the first in Plato’s construction of the State; that each should be to their own cause (Barker 1959: 100, 104-105). In Plato’s understanding of justice an individual has two aspects to their own justice,

¹¹⁵ Contrary to this Thrasymachus considered might as right and defined justice as fulfilling “the interest of the stronger” (Barker 1959: 95). Accordingly, the standard of action for a man living in a community is the will of the ruler who wills his own good. It follows that justice may really and in truth be defined as sharing “another’s good”. Thus, to be “just” is to be a means to the satisfaction of another: to be “unjust” is to act for the satisfaction of oneself (Barker 1959: 95-96).

and shows justice through either. In one aspect he is a member of a community and he shows justice by exhibiting the one virtue proper to the peculiar place which the one predominant element in his nature has assigned him to; the virtue (for instance) of courage. In another aspect he is an individual soul, and as such he shows justice, if he keeps each of all the elements of his soul in its right place, and there by exhibits all the virtues of wisdom, and courage, and self-control. In a state of nature men do and suffer injustice freely and without restraint. But the weaker, finding that they suffer more injustice than they can inflict, creates a contract with another to neither do injustice, nor to suffer it to be done: and, in pursuance of the contract, they lay down the law, the provisions of which are the standard of action and the code of justice.¹¹⁶

Contrary to this Aristotle argued that there are different forms of justice in different associations. He considered justice as "the true spirit of a political association". In discussing the issues of justice he specially emphasises the conception of man, state, constitution and movement. Man has his real meaning as a member of a State, he lives and has his being; without a State he has no meaning. Man is by nature a political being forming associations of various kinds. The State is described as an association of such other associations. Each of the subordinate and subsumed associations has their own justice and friendship. The inner unity of a State, like that of all associations, is to be found in the justice and friendship which unite its members. But the family, as an association or true institution, being included in the State, the justice of the family has become part of the justice of the State (Barker 1959: 235, 225, 237). The sum of justices in each association constitutes the justice of the state.

Beginning from ancient time's justice had always been about distribution of rewards or punishments. The contest comes from what we want to divide and the grounds upon which this distribution will form. According to Aristotle virtue is to be

¹¹⁶ See Barker 1959: 99.

distributed. He argued that what made the State's identity and constituency was not its divisional part but its form, that is to say its constitution, for the constitution is the form of the State. The constitution is essentially a determination or conception of the movement towards the end at which a political community aims. There is one true end, which, and which alone, the state as moral community can pursue: and that is a life of virtue. And it is this virtue which is to be distributed among subjects of justice. Every State that walks by this end is a normal and proper state. The constitution, where the government agrees in unselfishness, is thus good as compared to a bad constitution. Justice as a virtue is the "political good": defined as a "reciprocal rendering of equal opportunity," it is termed the "savior of the State and gives to each and all their own (Barker 1959: 218, 235, 305-308).

The distribution of virtue makes justice higher than virtue; it is virtue in action, it is more than an internal spirit; it is the active fulfillment of an internal spirit in the conduct of a member of society towards another member. To be considerate is a virtue; to act accordingly towards another is justice. Justice (action in conformity with the law) is determinant of the quality of its members. There is "complete justice" and the "final good" when every moral obligation is enacted which means the fulfilling of the law (Baker 1959: 332, 337). To be just is to have all the virtues in one.

Moreover, Aristotle gave due emphasis to what he called 'particular justice' and the capability of individuals towards the rule of equality. The just here is the equal, and he who is just is he who takes no more for himself than he allows his fellow to take for themselves. This is what Aristotle called 'particular justice'. The state on which particular justice rests is that of an association of equals. Each individual has his due, and that he is so treated, and so treats others, as to preserve the proper proportion between the members of the association. The due of an individual is answered vis-à-vis distributive and corrective justice (Baker 1959: 339).

Aristotle also gave capacity as an element of justice. Taking a citizen as a shareholder, not a tax-payer, he argued that that we need to exert our effort to get

the right man in the right place; 'but the right man is the ablest rather than the worthiest' (Baker 1969: 341). In the administration of justice Aristotle made capacity (to wealth, birth, friendship) as basis of justice. For example Aristotle preferred to award instruments to those who are best at the work for which these instruments are intended. In office he prefers 'capacity for the function of office' (Baker 1959: 347-348).

According to Aristotle men aim at a certain end (happiness with its constituents) which determined what they choose and what they avoid. Institutions ought to do whatever increases happiness and avoid whatever destroys or hampers happiness. The activity of wealth, the use of property (such as money and territory) is the constituent part of happiness. Justice is the virtue through which everyone enjoys his possession in accordance with the law and is good as a cause of the good of the community (Aristotle Rhetoric: 17). Then it is a must to distinguish those particular institutions which tend to realize the ideal of this constitutional end (Aristotle Rhetoric: 17).

2.3.2 Justice: Contemporary Times

It is not only the naturalists who actually attach happiness to a sense of justice. More specifically, and more directly, the Utilitarian's sense justice whenever an act or a rule or the consequences wherefrom produces pleasure/happiness over pain. Among contemporary writers Rawls' justice as fairness, Nozick's justice as entitlement, Nielsen's justice as equality, Barry's justice as impartiality and Sen's and Nussbaum's Capability approach broadly explain the current discourses on the issue of justice (Scherer 1992: 17). The following sections briefly treat Rawls's and the capability approach.

Rawls's justice as fairness is a development to reconcile the tension in classical liberal philosophy between demands of equality and individual liberty. Justice as fairness is a systematic and practicable conception (not metaphysical or

epistemological) and offers an alternative to the dominant Utilitarianism (Rawls 1985: 226, 1999: 20).

According to Rawls justice, as a basic structure of society, determines the way in which institutions distribute rights and burdens. Efficient and well-arranged institutions should be reformed or abolished if they fail to be just (Rawls 1999: 47, Scherer 1992: 18). The primary subject and the first virtue of social institutions, of the basic structure of society is justice by which the major social institutions distribute fundamental rights (primary goods) and duties and determine the division of advantages from social cooperation.¹¹⁷

Rawls assumes membership in a society as involuntary associations. As society is characterized by irreducible value pluralism, the starting point for a discussion of theory of justice cannot be based on a comprehensive moral or religious doctrine (Rawls 1999: 82, Peter 2009: 3, 4). If the basic structures of a society are just, the outcome generated by the social and economic process will be just. The most important ideas to reconcile this tension is the idea of society as a fair system of cooperation and the idea of "citizens as free and equal persons."¹¹⁸ The latter is based on the political conception of persons having two fundamental moral powers; capacity for conception of the good and the capacity for a sense of justice. For Rawls, the conceptions of the good are called reasonable if they are in accord with the requirement of the reasonable. However, he holds that reasonable citizens accept that their society will always contain a plurality of conceptions of the good. Reasonable persons are not moved by the general good as such but desire for its own sake a world in which they, as free and equal, can cooperate with others on terms all can accept reciprocally -an idea of fair cooperation.

Taking people in the original positions as free and equals, everyone is symmetrically related to make decisions under a veil of ignorance (Locke's 'state of nature') (Rawls 1999: 11). Of other strategies in the original position (*maximax* or gambling) people

¹¹⁷ Rawls 1971: 61.

¹¹⁸ Rawls 1999: 82

chose the *maximini* strategy where they go for safe options. In choosing the *maximini* strategy, the first principle of justice people chose is equality in certain kinds of liberties (procedural justice).¹¹⁹ According to Rawls this would be a basis to agree on fundamental principles of justice of decent people that burdened people should endorse.

As far as the function of institutions is concerned Rawls (1999: 47) held that institutions (whose principles are different from principles for individuals) promote one common good. Imagining persons in the original position as maximising their individual preferences he (1985: 227) argued that realisation of values of liberty and equality is the common good. Institutions are established and ranked to the extent they effectively guarantee conditions necessarily for all and how efficiently they advance common end benefit of liberty to everyone (Rawls 1985: 97). Hence for the libertarian Rawls basic institutions in a modern democracy are guided by the two principles of the realization of the values of liberty and equality and are just or unjust to the extent of such realization (Rawls 1985: 227, 1999: 53). Thus just social realisations would only follow the arrangement of just institutions.

Rawls makes some important points and his pragmatic approach is appreciable. His pragmatic approach (to metaphysical) is determinate enough for justice will always be about what people are due. Pragmatic approaches help to settle issues which cannot be settled entirely by conceptual analysis (Schmidtz 2006: 7). His idea of justice as determinate enough has procedural and substantive elements (Schmidtz 2006: 12). Stum (1999: 160) holds that evidence of interrelationships exist between the outcomes of a particular interaction namely distributive justice and the procedure used to allocate resources in the decision making process. The fairer the procedure used to determine the outcome, the more psychologically acceptable the outcomes will be. These procedural elements are a must that one cannot avoid in the analysis of justice.

¹¹⁹ Rawls 1972: 154-155.

Notwithstanding his approach, Rawls' theory did not tell us what the free and equal persons end up with. He didn't yield clear answers as to where the destination of burdened societies is. As he gave primary importance to the arrangement of perfectly just society and just institutions than social realizations, he ignored the possible adverse effect that his theory might have on people beyond borders, he failed to provide systematic remedies to those affected by parochial values and failed to take the possibility of the presence of different justice principles in the original positions and gave no room to the possibility that some people may not behave reasonably (Sen 2009: 90). As pragmatic as it looks, it cannot help in pragmatic assessment of function of institution.

Rawls common good is made clearer by the neo-liberal economists that consider economic growth as a common good. This interest to attach institutional functions with economic growth grew more and more as a result of World Banks desire to 'demonstrate the links between good legal systems and positive economic outcomes (Faundez 2011-12: 10). The Zedillo Report¹²⁰ recommends that no country can expect to achieve equitable growth, or meet the International Development Goals, unless it focuses on building effective domestic institutions. Douglas North's conception of contract and property rights goes in line with this as it considers institutional function to maximizing wealth or utility.¹²¹

In this respect there is evidence which proves that institutions and economic growth have positive links. Risse, for instance, concludes that recent econometric work show institutional quality is crucially and truly causal to economic growth (Risse 2004: 87). Despite this mushrooming interest in connecting economic growth

¹²⁰ After the chairman of the report, Dr. Ernesto Zedillo former President of Mexico, of high-level commission on Modernization of World Bank Group Governance, October 2009. This was in exploring the possibilities for financing the goals of the Millennium Declaration''.

¹²¹ These developments look institutions as devised to create order and reduce uncertainty in exchange. The exchanges in free market need to secure property regimes and market so that wealth shall be accumulated. When institutions become effective in such situations they raise the benefits of cooperation (in the exchange) or reduce the cost of defection. Political and economic institutions account for the creation of "an economic environment that induces increasing productivity" (Risse 2004: 98). See also Douglas North 1981: 2010-202.

and institutional strength, taking this linearity and causality discourse seriously is problematic for a number of reasons.

The current mechanism of measurement (inclined to liberalisation and growth rather than human development) merges different kinds of institutions and uses a composite and unified concept to measure its quality. The indexes use incompatible and structurally biased variables that are influenced by the general nature of business, picture of how institutions may or may not promote growth and development (Chang 2010: 484). The mechanism claims institutional qualities but did not show us the true qualities of institutions except that institutions should be predictable, efficient, transparent, accessible and accountable.

Secondly this approach suffers from being simplistic, linear and wrongly connects institutional strength with economic growth. The causality runs from institutions to economic development, ignoring the important possibility that economic development (the reality is more in this direction) changes the operation of institutions (Chang 2010: 476). It also took the relationship to be uniform across time and space (Chang 2010: 482).

Thirdly the approach is hegemonic and could not yield in establishing basic institutions from the bottom. It particularly considers free market and property as institutions. According to Chang these supposedly better institutions are those institutions typically found in Anglo-American countries which are seen as maximizing market freedom and protecting private property rights most strongly (Chang 2010: 474). A legal system which does not have an ideal legal system like the advanced capitalist countries is considered as "incomplete and imperfect" (Faundez 2011: 11). As shall be discussed in the next chapter this is a renewed, revived interest in the law and development movement which assumes states as a new type of states-a market-friendly state regarded by the Bretton Woods Institutions as destination for all states regardless of their level of economic or political development (Faundez 2010: 7, 8).

Despite the emphasis on the free market this trend does not provide us with an objective means to measure the degree of free market, the extent of regulation or the exact empirical relationship between free market and efficiency (Chang 2010: 478). It is difficult to measure the quality of such institutions. As indicated at Section 2.1 this discourse did not allow space to other form of property rights including communal property and agricultural cooperatives (Chang 2010: 479-480) Problems in measuring make the creation of a causal link between institutional quality and economic growth difficult.

By exclusively focusing on economic growth, one ignores other important functions of these institutions such as the coordination administration, learning, innovation, income redistribution and social cohesion of the institutions. Factors such as geography, disease and natural endowments which are fundamental causes for differences between countries in economic terms are also not given enough weight (Chang 2010: 36). The linear nature of the approach also ignores the non-formal institutions long established and could contribute to economic growth if properly understood and employed. With an exclusive focus on econometrics, building the capability of human beings is excluded.

As far as this is concerned Botero argued that it is important to note that human factors are decisive in the development agenda of poorer countries or are possible impediments to development. Evidence pointed out that it is the human capital which has a causal effect both on economic growth and democratization (Botero et al 2004: 196-197). Rather than political institutions it is the human and social capital that is primarily and causally connected with growth. Human and social capital, determine a set of institutional opportunities and shape institutional and productive capacities of society. Thus human capability is causal not only to economic growth but also to political development. Poorer countries should therefore accumulate human capital and, once they become richer, are increasingly likely to improve their institutions (Botero et al 2004: 297, 298).

The problem is how to build human capital and by whom this can be built. What mechanism can poorer countries employ to accumulate human capital if the accumulation of human capital is going to bring about improved institutions. How can human capital be built without institutions undergoing appropriate change in the way they think and act? Should not institutions assume the primary responsibility in building human capital-whatever it means?

Thus, both Rawls and the neo-liberal economists show us only one view of the wider picture. To use Dworkin's phrase, they are an intermediate conclusions within a deeper theory. Hence, it is important to complement these thoughts from other contemporary insights. The capability approach is one such insight.

2.3.The Capability Approach

Following Aristotle, Amartya Sen developed the capability approach and departed from preexisting hegemonic discussions of justice on important points.

Sen took peoples' suffering of injustices as the starting point for a discussion of justice. The most and the first important departures of Sen from the earlier discourses begin with the desire to eliminate clear remedial injustices around people (Sen 2009: vii). The central and a reasonable starting point (and Sen asks if this could also be a reasonable ending point) to the theory of justice is the identification and retreat of redressable injustices. The question is how to reduce injustice and advance justice rather than looking for perfect or just institutions. One of the reasons for this approach is a lack of agreement, under strict conditions of impartiality and open mindedness, of the nature of a just society and the unavailability of perfect institutions (Sen 2009: 8-9).

His second departure layover his argument that "justice cannot be indifferent to the lives that people can actually live" (Sen 2009: 18). The advancement of justice has to be a search for comparatively (rather than transcendently) the actual realisations (rather than institutions and rules) in societies involved. The importance given to human lives, experiences and realisation cannot be supplanted by

information about institutions that exist and the rules that operate. The realised actually goes beyond the rules and the institutions. Thus the central concern of the capability approach is evaluating how well people's lives are socially realised with reference to their capability to function, (rather than in terms of their utilities or happiness) that is their real opportunities to be and to do what they value being and doing (functioning).¹²²

Sen is interested not only in the kinds of lives people manage to lead, but also in the freedom that they actually have to choose between different styles and ways of living (Sen 2009: 227). We could choose to use our freedom to enhance many objectives that are not part of our own lives in a narrow sense. Capability is thus the opportunity to decide what people should do and the deontological responsibility for what they do (Sen 2009: 19, 231). According to Sen (2009: 228) this freedom is valuable at least for two different reasons: more freedom gives more opportunity to pursue our objectives (opportunity aspect) judged by whether people end up doing what they would respectively choose to do if unrestrained and we may also attach importance to the process itself (process aspect). Accordingly, an equal share of opportunities is more important than an equal share of the means to freedom (e.g. primary goods). This idea of justice is significant in the analysis of justice particularly in a plural society with multiple grounding or plurality of principles (Sen 2009: 194FF).

Instead of equalising resources or welfare, equality is defined and aimed at in terms of the capacity each individual has to pursue and to achieve well-being—a space for the assessment of individual well-being and the freedom to achieve it. Capability is a set of vectors of functionings reflecting a person's freedom to lead one type of life or another. Capability amounts to the substantive freedoms a person has, or the real alternatives available to the person herself to achieve well-being. In that respect capacity is related to well-being both instrumentally, as a basis of judgment

¹²² Sen 2009: 18-19. See also Terzi (2010) *Justice and Equality in Education: Capability Perspectives on Disability and Special Needs*, Continuum International Publishing Group.

about the relative advantage a person has and her place in society; and intrinsically since achieved well-being itself depends on the capacity to function and the exercise of choice has value of its own as part of a freedom to determine what he wants, what he values, and ultimately what he decides to choose. In contrast to the emphasis on economic growth this idea of realising social justice is an alternative dimension of function of institution. In line with this humanistic function of institutions Sen thus gives much emphasis to the realization of social justice.

In this respect institutions are to allocate burdens and benefits towards building the capability of citizens. His conceptualisation of functions of institutions is linked to his understanding of development. He holds that many political thinkers (including Rawls) have gone wrong in considering justice as a matter of arranging just institutions.¹²³ Accordingly, his realisation focused theory pays attention to the way institutions actually work to affect people's lives rather than being merely arranged (Sen 2009: 20-22, 67-69). Sen does not see institutions as promoting a single common good. He rather takes lives of people seriously and visualises institutions as promoting human development and justice, rather than treating them as manifestations of justice. According to him it is hard to think of good institutions as being basically good in them, rather than possibly being effective ways of realising acceptable or excellent social achievements which is more important than achievements in terms of economic growth (Sen 2000: 83).

Sen brings in institutions only as ways and means of achieving development, characterised as expansion of different kinds of interlinked freedoms and the removal of different categories of interconnected "unfreedoms" (Sen 2000: 23). The notion of development cannot be conceptually unlinked from legal and judicial arrangements. Development is not confined only to institutions and policies in that

¹²³ One approach concentrates in identifying perfectly just institutions social arrangement and took the characterization of institutions as the only identical task of justice; another is based on the idea of contract (imagining population as a party to the contract). Contractarian is dominant now lead by Rawls contemporary dominant political philosophy, based on social contract and concentrates on the search for ideal social institutions.

sphere. It has to be judged by what freedom people manage to have in that sphere and the overall effect of all these instrumental variables on the lives of human beings in that particular sphere. Accordingly, it is necessary to examine what social realisations are actually generated through such institutions (Sen 2000: 82). Legal development, not just about what the law is and what the judicial system formally accepts or asserts, takes note of the enhancement of capability-their freedom to exercise the rights and entitlements that are associated with legal progress (Sen 2000: 10-11).

According to this approach there is no direct causality and linearity between institutions and development. Institutions are held as capable of contributing directly to the lives that people are able to lead and as important in facilitating people's ability to scrutinise the values and priorities that they can consider, especially through opportunities for public discussion.¹²⁴ Institutions, through 'government by discussion' help to build capacity to enhance reasoned engagement through enhancing informational availability and interactive discussions. Building capability would pave the way to realizing and sustaining justice.¹²⁵

Sen makes several critically important points. His point is so important, namely that justice has to give meaning to actual lives. The need to hold practical public debate is as important a starting point as the how of justice. His conception of development beyond the mere accumulation of wealth is significantly comprehensive and true. The fundamental importance he attaches to freedom and the interconnection between economic, social, political and legal freedoms is also important.

Despite its obvious strength, Sen's idea of justice needs some reconstruction. According to Chimni Sen talks about social realisation but did not critically show

¹²⁴ Sen 2009: xii. This will include considerations of freedom of speech and right to information as well as actual facilities for informed discussion..

¹²⁵ Institutions are meant instrumentals in realizing social justice towards sustainable development. Sustainable development could not be attained without effective decisions being rendered by decision making bodies.

how this realisation is to be materialized. He also did not see the “social process and structures that inhibit development” (Chimini 2008: 8). Those class structures that bear influence on the way capability is realized has not get due consideration by him. He does not explore the role of collective action in shaping social policies. His sole emphasis on individuals and ignoring groups in any society makes him suffers from both methodological nationalism (for his sole focus on local factors) and methodological individualism.¹²⁶

While Sen focuses on lives and visualises development more comprehensively, he neglects the subject of political economy that are compelling insights in to social process and structures central to the realization of the goals of development (Chimini 2008: 8). Sen convincingly demonstrated how personal heterogeneities, diversity in physical environment, variations in social climate and differences in relational perspectives can be contingencies in the conversion of incomes in to the kind of lives that people can lead but refrains from exploring the ways in which the concentration of economic power over the means of producing and diffusing culture might compromise my capability to decide what things I have reason to value (Sen 2000: 240, Chimini 2008: 9).

Pogge (2004: 30-32, 37, 45) on his part argues that “Sen’s approach is an important and helpful heuristic device, but does not provide a criterion of social justice that could in any way be considered a valid alternative to the resourcist perspective”. The capability approach overstates its contribution to the egalitarian debate, and

¹²⁶ In reply to this Sen has points and considered attacks on him as “methodological individualism” a mistake. He argues that the re-establishment of society as an abstraction vis-s-vis the individual has to be avoided. And he puts reasons why capability of groups is not the focus of his idea of justice. For one reason the capability that groups have tend to be understood in terms of the value that members of the group place on the proficiency of the group. In valuing a person’s ability to take part in the life of the group, there is an implicit valuation of the life of the society itself, and that is an important enough aspect of the capability perspective. On the other hand a person belongs to many different groups including gender, class, language, profession and religion. The increasing tendency towards seeing people in terms of one dominant identity is not only an imposition of an external and arbitrary priority, but also the denial of an important liberty of a person who can decide on their respective loyalties to different groups to all of which he or she belongs. Seeing a person as a member of one social group tends to be based on an inadequate understanding of this breadth and complexity of any society in the world (Sen 2009: 245-247).

cannot ultimately be justified. Pogge particularly criticises what he maintained as serious problems in dealing with natural inequalities. He claims the approach, including individual differences among the elements of moral concerns, ends up identifying disability as 'vertical inequalities' and hence in stigmatizing disabled people as overall worse endowed than other people. Things like eye or color are horizontal differences and as such do not constitute grounds for additional resources (Pogge 2004: 30-32, 37, 45).

The other problem with Sen is his ultimate emphasis on national issues. Sen (like other developmental economists) overwhelmingly focused on relating the persistence of severe poverty to local causes-bad governance, sexist culture, geography while leaving unstudied the huge impact of the global economic order on the incidence of poverty worldwide (Pogge 2004: 30). Pogge, like Sen, supports the idea of freedom from severe poverty as a basic human right (Vizard 2005: 17). But Sen treats poverty as capability deprivation while Pogge treats it as an external imposition (Vizard 2005: 17, Sen 2009: 254). Pogge held that the more advantaged citizens of affluent countries in collaboration with many political elites in the developing world have acted responsibility towards most of the life-threatening poverty in the world (Pogge 2004: 31, 45).

The high rate of mortality and morbidity (where women and children under the age of five are the most at risk) is most significantly determined by poverty (Pogge 2005: 183). Accordingly, the rich are actively participating in the largest crime ever committed by shaping and enforcing the social conditions and social institutions that forcibly and avoidably cause to suffering and poverty. We cannot avoid poverty only because of the fantastic increase in inequality (Pogee 2004: 32, 37). In the existing world poverty manifests a violation of our negative duties, our duties not to harm, as well as duties to avoid causing harm that one's past conduct may cause in the future to others, our intermediate duty (Pogge 2004: 34-36) Sharing this view of Pogge, Chimni also criticizes Sen for not sufficiently appreciating the effect of globalisation on the fundamental transformation of the international system, with

the result that Sen does not attach any particular salience to global economic and political structures (Chimini 2002: 10).

Accordingly Sen's approach to justice needs further revision in order to visualize the Ethiopian context.

2.3.2. Nussbaum's reconstruction of the Capability Approach

Nussbaum has developed the capability approach further. She visualised structural defects in the dominant western theories that yield very imperfect results (Nussbaum 2004: 1). Accordingly the problem of global justice will only be solved by thinking of what all human beings require to live a rich human life through purposeful social cooperation that focuses on old fellowship as well as new self-interest. Capability cannot be detached from a central part of our own good-to-produce and live in a world in which all human beings have what they need to live a life with human dignity (Nussbaum 2004: 2).

Thus Nussbaum endorsed the capability rather than resources approach as it, rather than resources, yields the most appropriate space for comparison between individuals. She however criticises Sen's approach, stating that it does not show the "most central capabilities that are central to any human life" (Nussbaum 1997: 227, 265). Accordingly she lists the basic capabilities (she terms entitlements) that are in a way similar to Rawls' lists of primary goods.¹²⁷ Human respect, human fellowship in a more expansive sense is the bargain for mutual advantage among rough equals and is the focus of her capability listing. Despite an overlapping consensus Nussbaum held that her capability list can more concretely be specified in accordance with local beliefs and circumstances (Nussbaum 1997: 286). The lists have separate and indispensable components that are related to one another in complex ways. Her current list of capabilities include capability for life, bodily

¹²⁷ Rawls list of Important liberties include political liberty and freedom of speech and assembly, liberty of conscience and freedom of thought, freedom of the person, the right to hold personal property and freedom from arbitrary arrest and seizure as defined by the concept of the rule of law (Rawls 1999: 53).

health, bodily integrity, sense, imagination and thought, emotion, practical reason, affiliation (friendship and respect), other species, play, control over one's environment (political and material) (Nussbaum 1997: 287-288).

The duty to realise list of capabilities lies in individuals, fellow citizens and in institutions. Since each person cannot define this list individually, constitutionally structured institutions are created and delegated with the responsibility of meeting the minimum capability threshold.¹²⁸ The establishment of institutions therefore provides this valuable service and human need and contributes towards living fulfilled life. The citizens are then charged with a collective obligation to fulfill this responsibility by being respectful to cultural difference and align cooperation (Nussbaum 1997: 200).

2.4. Basics of Justice

2.4.1 Common Good

The discussion on justice recapitulated that justice is all about the interests in the lives of individuals and groups. Individuals and groups have their own specific needs that may be in conflict, parallel, overlap or intersect with one another. A political community must aim, above all, at making good the wants of individuals and groups and this is the realisation of their specific powers of thinking, feeling, and contributing as social beings.¹²⁹ Striking a balance is the key driver.

¹²⁸ See Nussbaum, *Beyond Social Contract: Capabilities and Global Justice*. Accordingly, Nussbaum's capability approach complements Sen's approach and suggests a set of basic human entitlements. Most important ideas of the list include:

- Most nations, well and honestly run, can promote many or even most of the human capabilities up to some reasonable threshold level
- Respect for national sovereignty within the constraints of promoting human capability
- Main structure of the global economic system must be designed to be fair to poor and developing countries
- All the individuals and institutions should focus on problems of the disadvantaged in each region
- Care for ill, elderly and the disabled should be a prominent focus of the world community
- The family should be treated as a sphere that is precious but not "private".

¹²⁹ Aristotle in Philp, 2002.

According to Barker individuals live as individuals according to their own good pleasure (Barker 1959: 36). People at the same time live as a group according to their common way of thinking, speaking and acting. In other words a person lives through two vises as individual and member of a community (Barker 1959: 106). Whilst individuals live in group they consciously surrender the free exercise of their own will in return for the common good namely the protection and preservation of common lives. The real freedom and sustained justice in a pluralised society requires individuals that are not socially isolated.

There are therefore three goods for a society to attain: the reduction of individual disability, realisation of individual capability and the maximisation of group capability. The first involves satisfying the interest of another. The second involves self-sufficiency. The satisfaction of all the interests involves the creation of the common good which is the sum total of satisfaction of "one-self" and "another-self". When a person seek for the common good, he becomes both selfish and "unselfish". He seeks to avoid injustice in protecting and preserving him-self: he at the same time seeks justice in maximizing "another-self".

Accordingly, though individuals can be described as unit and cannot act in two entirely opposite ways now he is expected to act entirely in many directions towards the common good (Barker 1959: 100). The duty that each has to do his own (Plato's doctrine of specialisation) has an implied conception of the true nature of justice (Barker 1959: 105). In accordance with specialisation, life, demands diversification of tasks for the sake another's good. According to Barker fullness of expression and true consciousness of pleasure are to be found in doing one's duty in the station to which one is called (Barker 1959: 96). Healthy relationships among these interests naturally moves society forward, secures social justice and is a natural cause for development. This, building upon the capability approach, is the thematic area of this research.

The common good which has got such a status would be the only One Common Good and the "Final Good" –to use Aristotle's phrase. However the "common

good” has got various versions. Rawls for example more importantly affirms the plurality of conflicting and incommensurable conceptions of the good affirmed by citizens. However as public agreement on the requisite conception of the good cannot be obtained out of this plurality, liberal values of the decent people shall be imported by burdened people. For Rawls the principles that decent peoples endorse are common goods. These, according to Rawls, are nothing less than liberal principles of global justice.¹³⁰

In any society the common good is to be found in the basic institution. Adopted by the consensus of individuals and groups, this constitution, is State’s identity and constitutes its permanence (Barker 1959: 208). A clear knowledge of the common good orient knowledge and action towards the right end otherwise thought and action will be disoriented (O’Neil 2004: 13). The corollary demands the intervention of the State through its institutions so that the common good is understood, pursued and ultimately achieved; this is to maintain the tripartite relationship of the individual, the people and the State.

In the tripartite relationship, as Plato noted, the just man will discharge his function satisfactorily. The whole issue focuses on the function of living well, and this is realised when the people live in order to be glad as neighbors: about getting on with our lives in a way that complements rather than hinders our neighbors’ efforts to get on their own (Barker 1959: 174). Decision making bodies serve the advancement of the common good by promoting the individual as well as society’s self-realisation. In the realisation of a list of capabilities these bodies need to understand society’s expectations for individual and the group through which they administer the right justice.

2.4.2 Indispensability of Reason

The enhancement of justice towards maximisation of citizen’s lives involves a reasoned engagement. Reason can be defined as an explanation or justification for

¹³⁰ Rawls 1985: 249-250)See Rawls (1971), *A Theory of justice*, P. 97, 424 and following. See also Kuper 2010: 643.

something, a motive for acting or thinking, and a power to think in a rational way.¹³¹ It can be concerned with the right way of viewing and treating other people (culture, claim) by examining different grounds for respect and tolerance. Those who advocate reasoned thinking point out that reasoning is important for two reasons; for avoiding arbitrariness and accessing authority (O'Neil 2004: 11). According to O'Neil there are four conceptions of practical reason; reasoned action towards the objective Good, pursuit of subjective ends using instrumental reasoning, shared norms and action-based personal commitments and critical revisions of action-based norms and commitments (O'Neil 2004: 49).

Practical reasoning is one of the constituents of the human soul which is indispensable to guide individuals along a single line. This line is a principle imposed by reason (Barker 1959: 97). Accordingly, the path of reason or the rule of the intellect has to be the basic determinant of good and just behavior as well as of an acceptable framework of legal duties and entitlements (Sen 2009: 38-39).

Though this is contentious, there is no dispute over an alternative to practical reasoning.¹³² The purpose of coming to decision making bodies is for public discussion and reasoning, is not merely to decide the winner or loser of a game. For Aristotle, citizens of a polity do not come to court in order to promote their own selfish agenda-to injure an enemy or reward a friend-but to do what is just and beneficial for the whole society (Kraut 2002: 450). Hence, thinking of the familiar legal apparatus of assemblies and courts, Aristotle identified law as dispassionate reason and maintained that people should be allowed to share in the process of due deliberation and judgment (Kraut 2002: 405). Accordingly the great spiritual limitation upon man is reason (Barker 1959: 321).

¹³¹ Black's Law dictionary.

¹³² This raises problems for non-formal or traditional institutions as it is usually argued that they operate in an irrational manner and not a reasoned manner. Max Weber categorized Kadhi justice in this way suggesting that they decided cases according to the facts of the specific case rather than through reason based on norms.

Sen also advocated the indispensability of reasoned thought (Sen 2009: 39). Justice demands that we have a desire to understand the world and this understanding inescapably involves reasoning. Reasoning is central to a proper understanding of justice; concept which at its core involves considerable unreasoned thinking; indeed it may be particularly important in understanding such a world. Unreason, impulses and mental attitudes, relying on very defective primitive form of reasoning, which makes reason based actions and responses far less effective (Sen 2009: preface, xvii). Decision making bodies should give due emphasis to the indispensability of reason when screening illegitimate claims in their pursuit of social justice.

Justice whilst being the common good of a society is built on some theoretical and practical conceptions of what reasoning is. Reasoning is a way of guarantying that the right things are done but also helps to ensure that the people affected can see that justice is being done. It helps to scrutinise unjust ideologies and blind beliefs. Public reasoning is important as a way of extending the reach and reliability of valuations and making them more robust. Reasoned engagement (not just goodwill towards others) helps to prevent catastrophes and injustice (Sen 2009: 5, 35, 46-48, 241).

2.4.3 Objectivity and Subjectivity

If reason happens to be indispensable in the pursuit of justice, what special role does it play? Does it guarantee that it indispensably leads us to enhancing or securing justice and truth? In epistemology, where the matter is clear, a very dubious procedure could accidentally yield a more correct answer than extremely rigorous reasoning but a decision devoid of reason may have unintended consequences and the probability of enhancing capability may be low. In thinking about the issues of justice in the case reasoned scrutiny emerges as being an objective we can reasonably aspire to (Sen 2009: 40-41). Judges are accountable to be objective when they give reasoned decisions which justify acts of citizens which aspire to reflect the common citizen's basic institutions. This belief should not be

that of the decision maker, but one formed objectively out of impartiality to the decision-makers own thoughts but in conjunction with that of their community; this is an unusual and exceptional quality in a decision-maker.

In order to objectively assess the world, judges need to free themselves from the position they assume. Objectivity and exploring a theory based on public reasoning demands going beyond positional confinement towards an independent position, viewing the world from a delineated somewhere and broadening the comparative assessment and transposition by avoiding barriers to the comprehension of what is going on from the limited perspective of what to observe from ones perspective.¹³³

In this regard Rawls demands people to ignore their talents, education, social standing, economic resources and operate under a veil of ignorance and further demands of people to think devoid of political, religious, moral doctrines, and thus position themselves in an original position to deliberate their set of principles or justice to the common group (Rawls 1971: 19-20). This is comparable to Lock's state of nature where there is no assumption of any principle, even Lock's Natural Law, as the basis of any agreement.

One lesson that could be taken from this theoretical thinking around justice is the nature of objectivity practically applied to the demands of public discussion, reasoning, impartiality and reflection. The role of unrestricted public reasoning is central to democratic politics and the pursuit of social justice (Sen 2009: 44).

Be that as it may objectivity is an illusion if one thinks in terms of objective reasoning alone. Subjective reasoning cannot be avoided as decisions are made

¹³³ Sen 2009: 151-156. Objective reasoning has been championed by many thinkers. Adam Smith, invoking the impartial spectator and recognizing justice as one of the three human virtues, insists that we must view our sentiments from a certain distance from us (Mathis 2009: 92). This is motivated by the object of scrutinizing not only the influence of vested interest but also the impact of entrenched tradition and custom (Sen 2009: 45). Rawls also considers objectivity as basic structure of society. Reason of justice, however, differs from reasons of self-love, and also of prudence. Conception of objectivity must establish a public frame work of thought sufficient for the concept of judgment (Sen 2009: 42). Looking for ethical objectivity demands reasoning to "satisfy what can be seen as the requirement of impartiality" to take "asymmetric interest" in what a decision maker observes (Sen 2009: 46).

largely based on emotions and personal values. These values are ultimately rooted in our sense of shared humanity; Dunson commented that emotions energize the ethical quest (Dunson 1999: 96). Even Sen spent most of his life seeking creative solutions to the colossal scourge of hunger and malnutrition for he cannot forget the look in the eyes of emaciated refugees during the Bengal famine of 1943, the foundation setting experience or the emotions felt which have subsequently never been far from his consciousness (Dunson 1999: 96). Moral attachments are one of the primary and essential purposes of a democratic society.

At one side of the extreme we find the advice of Lord Mansfield to a colonial governor to consider only what the governor thinks of justice and require him to decide accordingly without giving consideration to reasoned thinking. The logic or the reason behind such advice was that judgments will probably be right but reasons will certainly be wrong". In situations like the raging famine, Sen (2009: 4) held that it seems natural to protest rather than to reason elaborately about justice or injustice. Thus in decision making subjectivity is as indispensable as its objectivity.

According to Flex rationalist approaches to justice have proved inadequate. Flex argues that some of the problems with concept of justice (such as those of Plato, Aristotle, and Rawls) arise from giving privilege to the rational aspects of human subjectivity and from positing abstract, impersonal, and disembodied concepts of reasoning (Flex 1993: 332). Relationships between people are defined by logic and intellect, which unaided by unrefined judgment cannot in isolation comprehend such connectivity as is between related persons. The rationalistic approaches are suggested to be doomed to fail and actually are counterproductive because they block the development of other capacities such as empathy and appreciation for otherness, which is required for the effective exercise of justice. Contrary to these views he held that justice is not a finite or permanently set as rules or principles. It is an ongoing process, through a set of interrelated practices, where our goals and purposes subsequently change. Some form of reason may inhibit or block its

development. Thus discourse about justice cannot do without the concept of subjectivity and society does not become completely different beings when entering the communal world (Flex 1993: 332). Justice is best understood as an ongoing process rather than a fixed set of procedures or a pre-prepared standard to which individuals must conform (Flex 1993: 341). Rawls also calls convictions and attachments part of a non-public identity without which we would be disoriented and unable to carry on.¹³⁴ Thus it is both possible and necessary to develop a non-rationalised conception of the self and justice.

Understood as a process, justice is one of the ways individuals manage the strain of being simultaneously public and private, alone and in relation to others, desiring and interdependent. On a collective level, justice is one way which groups manage the strain of mediation between individual subjectivities and that which they are composed such objectivities limited by resources, past traditions, and the consequences of historical decisions to which individuals must now must respond (Flex 1993: 341). The management of such tensions necessarily involves the exercise of various forms of power. Justice, as a process, incorporates the least reconciliation,¹³⁵ reciprocity,¹³⁶ recognition,¹³⁷ and judgment.¹³⁸ This signifies the indispensability of subjectivity in pursuit of social justice.

The reasons for making room for relevant emotions, plays complementary role to reason and reflection. As far as the reliability of impressions and feelings is concerned, it would not be plausible to see emotions, psychology, or instincts as an independent source of valuation (Sen 2009: xvii). Ideology and dogmatic belief can emerge from sources other than religion and custom and have frequently done so,

¹³⁴ See Rawls, *A Theory of justice* supra note 25, p. 241. See also Adam Smith who held that human affections, feelings and passion (what he calls 'moral sentiments') play a greater part than reason in socialization (Mathis 2009: 88).

¹³⁵ This requires new unity of differences, mutuality and incorporation rather than annihilation of opposites and distinctions.

¹³⁶ This involves a continuous though imprecisely defined sharing of authority-not necessarily equality of power- and mutuality of decision.

¹³⁷ This involves acknowledging the legitimacy of others.

¹³⁸ This involves a process of balancing and proportion, of evidence and reflection, of looking forward and backward.

that does not deny the role of reason in assessing the rationale behind instinctive attitudes. The role of instinctive psychology and spontaneous responses cannot be underestimated; it is important to note that the sentiments, psychology and reasoning can be interwoven and supplement each other. The first perception shouldn't be of right and wrong as that cannot be the object of reason, but of an immediate sense and feeling of reasoning in a subjective way involves a move from observation of the tragedy to the diagnosis of injustice'' (Sen 2009: 4, 49-50).

Thus, like the transitional object, justice cannot bridge inner and external reality if it is conceptualised in purely objective or subjective terms (Flex 1993: 341). Realising social justice therefore demands giving due weight to objectivity and subjectivity in a way which necessitates giving due weigh to formal and non-formal systems. Moreover the realisation of social justice demands some constant elements of justice and some locally variable elements of justice. Nevertheless the conceptualisation of institutions and social justice had been dominated by a one-size-fits-all mindset and has ignored this conceptualisation challenge of reasoning and institutions in envisaging equitable social justice.

Conclusion

This chapter indicated that understanding of institutions and their function has to a large extent been influenced by Douglass North's conceptions of contract and property rights as institutions. Though discourses have changed in theory, this conceptualisation hadn't substantially shifted. The notion of economic growth as development was supposed to follow just institutional arrangements that had to be endorsed by poorer countries.

As the one-size-fits-all solution fails, the demands of exploring solutions incorporated the opportunity that locally grown non-formal systems provid for. This further demands an exploration development beyond economic growth, considering humanistic elements of development, expanding the real freedoms of the people in speculating and realising purposes of living and designing the ways

that make people capable of getting their wishes realised. These demands a bottom up approach in designing the common good around the ends needs of the population and making balanced and proper use of objective and subjective reason based public engagement. The exercise calls for giving a balanced and particular attention to cases before decision-making institutions and hence the contextual listing of capabilities towards social justice.

Besides contract law and economic growth reform efforts, this would yield results in developing countries if root ideas of institutions and justice are broad enough to encompass non-formal systems with the end of realising human capability as a concept of justice. This demands establishing connections between various decision making bodies and assessing their impacts on the different interests reflected by litigants towards or against social justice. This creates a proposition in response to the lingering question of the connection between human rights, human capabilities and justice.

The previous chapter illustrated how the formal law and court system could not bring behavioral change on the part of the people. A reformed institution is needed so that the people secures a more resilience chance of attaining a reasonable level of social justice out of balancing issues of human rights, capabilities and justice. The reform discussed in Chapter One failed to yield this effect and therefore it is important to see if the global attempt to reform institutions might properly conceptualise institutions and justice so that the reforms can base the realization of social justice on firmer foundations. As human life is central to institutions, meaningful endeavor to form or reform justice systems cannot ignore the value of human lives. An institution reformed in such a way must reflect societal justice and encourage the proper understanding and attainment of legal and social justice and reduce injustice. The next chapter explores if the reform pertaining to these institutions would result in realisation of social justice as identified in this chapter.

Legal and Judicial Reform

In the previous chapter the relationship between the ideas of justice, legal justice, social justice and the role of institutions was explained so that basic and derivative institutions serve justice when, through preventing injustice and enhancing justice, they make people capable of being and doing. It was suggested that conceptions relating to institutions and justice gave insufficient space to the social, cultural, political, economic and religious contexts of the countries they were supposed to serve. It was also suggested that the need to reform institutions arose when they became roadblocks to the realization of development.

This chapter is chiefly concerned with whether and to what extent can institutional reform programmes provide an effective response to the needs of legal and social justice. In this respect the chapter discusses the old and new law and development movements. The chapter enquires as to whether the old law and development movement has been influenced by this understanding and how far it was resorted to or departed from the earlier ideas of progress, institutions and justice. It indicates why it failed to realise its promises and exacerbated the inconsistencies that poorer countries had in their legal systems. Building on this the chapter also enquires as to how this failure forced the move from institution-free technocratic reform programmes of the Bretton Woods ethos¹³⁹ to the “institutions matter” slogans. It queries how once a marginal topic became the central agenda in the 1980’s through the debate on economic development (Chang 2010: 473) and why judicial bodies were made the center of reform. This triggered the new law and development movement. Thus this chapter discusses the relationship between institutions and social justice and elaborates on whether and how the judicial

¹³⁹ See <https://en.m.wikipedia.org/wiki/Bretton>. design the financial system, last visited on 4 Aug. 2016. The institutions are the International Financial Institutions mainly the World Bank and the International Monetary Fund. After the conclusion of world war the second 730 delegates from 44 allied nations gathered to regulate international monetary and financial order. The financial Institutions were hostile to the institutions and used to treat institutions as mere details.

reform programme impacts lives, principally through reducing injustice and enhancing legal and social justice.

The chapter has two parts. The first part of the chapter deals with issues of the old law and development movement (what it is, why it failed and the reasons for its failures), a brief history of judicial reform, the relationship it had with the old law and development movement and what is meant by judicial reform. The second part carries on the discussion further and explores the various discourses of hegemonic, counter-hegemonic and capability approaches to development. As the judicial reform programme cannot ignore the way peoples' do justice and the role of the State in effecting development, this has resulted in the discussion of the development of legal pluralism and the idea of developmental state to be followed by a short conclusion.

3.1 The old law and development movement

The old law and development discourse casually correlates law and progress. Its conceptualisation had been preceded by earlier notions of 'missionisation', progress, civilisation, growth and modernisation (Wallerstain 2005: 1262-1265) from which it did not significantly departed. The notion made a strong return to the 18th Century with the most important product –'can do'- attitude to progress and made development a euphemism for progress'' (Marryman 1977: 462-463, 467). The earlier trends had been influenced by the work of German Sociologist Max Weber who had been the key figure in holding law as an important means of development. Weber explained that the rise of capitalism and industrial civilisation owed to a rationalized legal system of the West that was autonomous from other spheres of society, consciously designed, and universally and consistently applied to all similar cases. A rational and predictable legal system thereby generates certain substantive provisions necessary to the operation of the industrial system (Marryman 1977: 5, 11).

The earlier colonization trends assumed that non-European countries were unable or unwilling to develop their resources which led to an exploitative and profit-driven approach to the resources of the non-European world (Wallerstain 2005: 1264). This civilizing mission was seen as moral and political duty of the Europeans. After 1945 the language of civilization was changed to development, the European and non-European to North and South dichotomy, and it was assumed that countries of the South could potentially develop themselves, as opposed to being developed by the North. The assumption then was that countries in the South would develop technologically if they adopted proper policies in government function areas. Accordingly, aid and advice were rendered and this was seen positively as a route to achieving the ends of development (Marryman 1977: 466). The new ideology was called Developmentalism or dependency by Latin Americans,¹⁴⁰ Socialism by the Soviet Union and economic development by the USA (Wallerstain 2005: 1265).

The language and tone of the mission had got a new flavour in the 1960s with the emergence of the idea of stage of growth the main proponent of which was Rostow. Rostow's model of development, the modernisation model was based on the belief that every country in the world can develop. It explained why some countries are developed and why some had not and prescribed patterns of development. His prescription was a liberal economic theory having five stages of development: traditional society (characterized by subsistence agricultural economy), preconditions to take off (with surplus of wealth society begins to develop manufacturing), take off (industrialization and commercial agriculture begins), drive to maturity (national economy grows and intensifies) and age of high mass consumption (greater income than buying essentials, economy flourishes).

¹⁴⁰ This theory is Marxist-inspired and is developed in the Global South and argues that modernization theory is based on false premises, the challenges of development are external to the South and international relations are bad so development is possible with fewer relations. Elaborated primarily by Latin American scholars, it attributes the cause of underdevelopment to be found in the history and structure of the global capitalist system (Merryman 2004: 9-10).

According to Rostow every country need to pass through all these five stages. Rostow's key notion was that development required a takeoff which could be achieved through the transfer of institutional lessons undertaken by Western countries to developing countries. For the law and development movement, this meant the transfer of the key principles of Western legal systems, also known as liberal legalism, to developing countries (Trubek and Galanter 1974: 1062).

Influenced by the Western model of modernisation, this model assumed that the West had the best and had outgrown its developing neighbours. Development was suggested to be achieved when the South had similar institutions like the West. Part of being economically and politically free, it was assumed that if each country followed the same route to development the same result would follow.

The now well established criticism of this proposition was that it gave no regard for each country's specific geographic, historic and the situation of the people. Accordingly modernisation theory simply ran out of steam in the early 1970s as political institutions disintegrated, authoritarian and military regimes proliferated and developing countries failed to progress economically as predicted (Tamanaha 1995: 2, 3). Then it was followed in the 1970s by the decade of development (as declared by the United Nations) a decade in which development became an all-embracing, elixir concept. Having its heyday in the United States in the 1970s it defined development as embodying principles of economic growth and poverty alleviation. With this the law and development movement emerged and tried to causally connect law with these objectives.

Embraced by the basic tenets of modernisation theory (Tamanaha 1995: 3) the law and development movement followed the 1960s growth agenda as a new field of technical assistance and scholarship whose components included the idea of progress, the movement for law reform and the emergence of interest in law and society (Marryman 1977: 461). The theme was to speed up the social, economic and political convergence of the South and the North economically via the protection of property and contract rights; politically via the establishment of

liberal-democratic government and socially via a change in social behaviour for the South using Western law reform.¹⁴¹

The movement assumed that law was the solution to the problem of development in developing countries (Trubek and Galanter 1974: 1096) and thus optimistically, invariably, positively and causally connected law with development. As the theory underlying the law and development movement was the underlying modernisation theory whose main proponent was Rostow's stages of growth, for the law and development movement this meant transferring core conceptions of modern law, liberal legalism, to developing countries. Like the earlier makability tenets the law and development movement assumed the evolutionary power of ideas and institutions of the West on developing countries.¹⁴² The core conceptions of modern law were used to explain the cause of industrialisation in the West that included the social purpose of law:

1. As designing to help and control the conduct of individuals
2. As applied equally, and its enforcement designed to assure conformity with the law and
3. Applied by courts, whose bases of decisions are authoritative rules and doctrines, as the primary institutions to apply and define the law.

The paramount importance the movement gave to individuals, the principle of equality and the formal system is apparent from the start. Moreover formal laws, formal ways of enacting them, formal enforcement institutions and formal education were the central positive change agents in the process. The basic theory held modern law as a system of rules, a form of purposive human action and part of

¹⁴¹ Barron 2002: 5, Trubek 1972: 3, 7-10, Nader 2007: 2, Barron 2005: 6). See also Frank 1972: 768. The main idea behind the conception is the existence of an organized modern nation state which rationally and purposively enacts laws for the realization of growth. For that purpose western laws were taken as possessing such "purpose" and "power" of change. This conviction forced the West to mobilize and transfer resources to the South-the most notable of which is the deliberate flow of laws and institutions of and from the West to the South.

¹⁴² The idea is taken from Chimni (2008), *The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels*, *The Law and Development Review*, Volume 1, Issue 1. See also Tamanaha 1995: 3-4.

the nation-state to effect social change enhancing the state to create the system of rules, courts and other institutions which make, apply and enforce the law. Being purposive, universal and rational modern law supplant local, particularistic and traditional forces and is the vehicle through which the assistance of State replaces communal and traditional authority (Tamanaha 1995: 4-6) that organized decision-making against common standards.

Thus the purpose of law in the old law and development movement was the functional prerequisite of an industrial economy with different articulations. This includes in its importance the creation and maintenance of the market that emphasized predictability. Another articulation lays in its purposiveness and power of more effective norms to define and channel behaviour, with the more likely economic growth that will subsequently occur. Effectiveness was viewed as a mechanism to measure the capacity of a state to exert its power as main actor in transforming economic activity (Tamanaha 1995: 6-7).

Professionally educating judges as social engineers about the role of law in development was assumed to narrow the gap between the law in books and the law in action. In this respect Galanter¹⁴³ hopefully speculated that education could be the basis of development as it could overcome values installed by family, class, religion, and other social forces.

This conception resulted in changing the laws and decision making bodies of the South. First laws on the books were "perfected" if necessary by importing foreign codes-such as laws guarantying freedom of contract. And as tradition suppresses the application of rationally enacted modern law, impartiality in the application of laws must become a reality (Tamanaha 1995: 9).

¹⁴³ See Mark Galanter (1966), *The Modernization of Law in Modernization*, Myron Weiner. Mark Galanter was one of law and development movement writer.

3.1.1 The Reality

The reality on the ground proved that economic, political and social merger of the West and the South had not been realized. Contrary to what the movement dictated the gap between the West and the South had been polarizing. According to Trebilcock (2001: 9) the average income gap between the richest and poorest countries has doubled within the last 40 years. With all sorts of declarations, commitments and conventions countries and peoples were not made equal. Within the West itself there were severe problems. In the US, where the laws, development policies and ideas of the movement originated, there is a widespread poverty and a wide gap between the economically rich and the poor (Nader 2007: 5).

Legal education too was not capable of bringing about the necessary changes. After lawyers and judges went through education (mostly modeled in the law and development movement) the way they practiced law proved that law schools and training centers did not manage to be bath house where entrenched societal values could easily be taken off. Legal education was inadequate in that it placed excessive emphasis on learning legal rules and doctrines, a method which, apart from dull, did not enable the student to properly understand the social and economic reality and hence social justice as an idea.¹⁴⁴ Most political thinkers are aware that human beings are complex, multi-faceted beings made up of biological, physical, psychological, intellectual, social, and in many cases spiritual elements.¹⁴⁵ As Schmidt (2006: 179-180) suggested some part of Justice may not be analytically built into a concept and is not immutable, therefore it would be hard to believe that education can exclude these.

Unfortunately the law and development movement failed. Regardless of the situation in developing countries the same reason that accounted for the political development movement also accounted for its failure. The main proponents of the

¹⁴⁴ The idea is basically taken from Faundez: 2010, 2011.

¹⁴⁵ The idea is taken from Heywood (2000), *key concepts in politics*, P. 21.

movement at Yale, Trubek and Galanter, in their widely read article entitled *Scholars in Self-Estrangement* indicated how a lack of theory and empirical knowledge of the third world, a loss of faith in the Western conceptions as a picture of American society, doubts about the desirability or universality of the American experience and skepticism about the policy motives of America challenged the movement.¹⁴⁶

The movement in the first instance was based on a weak theoretical foundation of law and development. According to Tamanaha the crisis facing the movement was in part the wider crisis facing social science. As science could not have all the answers for all social problems, the ideas in the movement were also less than perfect thus the laws, the ideas and the conceptions were unable to solve the many social problems confronting developing countries (Tamanaha 1995: 21). For the lack of theoretical foundation the practitioners in the South were not able to prioritise reforms or to predict the effects of various measures; any analysis of the cause and effect relationship was difficult.

The lack of theory forced the movement to be based on false comparisons that lacked compatibility with the environment that existed in third world countries. Besides the normative blindness, the inability (and in some cases unwillingness) on the part of Western countries to understand the social and cultural plurality of developing countries,¹⁴⁷ many problems related to power imbalance, level of professionalism, level of competence and corruption in the South were also factors (Nader 2007: 11). Third world countries were characterised by entrenched ethnic highly diversified communities with wide social strata that were simply overlooked by the movement (Chua 1998: 6). The one-size-fits-all solution just could not yield

¹⁴⁶ Trubek and Galanter (1974), *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, *Wisconsin Law Review*, P. 1080, 1082, 1085, 1096, 1097. See also Tamanaha, *Supra* note 8, p. 475. See also Tamanaha (1995): *The Lessons of Law-and-Development Movement*, *The American Journal of International Law*, Volume 89, No.2, p. 3.

¹⁴⁷ The social concerns, for example, was not only separated from the economic one but was in conflict with it (Rittich 2004: 2).

enough resonance and specificity for such a highly heterogeneous societies. In such circumstances law was one player out of a team of players which needed to align their interests and ideas with the society in which they were playing a significant part.

This false comparison and idealisation was followed by invalid comparisons and involuntary impositions of Western laws. The mission became unjustified interferences with third world legal affairs. According to Trubek and Galanter this naivety and ethnocentricity was the main reason for its failure. Merryman also held that the movement failed, as it was largely a parochial expression of the USA legal style, and because it was to the most part an attempt to impose US ideas and attitudes on the third world (Marryman 1977: 479, 483). The belief that liberal legalism could easily be transplanted to developing countries from the Western countries was perhaps naïve with hindsight.

The reality of US society also indicated further contradictions. While the law and development movement encouraged formal systems, the 1970s also witnessed another significant Alternative Dispute Resolution (ADR) movement in the US the central theme of which is a desire to discourage litigation and to settle disputes out of courts.¹⁴⁸ It was an equal and opposite movement to the law and development movement. The assumption in the ADR movement was the lack of trust in courts as the primary institutions to apply or define the law. What Roscoe Pound called popular dissatisfaction and judicial crisis almost a hundred years ago was the central idea triggering this ADR movement. Though such a movement cannot be labeled as anti-law it was right in pointing out that formal systems in the West could not be omnipotent or omnipresent.

¹⁴⁸ See for example Riskin, Leonard (1987), *Dispute Resolution and Lawyers*, American Case book Series, West Publishing Company, pp.8-10, 12.

The other problem inherent in the movement was the way development was understood.¹⁴⁹ As progressive social change the law and development movement assumed a nation as developed when it adopted Western legal standards. This entailed economic growth that did not reflect the way development was conceived in the developing countries (Nader 2007: 10, 11) where US lawyers were not considered as social engineers (or as omnipotent problem solvers) (Marryman 1977: 466). More generally the movement allowed too little participation of lawyers from the developing countries and the reform focused on the formal legal process to the exclusion of non-formal systems. These factors narrowed the much greater project of freedoms and capability enhancement in developing countries that resulted in the failure of the movement and forced the West to resort to the new “Institutions Matter” slogan.

This failure coupled with the failure of governments in Africa, the collapse of dictatorships in Latin America, and the profound transformation in central and Eastern Europe thus necessitated a sound legal framework but also an independent and honest judiciary. The institution by having such improvements in quality didn’t cause the collapse of social and economic development (Santos 2002: 316). Accordingly, the judiciary as an institution became the central focus of the new law and development movement and has been reformed in all continents of the world. There after every government in transition and developing countries has been

¹⁴⁹ See Nader 2007, p.3. The movement had also treaded further contradictions. It assumed natural way of development while explaining how the West grew (which is evolutionary) but recommended the adoption of the West law by traditional societies (formative or reformative) that is not necessarily the way things grow naturally. This evolutionary and reformism and voluntarism and determinism are contradictory strands (Nader 2007: 19). While its instrumentality may increase the legitimacy and autonomy of the state, it may diminish the autonomy of judges in deciding cases who may be expected to implement the policies of the state. This may erode trust of courts as the courts would be expected to implement policies to laws with every change in regimes. This may further be problematic in a pluralistic society where non-formal laws are competing with the formal laws. Furthermore the movement, according to Nader, did not carry abroad the most enduring and basic political foundations of American law and democracy-the constitution and Bill of Rights. Thus, based on the “theory of lack”, only modern economic laws that did not reflect the true values of neither the American nor the South community were transplanted (Nader 2007: 19-20).

involved in one or more internationally sponsored projects designed to strengthen their legal system and institutions (Faundez 2010: 567).

3.2 A Brief History of the judicial reform programme

The old law and development movement revived in the late 1980s when the global economy interlinked factors of globalisation, democratisation and international human rights (Faundez 2010: 3). In line with this the Bretton Woods Institutions (the World Bank and the IMF) called for a major shift in the theory and practice of development.¹⁵⁰ Since then the World Bank has been the major player in promoting and implementing legal and judicial reform programmes. The Bank is a vital source of financial and technical assistance to developing countries and works in “partnership to reduce poverty and support development”.¹⁵¹

As a result the Bank advocated a number of substantive economic policies (structural adjustment policies) that required major legal and institutional reforms. These measures included trade liberalisation, privatisation of state-owned enterprises, deregulation, tax reform, fiscal discipline and enhancing the security of property rights (Faundez 2011: 6-7). These measures, termed the Washington Consensus, expected government roles in recipient countries to be reduced and pressed for free-market based reforms. These structural adjustment policies that aimed at “reducing the fiscal deficit of highly indebted countries did not yield the expected results and were resisted by governments and citizens of recipient countries (Faundez 2011: 6).

¹⁵⁰ During the 1980s the IMF and WB created loan packages for the majority of countries in Sub-Saharan Africa as they experienced economic crisis. The policy originated due to a series of global economic disaster during the late 1970s that necessitated deeper intervention in other countries. It usually involves a combination of free market policies such as privatization, fiscal austerity; free trade and deregulation (See Structural Adjustment www.economicshelp.org/blog/glossary/structuraladjustment, last visited on 2 Aug. 2016.

¹⁵¹ See The Challenge: Reducing Poverty, <https://www.worldbank.org/progress>, last visited 2 Aug. 2016.

Subsequently, the Bretton Woods Institutions demonstrated further shifts in the theory of development. The new approach to development was made obvious in 1992 through its *Governance and Development* publication that explained the legal implications of its new approach. The publication indicated that good governance is synonymous with sound development and further indicated that its programme and financial projects failed due to the qualities of government actions.¹⁵² This indicates that the Bank's approach had not been static as it exerted serious effort to offer intellectual justification for its involvement in the legal reform (Faundez 2010: 1). The dynamic nature of the Bank's approach can further be recounted from the proposal of Ibrahim Shihata who had been its General Council from 1983-1998.

In setting out the Bank's involvement in the legal reform programme Ibrahim Shihata proposed that legal rules and institutions should be market-friendly so that the two key institutions of the market economy (private property and contract) can function unencumbered by arbitrary state actions or by undue influence of local elites.¹⁵³ This proposal rejected the interventionist type of state and called a new type of State labeled the market friendly state. In this approach the legal system is expected to play critically important role. The proposal to this effect is positivist and formalistic which includes the law known in advance, properly enforced, amended by pre-established procedures, a legal system with general rules effectively enforced and authoritatively interpreted by an independent judiciary that was called upon to implement the prescription of the Washington Consensus (Faundez 2011: 3, 7).

As far as implementation of the proposal is concerned the Bank attached conditions, as it did not regularly survey its member states, requiring recipient countries to enact market-friendly legislations. Based on this policy-based lending, the establishment of a market-friendly legal system was taken as an immediate

¹⁵² World Bank (1992), *Governance and Development*, Washington DC: The World Bank <http://documents.worldbank.org/curated/en/604951468739447676/Governance-and-Development>, last visited 12 Sep. 2015.

¹⁵³ Shihata 1996: 1579; also Faundez 2011: 7.

destination of all states regardless of their level of economic or political development.¹⁵⁴ The conditions to release funds were based upon commitments of liberalisation, privatisation and deregulation.¹⁵⁵ These prescriptions are what came to define the Washington Consensus.¹⁵⁶ This justified the Bank's involvement in the reform as nonpolitical and uncontaminated from its original objective and helped to spread the Washington Consensus worldwide.

Initially the evolution of the Bank's reform process was overridingly influenced by the Washington Consensus,¹⁵⁷ and was aimed at creating rules and institutions to further the process of economic liberalisation. Nevertheless weak institutions in developing countries were believed to hinder the success of market-based policies introduced under the aegis of the Washington Consensus (Faundez 2010: 10). Corruption and a lack of respect for the rule of law (in sub-Saharan Africa) and various other governance failures at the root of the ongoing dilemmas of development also gave another momentum (Faundez 2010: 6) to the agenda of institution matters. When the Bank recognised that this process would be unrealistic without taking into account such institutional frameworks within which the law is embedded the governance agenda became part of the reform process (Faundez 2010: 2).

Thus new components of reform which included anti-corruption and the development of targeted policies on poverty reduction were added on to the Washington

¹⁵⁴ This effort, important as it revived the old law and development movement, has important impact on the operation of the WB and IMF: in 2009 the WB reported that it has funded 2,500 justice reform projects, which include grants, loans, technical assistance and research projects (For such and similar discussions see The world bank (2009) Initiatives in Justice Reform, and Faundez 2011: 6-7.

¹⁵⁵ Include technical advice, thematic reports and policy prescriptions, empirical research on the determinants of growth (Shihata, note 153).

¹⁵⁶ Williamson coined the phrase in 1990 "to refer to the lowest common denominator of policy advice being addressed by the Washington based institutions to Latin American countries as of 1989". These policies were fiscal discipline, reduction of public expenditure, tax reform, interest rate liberalization, competitive exchange rate, trade liberalization, liberalization of inflow of foreign direct investment, privatization, deregulation and secure property right (Global Trade Negotiations) www.cid.harvard.edu/cidtrade/issues, last visited 2 Aug. 2016.(Rittich 2004: 5).

¹⁵⁷ Which include trade liberalization, privatization of state-owned enterprises, deregulation, tax reform, fiscal discipline and enhancing the security of property rights (Williamson, 2000).

Consensus.¹⁵⁸ This necessitated the reform of a wide range of institutions beyond the governance agenda.¹⁵⁹ Efficient and independent judiciary, civil service reform, decentralisation and empowering the poor were among the measures and policies of this agenda. Within the governance framework the place assigned to law was largely restricted to restraining governments and facilitating commercial intercourse (Faundez 2010: 2, 11). The critical attention courts have got is a product of this new role attributed to courts as a key instrument of good governance and law-based development (Santos 2002: 317). This has expanded the scope of the reform agenda (which was circumscribed exclusively to the economic sphere) and left no area of law that could be excluded from the reform which paved the opportunity to re-conceptualise the nature of the reform process and to place it within a broader framework of development.

Despite the advice of leading development experts to make country specific assessment (as the implementation touches many sectors and is complex) the Bank placed the governance agenda firmly within the framework of the Washington Consensus and defined improvement in governance as improvements in economic performance which include making and implementing economic policy, delivering social, legal and regulatory services and securing accountability (Faundez 2010: 11). This resulted in producing a long list of recommendations that placed an unbearable stress particularly on those countries whose institutional capacity was weak (Faundez 2010: 11) which further necessitated the need to focus on core public institutions such as legal and judicial reform being key examples.

Though the World Bank inspired ideas especially in the Rule of Law programmes have influenced general thinking on the need for judicial and legal reform, the Bank later recognised shortcomings including being technocratic, adhering to the one-size-fits-all assumption and lending without allowing enough time for project implementation. Being aware of the difficulties and criticisms in the expansion of the reform projects,

¹⁵⁸ See for example Roderick 2002 and Supra note 135.

¹⁵⁹ There were 45 items in 1997, 66 in 1999 and 116 in 2003 (Faundez 2010: 10).

its legal department began responding to the difficulties. The one-size-does-not-fit-all philosophy become frequently used in the late 1990s (Post-Washington Consensus) and the Bank has brought about the social dimension of development into the mainstream economic development agenda (World Bank 2000). This shift is marked by the production of the Comprehensive Development Framework (CDF) which pronounces greater attention to the social, structural and human side of economic growth (World Bank 1999). The Bank (1999) was more ambitious when it suggested that poverty cannot be eradicated and other social goals cannot be achieved without political action at the grassroots” (World Bank 2000).

This recourse was in sharp contrast to the old law and development movement but also contradicts the economic rhetoric that necessitates the way to design the co-existence between the two conceptions. The recourse emphasised country-specific, country-led ownership, participatory and more inclusive approach to intervention that strikes a closer chord to that of a proper development strategy. The widening of the scope and procedural changes is more than responding to the critiques of the old law and development movement.

Based on the firmness of the Bank’s strategy, it organized a conference in the year 2000 with a central question: what is the role of legal and judicial reform in the development process? The answer given by the keynote speaker of the conference, Amartya Sen, in his widely quoted book *Development as Freedom* raised the issues of capability enhancement for citizens. This challenge was considered a costly diversion from the objectives of the Washington Consensus in which the tools of economic analysis couldn’t be easily employed to measure the results of development (Faundez 2010: 2). It highlighted the disadvantages provided by the intellectual dominance of economists within the Bank. The economists undermined Sen’s agenda in favour of the Washington Consensus so that institutional, legal and judicial reform was to serve the consensus. The Bank’s economists went about restoring the original link between legal reform and the Washington Consensus and

hence the “Institutions Matter” and judicial reform programmes began to make their way into the Bank (Faundez 2010: 10).

3.2.1. Judicial reform as an agenda of “Institution Matter” and the New law and Development Movement.

International assistance to the judicial reform programme can be divided in to two main periods: from 1960s to 1970s and from the 1990s to the present. The in between period of almost 20 years was a time when little judicial reform took place at all and when international donors were virtually absent from the scene.¹⁶⁰

The judicial reform programme was needed to tackle the issues of effectiveness. Accordingly judicial reform has been one component of the justice reform programmes that refer to the efforts of creating a viable judiciary, strengthening its democratic function and improving the functioning of a country’s legal system, both in terms of fairness and efficiency. It forms part of a broader category of the promotion of the rule of law and justice reform programmes (Gloppen et al 2004: 1, 2) which is built on the cornerstone of an independent, efficient and effective judicial system. Theoretically this has meant making developing countries and countries in transition more market friendly which has included the strengthening of the judicial branch, speeding up of the processing of cases, increased access to ADR, reduce caseloads in the courts and professionalising the bench (Messick 2002: 117-118). Tackling these issues has been intended to make the courts effective.

In the selection of judicial reform programmes three generalised approaches are notable. According to Magalhaes (1999:145) the reform programmes can be viewed from either the cultural and political legacies of the past, the role of international actors and external models and the self-interest of political actors.

¹⁶⁰ Gloppen 2004: 9 and save for the structural adjustment programme discussed in section 3.2.

Accordingly the motivations to reform the judiciary, according to Gloppen et al (2004: 4-5, 16), can be summarised as motivated by four objectives. The objectives include to:

- Facilitate human rights and provide access to justice for all members of society;
- Secure law and order;
- Facilitate economic development
- Secure democratic accountability, good governance, and the integrity of the political process

Most reforms have been influenced by external models and interests. For example, the 1960s reform in Latin America assisted by the US was motivated by economic development while the 1990s effort by the World Bank was motivated by economic liberalisation in enhancing economic development, encouraging foreign investment and trade and political liberalisation. The reforms in Africa in the 1950s and 1960s were motivated by the desire to strengthen local capacity so as to operate the country's legal system in accordance with each country's colonial past. On the other hand the 1990s African legal reform was motivated by the "wish to support democratisation and was less interested in economic liberalisation", by the desire to strengthening the rule of law and its institutional players as part of the broader good governance agenda (Gloppen 2004: 15, 16).

The endeavors of the World Bank was also motivated by the desire to see a more efficient and transparent judiciary capable of speeding up the process of economic development. Messik (2002: 1) states that the World Bank supports judicial reform only when it is relevant to the country's economic development and to the success of the Bank's lending strategy for the country. Legal reform, according to Ibrahim Shihata, was meant to serve the overriding objective of transforming state-centered development policies into market-based policies.¹⁶¹

¹⁶¹ Shihata 1996: 1577, 1579: see also Faundez 2010: 3.

After the year 2000, the World Bank (2000: 1) redefined its role as promoting economic growth and reducing poverty in its member states by providing opportunity, empowerment, and security through laws and legal institutions. The desire to making the judiciary effective was due to reflect on this role in light of the needs of national governments and donors. In this regard key considerations of the work of the Bank was the embrace of judicial independence, the right to limit government power and protect the rights of individuals, judicial training to educate and train judges in law skills and attitude, court administration and case management such as how to clear backlogs, record keepings, infrastructures, online decisions, fighting corruption, appointment of politically insulated judges, discipline and the removing of judges, the improvement in criminal justice, the accountability of government the promotion of alternative dispute resolution mechanisms in order to decrease court congestion, time and in some cases promote healthy competition.¹⁶²

Based on these objectives the court reform programmes are directed towards improving the court's efficiency, capacity, integrity and responsiveness (Gloppen et al 2004: 6, 7). The main problems that reform efforts have been trying to overcome are accessibility of courts such as resources, psychological and motivational barriers, the lack of responsiveness and capability, the lack of judicial independence, a shortage of resources and inefficient use of resources available, and lack of legitimacy. Moreover, the reform process concentrated mainly on improving efficiency by updating and modernising the infrastructure of courts by introducing modern systems of case management and court administration and providing training for judges and court personnel (Faundez 2010: 569).

3.3 Common trends in the Old and the New Law and Development Movements

The "Institutions Matter" agenda assumed the prevalence of some fault in the old law and development movement which needed a remedy. As the old law and

¹⁶² See for example Gloppen et al (2004: 3-5).

development movement had made assumptions associated with the judiciary one can welcome the institutional reform if amended structural faults in the earlier assumptions and practices of the judiciary. As indicated above the change introduced by the “Institutions Matter” agenda pertains to the policy shift that included an emphasis on institutions, human rights, policy-based (rather than project based) lending and the use of soft law in the involvement of new actors (including NGOs, religious institutions), the involvement of non-formal sectors and norms at the grassroots level and a desire to channel government power. These changes demanded complex interaction among the various actors that forced the Bank to retreat to its original position and made the changes, both dynamic and static, mere speculative than a firm reality.¹⁶³ Thus despite the shift in the policy direction of the new law and development movement, important similarities can be seen in the practice of the Bank than the record the documents care to tell.

Both movements shared similar roots that extend back to the 15th Century. Theoretical interest to attaching quality of institutions to country’s level of economic development flourished in the 15th Century. For example, in the 15th Century Sir John Fortescue stated that England’s prosperity was traceable to the quality of English legal institutions” (Messick 1999: 121). A restatement by comparison 300 years later of the importance of Adam Smith’s tolerable administration of justice to carry a state to the highest degree of opulence. In the 19th Century Max Weber correlated legal rationality with a Western kind of capitalism when he held that legal rationality was an instrumental factor in accounting for the emergence of capitalism in Western Europe. In the 20th Century Max Weber attributed the rationalized, well-functioning judiciary to the differences in development between West Europe and China” (Messick 2002: 120-121) and Hobbes emphasised the importance of the fear of some coercive

¹⁶³ The failure of the law and development movement made the Bank pursue a different policy. When it was made clear that social behavior could not be affected by an immediate change in the law, the Bank shifted its attention to center institutions (Barron 2002: 18) so as to pursue the same mission in a different way. Despite this shift in policy from doctrinal law development to institution development the protection of property rights and rights around the enforcement of contracts make up constituent parts of the rule of law (Barron 2005: 12).

power to respect wealth enhancing exchanges. More recently Douglass North's low cost means of enforcing contracts as a means of lowering higher transaction costs explains the contribution of the World Bank's involvement in the "Institutions Matter" agenda. The "Institutions Matter" slogan is thus a return to these original principles.

Most recent pragmatic approaches to theoretical trends, such as the interests of the Bretton Woods Institutions also correlate institutional quality with economic development. Both movements significantly narrow the conception of development to the domain of economic growth¹⁶⁴ and decouple it from social growth. Both aim at keeping the legal environment stable and predictable so that economic actors freely transact with minimal government interference (Barron 2005: 15). However, as the law and development approach did not prove a causal connection, the same is true for the new law and development movement.¹⁶⁵

The third similarity lies in the lack of contextualization on the part of the reform proposals. Both did not take note of the detailed analysis of the reform recipient's national institutional framework or their social conditions (Faundez 2010: 5, 6). The new movement explicitly embraced the rule of law rhetoric as a goal of development policy promoting sustainable development and good governance. This rhetoric was implicit in the old law and development conception. The movement produced and reproduced hegemonic institutions which bracket the people. The similarity in the "conception of the legal field was that it was not suitable for reimagining institutions" (Santos 2002: 315).

¹⁶⁴ See *Doing Business 2011, Ethiopia, Making a difference* for entrepreneurs. Doing business is the Bank's yearly publication to survey country's economic performance which ranks countries based on economic terms (starting a business, dealing with construction permit, registering property, getting credit, protecting investors, trading across borders, enforcing contracts and closing a business). This list is taken from the publication of the World Bank and International Financial Corporation, (*Doing Business 2011, Ethiopia, Making a difference* for entrepreneurs).

¹⁶⁵ Most studies only identified statistically significant correlation, not casual links, between institutions and economic growth (Faundez 2010: 12). Thus both (either in theory or in practice) exclusively emphasized on economic governance which is a return to its near and distant original emphasis on market-friendly institutions.

Despite the World Bank definition of its task in terms of poverty alleviation since 2000, the practice above demonstrates that both movements ignored social justice in its strictest sense. Practically they talk in a language of positive law, formal courts and authoritative application of such law by the courts. Both were devoid of practically promoting the non-market purpose of living in a world that avoided the view that the interconnection between law and other non-economic spheres of life should be carefully investigated. In this regard, the most significant non-formal institutions meaningfully impacted the lives of people in the South were not given enough space as part of the movement. Both rejected non-formal ways of people doing justice in poorer countries.¹⁶⁶ Despite the change in theory the practice the procedural, substantive and a formalistic approach to law remains the same.

Both movements, old and new, have little to do with law considered seriously. Martin (1983: 133) held that the old law and development movement has very little to do with development in terms of capability. Martin is partially right. It is correct to hold that the new law and development movement has very little to do with either institution defined by Douglass North,¹⁶⁷ or with development defined in this thesis in terms of capability realisation.

Thus reform movements have been challenged from various corners. The challenges didn't target the need to have the reform but rather are focused on its questionable assumptions, unproven impact and insufficient attention to the legal needs of the disadvantaged (Golub 2003: 3). It lies in the programme being ambitious, unrealistic, delinked from national priorities and the lack of sustainability towards results. For example, if one considers the economic achievements of the various economic miracles,¹⁶⁸ one can observe that the rule of law enterprise, as

¹⁶⁶ Both reduced or redefined sovereignty and made state "enabling" than proactive.

¹⁶⁷ This has been indicated under section 2.1as including the non-formal constrains though latter reduced to contract and property rights.

¹⁶⁸ Tigers and Dragons, which are Hong Kong, South Korea, Singapore and Taiwan: they were notable for maintaining exceptionally high growth rates (in excess of 7 percent a year) and rapid

presently conceived and implemented, is not the only way to achieve either improved economic outcomes or improvements in the quality of governance (Faundez 2010: 572). The extent it is detached from the earlier law and development endeavors is a further challenge.

If both movements have these similarities, it is important to investigate other discourses that may benefit countries like Ethiopia. Contemporary discourse and attaching judicial reform programmes and development can be discussed alongside five categories. The first is hegemonic to borrow the word from Santos and is to a large extent dominated by international organizations notably the World Bank. The second is the Capability Approach and the influential work by Amartya Sen. The third is a counter-hegemonic discourse dominated by different contemporary writers including Santos. The final two are related to the role of governments and people in reform programmes chiefly related to developmental state and legal pluralism. Let us have a closer look at each of them.

3.4 Hegemonic discourse

This discourse assumes that judicial reform programmes constitute an essential element of successful governance and anti-corruption strategies. Accordingly the objectives of good governance and anti-corruption couldn't be reached without overhauling the judicial system and recreating stable, impartial, independent, predictable and accessible institution. After the law and development movement such an institution is what a second generation reform demanded (Dakolias 1996: 1, 11, 64). The roots of the reform programme lie in the orientations of this discourse.

As per the discourse one of the means where such ROL project could be built or promoted is through the reform of institutions including court systems. As these reformed institutions are believed to significantly and positively affect the economic performance of a country, the reform programme has to achieve "the goals of judicial

industrialization between the early 1960s and 1990s
(<https://en.m.wikipedia.org/wiki/FourAsianTigers>), last visited 12 June 2016.

independence, access to justice, accountability and efficiency” (Barron 2002: 27). Its conceptualisation of reform is however intellectually nurtured almost exclusively by economists of a neo-liberal persuasion to the exclusion of the legal academics (Faundez 2010: 568). Thus the underpinning theory is the New Institutional Economics Theory (Barron 2002: 12) according to which long term economic growth (in contrast to the short term growth of the Asian Tigers) entails the development of the rule of law and civil and political rights (Barron 2002: 13). Named as a result as the Rule of Law enterprise, the very goals of reform programmes is contributing to a long term economic growth. Judicial effectiveness is associated with the presence or absence of one or more of these elements.

International institutions have shown paramount interest in seeing the attainment of economic development through this enterprise. Among the international donors the Bank is a “major player” in the promotion of the legal reform programme.¹⁶⁹ According to Ibrahim Shihata, the main thrust the Bank’s increased interest rests is based on the ground that court’s institutional reforms cannot be ignored in the process of economic development (Santos 2002: 325). Such reform programmes assumed the responsibility of quenching the needs of economic reform and of an open market. Accordingly the attainment of development, measured in economic terms, is the role of an effective judicial reform.

The Bank’s approach is in perspectives advanced by writers like Thomas Hobbes, Douglass North, John Fortescue, Adam Smith and Max Weber (Messick 1999: 121, 123). These writers argue to justify the “Institutions Matter” slogan from different angles. Risse, for example, relied on recent econometric work by Rodrick, Subberamanian and Trebbi to show that institutions are crucial causal constituents to economic development. Despite the fact that institutions, geography and integration

¹⁶⁹ Thome 2000: 3-4, Dodson 2002: 34, Barron 2002: 27, Vargas 2006: 45, Trebilcock 2001: 14, Santos 2005: 222.

matter to economic growth, institutions trump everything else. As such assistance to the poor should focus on institutional buildings.¹⁷⁰

As the enterprise is connected to the “Institutions Matter” agenda, it is challenged from different perspectives. For example, Dodson, Thome, Dakolias, and Hammergren question if the implementation of the discourse is on the right track. These individuals have witnessed what Latin America has experienced in an attempt to reform their judiciaries.

According to Dodson the experience in Latin American countries where the Bank had its first reform experiences and conducted the majority of its work, revealed that the results of the reform attempt were disappointing (Dodson 2002: 34) and were neither obvious nor easily measured.¹⁷¹ The reform programme in the region is said to produce results which are substantial but not drastic.¹⁷²

The reality in the countries where the reform programme is imposed also revealed how the main sponsors in this discourse took lessons from the failure law and development movements. Ineffective legal systems, weak political will, negative political culture, assumptions based on technicalities rather than political motives, the distribution of power (such as in Guatemala), the lack of local support and resistance from within the institution itself (such as in El Salvador), the lack of resources and poor reform programme from the start made the reform efforts in the region pessimistic and did not halt the Latin Americans life being subject to deficiencies in the rule of law (Dodson 2002: 34, Vargas 2006: 46).

Hammergren also questions the effectiveness of the project. She noted that the reform programme in Latin America had not necessarily brought about the performances or

¹⁷⁰ Risse 2004: 87, Hunt 2006, p. 18. This analysis is broadly in agreement with what Rawls formulated as a duty to “burdened society”. Hunt also agreed upon this approach and remarked that one of the two ways of vindicating human rights (including social, economic and cultural rights) is using all the tools at our disposal. One of the tools is the courts.

¹⁷¹ Dodson 2002: 34, Vargas 2006: 46; Dakolias 1996: abstract and executive summary.

¹⁷² This in turn demonstrates that “money and knowledge alone” were not sufficient to rectify the historic weaknesses in the courts of these countries.

outputs that were promised. Though there are important improvements in the region, the reforms were not meant to see improvements in the quality of service the courts provide. As per the recommendation of the Bank, they did not allow a focus on more fundamental things that require change and, the trend in such highly demanded areas of improvement was disturbing (Hammergren 2005: 407). It has been questioned if the reforms were guiled ones, benefiting judges and attorneys not the public. One of the problems identified by Hammergren was the jump-start of the US state re-democratisation process without taking account of local demand. Another problem was associated with the wrong assumptions about the process, performance, outcome, case load, delays, poverty in the courts, accessibility, commercial impediments to investment (which actually were criminal and administrative law), systems of registration and accountability in the courts (Hammergren 2005: 604, 608).

This discourse does not resolve conceptual problems including conceptions of development, institutions and the ROL that remained unresolved in the earlier movements. For example, the ROL has as many definitions to the extent of accusing "academics of having robbed it its analytical content" (Barron 2002: 12). It is a plastic and ambiguous phrase and is defined in various ways to the disadvantage of the academic but to the advantage of political debate. By the same token the inside definition of ROL is also ambiguous. The World Bank's definition of the ROL by Shihata including judicial independence is somehow different from the Tung-successor of Shihata which includes among others accessibility of justice, predictable and accountable government (Stephenson 2000: 7, Barron 2002: 12, 15). The former being more formal and the latter which is more substantive. With conceptual ambiguities one cannot be sure of what the real intent of international donors or the Bank¹⁷³ meant by while promoting the concepts.

¹⁷³ The lack of clarity lies in how this stance established the possible relationships between market, democracy and other social dimensions of life. The Banks' main orientation on market and enhancement (and reinforcement) of democracy (Thome 2000: 4, Dakolias 1996: 3, 5, 70) are now in agreement, now overlapping, now in conflict. According to Dakolias there is a tension between economic reform and democracy and between economic reform and social policy (Dakolias 1996: 10). The same conceptual problems prevail in the Banks understanding of development. This move

Thus the first discourse left the basic questions of social justice unanswered. Problems identified are similar to factors that contributed to the demise of the law and development movement and still remain an agenda for further exploration. The gaps in this discourse are somehow complemented by the conceptualisation of development by Amartya Sen.

3.5 The Capability discourse

The second discourse pertains to the capability approach as discussed in the previous chapter and follows a relatively holistic approach. Amartya Sen argued that development has to do with a wide range of dimensions of human being that bear on the capabilities of individuals to live lives they have reason to value. His analysis is based on his conception of comprehensiveness, conceptual integrity and casual interconnectedness according to which Judicial reform could only be seen as contributing to the process of development in general rather than separately to economic or other kinds of development. Glorifying one part of such a complex reality would produce a restricted view of development. Judicial reform programmes would be a critical part of the development process even if they do not contribute one iota to economic development (Sen 2010: 10).

According to this conception institutions are ways and means of achieving development as characterized by expanding the interlinked freedoms and removing the interconnectedness of restraints (Sen 2010: 23). Legal development will only be assessed when it takes note of the enhancement of people's capabilities rather than what the judicial body normally asserts or accepts. Sen has taken swaths of political freedoms, economic facilities, transparency guarantees, protective securities and social opportunities as the five distinct kinds of freedoms which are interconnected to advance the capabilities of a person.¹⁷⁴ Freedoms are the primary ends and principal means of

literally took development to mean economic progress, other critical components of which (social, environmental) being ignored or not given enough space.

¹⁷⁴ For the details of this and how their connections strengthen one another see Sen, Amartya *Development as Freedom*, Oxford University Press. Each of these rights and opportunities helps to

development that requires the removal of major sources of restraint. According to him development should enhance people's capabilities. Such basic capabilities lies with the Government's basic duties of respect, defend and support (Sen 2010: 225, 231). The goal of a reformed judiciary is thus not less than raising this capabilities of persons.

As discussed in the previous chapter this discourse too is incomplete and requires use of an assisting discourse which can be provided by the Counter-hegemonic discourse.

3.6 The Counter-Hegemonic discourse

This discourse provides an alternative to the first discourse and is to measure the delivery of justice or the prevention of injustice from those who are at the bottom of the hierarchy. Being counter-hegemonic it aims at domesticating judicial reform programmes. The discourse benefits from the prominent discussion of writers including Santos, Pogge, Upendra Baxia nd Pratiksha Baxi who criticize the legitimacy of the Bank involvement in the first discourse, the methodology that the bank follows and the efficacy of the reform project.¹⁷⁵

According to Santos the world is evolving in the direction of global consensus based on four elements; neo-liberal economic (the Washington) consensus, the weak state consensus, the neo-liberal democratic consensus and the legal and judicial reform consensus (Santos 2005: 315). These consensuses constitute the ideological basis of hegemonic justice. The fourth one where the judiciary is vested with the responsibility of delivering equitable, expeditious and transparent judicial services to citizens and

advance the general capability of persons. They may also serve to complement each other. Political freedoms takes the form of free speech and elections, social opportunities takes the form of education and health facilities, economic facility takes the form of opportunities for participation in trade and production.

¹⁷⁵ There are obvious differences between the authors included in the counter-hegemonic framework. The main difference seems to be that scholars such as Tamanaha and to an extent Faundez are critical of the World Bank's approach to law and development, but do not see their approach as intending to promote Western corporate globalization, whereas scholars such as Santos, Pogge, Upendra Baxi and Pratiksha Baxi are critical of the Western global corporate based globalization.

economic agents is the derivation of the other three and is the most complex and ambiguous one. Of other institutions in the liberal global consensus the judiciary is the quintessential national institution.¹⁷⁶ This is the basis to seeing the connection between reform programmes and development under this discourse.

According to the counter-hegemonic discourse it is doubtful if the hegemonic discourse could manage to avoid the problems which so frustrated and disappointed members of the law and development movement (Messick 1999: 126). In this regard Faundez effectively demonstrated how the hegemonic discourse pursued contradictory objectives. According to Faundez (2010: 2) the Bank re-conceptualised the nature of the reform process and placed it under a broader framework of development with the recognition of the need to take account of institutional framework in the realisation of legal reform. The Bank also ignored the intellectual backing by Amartya Sen, at the expense of economics pertaining the link between institutions and economic growth. This had been a resort to the original link between reform and the Washington consensus as it was solely aimed at the furthering of economic liberalisation. Thus, seemingly dynamic but resorting to the original link that legal reform and the Washington Consensus had (Faundez 2010: 2) the Bank pursued contradictory objectives in the following ways:

- a) A promotion to take account of local context with a resort to one-size-fits-all reflected in the Banks' well published edition: *Doing Business*
- b) The need to see the interconnection between law and other spheres of social life, the Comprehensive Development Framework (CDF), with the resort to seeing the relationship vis-à-vis economic growth and giving priority to market-friendly policies
- c) The move towards the "Institutions Matter" slogan and the expansion of the intellectual horizon to pursue market friendliness with a possible contradiction with ILO Labor Standards

¹⁷⁶ See Santos 2002: 317, the implication of which is that it is exceptional unnecessary to impose judicial systems.

- d) The tension between the definition of the Bank's mission as technical with the involvement in the legal and judicial reform that are not merely technical.¹⁷⁷

The tensions and contradictions forced the Bank to ignore the role of development regarding the non-economic dimensions of life and viewed the role of development too narrowly (Faundez 2010: 568-573). The Bank's approach does not only pursue contradictory objectives but is also a top down hegemonic imposition (Santos 2002: 317). As a result of being imposed, Faundez (2010: 6) held that most projects of judicial reform included long lists of activities without indicating priorities and realistic timetable for the completion of the projects.

These activities include building infrastructure for the courts, designing and implementing automated information systems, modernising the organizational and functional capabilities of courts, establishing career paths for judicial and administrative personnel, strengthening the transparency of the judicial bench, introducing alternative dispute resolution mechanisms to improve access to justice, establishing programmes to promote awareness of the legal needs of disadvantaged groups, especially those aimed at women, the young and indigenous people, the implementation of mobile court programmes, the establishment of legal aid clinics, the strengthening of public defenders offices and the improvement in the efficiency of judicial services for small businesses. This long list (drawn from the World Bank project in Honduras) is found in most countries of judicial reform programmes (Faundez 2010: 6).

While discussing the judicial reform programme in India, Baxi explored how impositions affected alternative dispute resolution mechanisms which according to the Bank was supposed to enhance access to justice and how it created judicial delay. Baxi held that the reform programme resorted to the strengthening of the rule of law

¹⁷⁷ Santos 2005, p. 352. According to Santos question of judicial reform, though judicial, is a political question. Owing to the reform, courts happened to be "an ideal instruments of a depoliticized conception of social transformation and are the main pillars of a democratic project". Thus, the reform judicialises politics.

framework that focused on access to justice in the context of economic growth and good governance. She argued that the reform created court arrears, imposed harsh regimes of impoverishment on the poor most prominently and excluded the poor. Thus the procedures and outcomes of the judicial reform disempowered the already dispossessed and only concealed the perfidious expansion of the power of the State and consolidate corporate interests. With the cost of justice, the reform used to legitimize the actualisation of projects of good governance, economic growth and development through the rule of law which now need serious interrogation (Baxi 2007: 2, 3, 17).

The Latin American and African experience also illustrates the impacts of hegemonic reforms. In Latin American countries and countries like Mozambique and Cambodia the globalisation is still mainly driven by donors, at times against the resistance of the recipient countries. In Africa the ROL programmes are imposed with the host countries in no position to resist. According to Santos (2002: 351) the high-intensive globalization is demonstrated by the case of Colombia as an example of extreme and intensive globalization and the result being destitution and economic decline. The tragic result of the reform projects being modest with the judiciary remaining weak and inefficient. The intensive pressure contributed decisively to the failure of most reform.

A top down imposition exclusively focused on the formal system at the cost of non-formal system¹⁷⁸. The Latin American reform experience left out multiplicities of

¹⁷⁸ Impositions against the will of the people had been resisted in a number of ways. Faundez discussed the tensions between different dispute resolution institutions from the indigenous peoples' point of view. Though democratisation and globalisation about bringing some change, Faundez noted that indigenous people regarded judicial institutions in Latin America as unfavorable, slow, expensive and inefficient and principally "a cause and symbol of their long standing economic and political oppression" (Faundez 2010b: 1). Despite policy of assimilation, the discrimination and unity of legal system in its traditional form of governance led citizens to resolve their own dispute. While judges openly disregard indigenous practices and customs, indigenous people on their part perceived judges and the judicial system in a negative light. The case of Africa is complex. In Africa states were heterogeneous considered "multiple microstates" operating in different sectors at different local, regional and national levels (Santos 2006: 45). The complex and dense interaction among the sectors at different levels made the boundaries between them more porous. Despite this these countries were taken as legal and judicial tabula rasa (Santos

unofficial legal orderings and the dispute resolution mechanism that has long existed within the official system. This has widened the gap between the law in books and actions (Santos 2006: 46).

Imposition also creates conflicts between the language of the reform programme and the language of the people in recipient countries. Upendra Baxi held that in all the discourse of development, the language of justice which was an antedate to Human Rights for a variety of reasons almost disappeared (Baxi 2007: 4, 7). According to him justice assumed a wider meaning than simply justice in a legal sense. In discussing the Bhopal case he claimed that the language of justice, rather than of human rights, was always championed by the people. Naming and shaming the producers of social indifference was much more important than the dialogue in terms of human rights. For the national and global impoverished the language of law almost always turns out to be disempowering whilst the language of justice continued to be source of empowerment.¹⁷⁹

Prudent investigation of justice in poor countries demands harnessing with the poor and the disabled. Furthermore much more care is needed in heterogeneous societies where multiple justice systems operate to ensure systems are effective. In this respect Pogge's idea is important as he opposed imposed programmes which exacerbated poverty. He, in his theory of global poverty, held that it is possible to establish poverty as a human rights violation under a minimalist normative position. The underlining assumption is that human rights exist not as a fundamental positive duty to assist and aid the poor, but rather a fundamental negative duty imposing a

2006: 70). As a result of which their diverse legal and judicial practices were ignored at the cost of imposed values.

¹⁷⁹ Baxi 2007: 7, Baxi 2000: 132, Twining 2007: World Bank 37-38. Baxi argued that talks of such human rights only promote "market-friendly human rights". Taking hegemonic approach seriously is, thus, taking human suffering seriously. Accordingly institutions impoverishing the people should be restricted. Baxi's concern has been for those people he calls "subaltern peoples". His distinctions (politics of human rights and politics for human rights, human right movements, human rights markets and human and market friendly human rights are puzzling and considers taking human rights seriously is taking human suffering seriously. He opposes all forms of imperialism, colonialism, racism, and patriarchy and sees the international human rights scheme as fragile, contradictory, and riddled with myths, false histories and ambiguities.

constraint on the conduct that causes severe poverty. This has the associated imposition of restrictions on institutions that cause severe poverty (Pogge 2002: 52, 55, 133, 180).

This position assumes justice involving specific minimal constraints on what harms persons may inflict upon others (Vizard 2005: 5-7). Accordingly the judiciary as an institution, either through the procedural law it follows or the substantive law it applies, will only be allowed to function as far as it does not cause poverty. As imposition contradicts the natural way things mature or develop, the development of institutions must be primarily counter-hegemonic and should be “based on the recipient country’s institutional framework and their social conditions so as to realize social justice” (Faundez 2010: 6).

Generally speaking the third approach questions normatively and empirically the methodology, legitimacy and efficacy of the first approach. Contrary to the language of the ROL, the counter-hegemonic approach talks in terms of justice and reverses the first approach. According to this approach it is highly improbable that the ROL and courts will sustain democracy against capitalism (Santos 2005: 52).

All the discourses outlined promote specific perspectives. This research suggests that the capabilities and counter-hegemonic discourses can make significant contributions to realising social justice and preventing injustice. Their contribution however has to be scrutinised in a pluralist society where the state claims to be developmental. I would like to suggest, that account has to be taken of further two dimensions in order to develop an effective judicial reform programme.

3.7 The Developmental State

Owing to the prevalence of rent-seeking and corruption, the 1980s structural adjustment policies assumed states to play minimal role in development. It was then assumed that as state grew in size, their range of functions, and the amount of resources they controlled, the proportion of economic activity that became incorporated into rental havens increased correspondingly and therefore economic efficiency was in decline. The prevailing thought was that the sphere of state action

needed to be reduced to the minimum to combat this. Bureaucratic control was to be replaced by economic subjects to the market whenever possible.¹⁸⁰ With the lack of powerful drives from the national government to constrain individual behavior and the pursuit of collective aims, the state was unable to perform even in its most basic role as the enforcer of contracts between parties (Evans 1989: 564). Hence, there was a need for the state to play a role in a more proactive way than as national police force towards development. This necessitated the improvement in government mechanisms and demanded the good governance state. It also defined development in terms of capital accumulation, which exclusively focused on democratic institutions of the state. An exclusive focus on this may not serve countries like Ethiopia.

The Asian tigers discussed under Section 3.2 tried to rectify some of these shortcomings and defined the role of the state as promoting economic development from within so that national businesses secure competitive advantages in the global market. In line with this the great industrial transformation of the modern era (after the 1980s) in the East Asian economies (Singapore, Taiwan and Korea) made the idea of the developmental state a key discussion all over the globe. Their economic success was “increasingly interpreted as depending in important ways on the active involvement of the state. (Evans 1989: 571). Woo-Cummings (1999: 10-20) defined the developmental state by its objectives and institutions and its characteristics can be summarized as:

- a) Planning substantive social and economic goals rather than leaving it to the market (plan rational capitalist developmental State) conjoined with private ownership under close supervision from the state
- b) Setting economic development as top priority and design effective instruments to promote such a goal; including forging new institutions,

¹⁸⁰ The idea of taking state action to the minimum is taken from Haywood, Andrew (2000) *Key Concepts in Politics*, P110, Palgrave Macmillan, who argued that Utilitarianism allows each individual to make his/her own moral judgments as each alone is able to define what is pleasurable and what is painful, it upholds diversity and freedom and demands that we respect others as pleasure-seeking creature. It provides the major foundation for classical liberalism.

weaving of formal and non-formal networks, the utilisation of new opportunities for trade and profitable production

- c) Avoiding shortcomings in unregulated free market forces and over regulated state for intervention and control; use of meritocracy and autonomy, use of professionals detached from powerful rent-seeking groups
- d) Achieving bureaucratic coherence, by providing a well-coordinated and well-staffed set of skilled employees, who have broad public and political autonomy
- e) State competence to implement the policies of Government

With a developmental state there is an obvious emphasis on socio-economic rights and the sectors involved in the provision of services. This state has meritocratic rather than coercive institutions so as to assist as well as discipline the big economic actors. Meritocratic institutions of the developmental state monitor these businesses towards the states strategic objectives.¹⁸¹ The state may increase incentives to “engage in transformative investments and thereby lowering the risks involved by such investments.” The role a state may play may not immune to rent-seeking but on balance the consequence of their actions promote rather than impede transformation” (Evans 1989: 563).

The following Section discusses the role of the developmental state in a pluralised society like Ethiopia.

¹⁸¹ See Evans 1989: P. 574. The implementation of this needed for example in Japan a coherent bureaucracy as a result of the greatest concentration of brain power, hyperbole-powerful, talented, prestige-laden economic bureaucracy of Weber renouncements. But the Japanese goes beyond this (Evans 1989: 574). It emphasized the indispensability of non-formal networks (both internal and external networks) as crucial to the bureaucracy’s coherence. The internal-meritorious networking connected with the external networks made the state and the private corporate elites even more important. The centrality of external ties has led some to argue that the state’s effectiveness emerges “not from its own inherent capacity but from the complexity and stability of its interaction with market players”. Its effectiveness depends on the ability to construct an apparently contradictory combination of Weberian bureaucratic insulation with intense immersion in the surrounding social structure.

3.8 Legal pluralism

The counter-hegemonic and capability discourses demonstrated that meaningful legal and justice reforms should take account of peoples' freedom to define development to make their life better. As legal pluralism is a key feature of many developing countries such as Ethiopia, effective and home grown judicial reform programmes would necessarily have to take account of legal pluralism. Meaningful judicial reform programmes would give due account to peoples multiple ways of doing justice. Conscious of this the 1986 declaration on the Right to Development under Article 1(1) provides that everyone has the right to "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, and contribute to, all human rights and fundamental freedoms which can then be fully realized". Accordingly all people have the right to participate, contribute and enjoy their economic, social, cultural and political development.¹⁸² The first element of this definition is participation but question is participation of what kind?

Participation through sharing hegemonic values involuntarily through various mechanisms, like structural adjustment or using soft laws, has been a new form of imperialism and a contractual mode of domination (Markus 2014: 373). As this could distance and dislocate the people from their own itinerary of development, participation under the usual state-to-state international development structure has failed to meet the objectives set out in the right to development (Markus 2014: 389).

Thus discourses have to be reconstructed or contested so that actors in the play of justice would be diversified in the interest of the objects of development namely its people. This empowers people towards capitalising their various modes of serving justice so that decision making would be democratised to the benefit of development as a whole, which is further defined by the people themselves. Democratising the process has the added benefit of diversifying actors in decision making so that development (as understood in this thesis as capability realisation) would not be

¹⁸² United Nations General Assembly Res. 41/129, 4 Dec. 1986, article 1(1).

reduced to a one-size-fits-all syndrome. Furthermore the grassroots or “bottom-up” perspective is more valuable for seeking to challenge power distribution within international development (Markus 2014: 389). The full enjoyment of this right entails the full exercise of legal pluralism which is not only a major theme in the study of justice but also a way of claiming communal identity.¹⁸³

So what is legal pluralism? Any sort of pluralism necessarily implies the presence of more than one legal system in the legal sphere. This contests the idea that lesser normative orderings, such as the church and the family are hierarchically subordinate to the law and the institutions of state. The legal reality in the modern legal system is approximate to the claims made on behalf of the state and this fails to see the fact that the legal reality is rather an unsystematic collegiate of inconsistent and overlapping parts, lending itself to no easily discernable legal definition (Griffiths 1986: 3, 4). In fact, the law in our modern society is pluralised rather than monolithic, in that it is private as well as public in character and that the national legal system is often a secondary rather than a primary locus of regulation. This reality contradicts “legal centralism” according to which law is and should be the law of the state, uniform for all persons, exclusive of all other law, justice produced and distributed by a state, administered by a

¹⁸³ See for example Markus (2014), *What is the use of Human Rights to Development? Legal Pluralism, “Participations” and Tentative Rehabilitation*, Cardiff University Law School, In this article Markus has demonstrated how marginalized and indigenous groups used the right to development as a means to claim active participation in matters that concern their community. Legal Pluralism enables people to actively participate in matters of justice which gives more energizing power towards realizing the capability of litigants. In the field of legal pluralism the identification of law from other norms of legal ordering has not been straight in different jurisdictions. As has been discussed in the previous chapter the line demarcating law and justice has been grey. Some part of the legal history of Ethiopia makes it clear that the true birth place of laws was not the formal laws enacted. It was in the non-formal systems and in the Emperors (seen as fountains of justice at times) who were mitigating the rigors of laws. The legal history of the country also shows the attempt on the part of the rulers to centralize legalism. This can be seen in the introduction of Fetha-Negest and the civil code attempt to disallow application of customary laws in civil matters. The bewildering fact is that the more is the push, the more is the infiltration of the non-formal system in to the formal system. Furthermore, as the question what is law in Ethiopia has not been answered so far and as the current Constitution declares to serving as a litmus paper for the play of the legal sphere, justice pluralism is more visible in the context of Ethiopia.

single set of institutions (Galanter 1981: 1, 3, 20) which is “contrary to the reality, a myth, an ideal, and an illusion” (Vanderlinden 1989: 49). Legal centralism thus has been the major obstacle to the development of a descriptive theory of law.

Legal pluralism is an attribute of a specified social group, and not a name of a doctrine, a theory an ideology, or an attribute of law or a legal system. In real terms it implies the presence of multiple legal mechanisms rather than one entire legal system. Legal pluralism is therefore a state of affairs in which the presence of behaviour pursuant to more than one legal order occurs.¹⁸⁴ It denotes the discovery of “...allocation of decision-making authority that would maximise the coexistence of these normative orders”.¹⁸⁵ This involves the law as something which is more than mere state law which necessitates a revision of the role of law, nature of law, function of law and the relationship it has with other norms of ordering society. This pushes us to review the legal reality and hierarchy of norms and the arrangement of forums in Ethiopia where the state claims to be democratic developmental whose main goal includes alleviating poverty.

Conclusion

This chapter explained that the global initiatives to improve the way the legal system works have been dynamic in theory but static in practice. It made clear that the

¹⁸⁴ Griffiths 1986: 1, 3, 10, 39. This necessitates the revisiting of what law in real sense is. According to Durkheim “law” is a social phenomenon which is to be defined by “function and not by form” (Dupret, *Legal Pluralism, Plurality of Laws and Legal Practice: Theories, Critiques and Prexiological Re-specification*, European Journal of Legal studies, Issue 1, P.2). Chiba in Dupret identified three dimensions of law: official law vs. unofficial law, legal rules vs. legal postulates, and indigenous law vs. transplanted law. It is in the combination of these at many levels and dichotomies that the law of each individual country is analyzed (Griffiths 87). Law is the self-regulation of a semi-autonomous social field (Moore in Griffiths)-multiple, overlapping. It is present in every ‘semi-autonomous social field’. Omnipresent, normal situation in human society...having sources in the self-regulatory activities of all the multifarious social fields present, activities which may support, complement, ignore, or frustrate one another so that the ‘law’ which is the result of enormously complex and usually in practice unpredictable patterns of competition, interaction, negotiation, isolationism, and the like.

¹⁸⁵ Surya Prakasha Sinha in Abera Degefa (2013), *Legal Pluralism in Multicultural Setting: Legal Appraisal of Ethiopia’s Monist Criminal Justice System*, Law and Development, and Legal Pluralism in Ethiopia, JLSRI Publications, P.143.

dominant discourse in the legal and justice reform programme distanced local contexts, such as legal pluralism and the developmental state, where the reforms were to be implemented. In practice the different discourses to this effect marched a long history but to end up with defining development narrowly in terms of economic growth. The trend also defined institutions and their roles narrowly as conception and protection of contract and property rights but to dislocate decision making bodies from the real lives of people.

The global endeavors to reform the judiciary has suffered from the same reconstruction. It had monopolised justice of the norms of the state and court systems as institutions to protect institutions of property and contract rights. This has excluded non-state norms and non-state actors in the play of justice and distanced decision making bodies from serving social justice. This is more impoverishing in poorer countries where legal pluralism is the rule and people make use of non-formal decision making bodies as the dominant mode of dispute settlement mechanisms at the level of extensive pluralism. Unless a legal system empowers people and recognises these forums as proper ones, particularly in a developmental state that recognised the right to development, decision making bodies and social justice would remain disconnected to disempower and decapacitate the people.

The next chapter explores the theoretical concept of whether the judicial reform programme of Ethiopia suffered from the same mistake.

Judicial reform in Ethiopia

The previous chapter discussed the global endeavors to improve institutions (especially the judiciary) and it has been indicated that there are theoretically distinct approaches about how to improve institutions. The main problem in reforming the judicial system had been the imposition by IFIs of a list of norms which narrowed the conception of development as economic growth. This excluded the other important project of social justice in poorer countries. Judicial reform programmes embraced recommendations with the same list of activities to be implemented across jurisdictions and dislocated justice from the non-formal system so that justice was distanced from the lives of the people. The problems in identifying institutions of institutions, social justice and the failure of the reform programme necessitates search for a remedy in the context of Ethiopia.

This chapter explores whether the judicial reform programme implemented in Ethiopia suffers from same mistakes as the global effort. It, accordingly, explains the judicial reform programme in Ethiopia as a solution to the legal problems discussed in Chapter One and investigates the history, nature and structure of the judicial reform programme in the context of Ethiopia. The chapter explores solutions proposed by the reform programme towards the realisation of social justice.

The chapter is organized in two main parts. The first part examines issues of social justice from the perspectives of the Ethiopian Constitution and further examines whether and how policy documents and government plans deal with problems of social justice. After a brief introduction on constitutionally recognized ways of dispute resolution mechanisms, the second part deals with the history and content of the judicial reform programme and whether the programme can solve the existing judicial problems to the same extent so that dispute settlement systems render quality social justice which is inclusive, creative, sustainable, equitable, viable, targeted and proactive. .

4.1 The growth and transformation plan (GTP)

Ethiopia targets the attainment of democratic rule, good governance and social justice based on the involvement and free will of the people, extracting itself from poverty, and with the intention to reach the level of a middle-income economy as of 2020-2023. On the basis of this vision the second Growth and Transformational Plan (hereafter the GTP2), is approved by the HOPR on December 25/2015, and is topical among Government bodies including policy makers, the executive, courts and media in Ethiopia.¹⁸⁶ The eradication of poverty is the basic aim of the plan and all strategies, policies and plans are geared towards it (the GTP2: 1, 21).

The GTP stipulates strengthening developmental state and democratic institutions, improving the effectiveness of the justice system and ensuring the independence, transparency and accountability of courts are emphasized for development. The strategy for the justice sector is to ensure its effectiveness towards contributing a stable democratic and developmental state. Whilst the implementation and interpretation of law is expected to be in conformity with the Constitution, customs and traditions of peaceful resolution of disputes will be given special emphasis and will be applied widely during the GTP (GTP2: 103).

Like the reform documents the GTP also adheres to the world development as a solution to the societal problem without a consensus on its definition. Development concerns, as understood in this thesis, should exert efforts by the Government to commit itself not to deprive the people of their needs as it should equally broaden the opportunities (economic, social, environmental) people should have towards exploring how empowered or disempowered people are with the GTP objectives regarding justice. The Constitution and the GTP claim that Ethiopia is a democratic developmental state; hence a brief discussion of what development means is a logical progression.

¹⁸⁶ The plan is being implemented for the second time (hence GTP2 for the year 2015-2020). The GTP2 considers development as a solution to the country's problems, especially poverty.

4.2. Ethiopia as a developmental State

The FDRE claims to be democratic but also a developmental state. The expectations and elements of a developmental state are discussed in the previous chapter. In the context of Ethiopia here follows an explanation of what is expected of the Ethiopian judiciary as a responsible institution of the state.

Generally speaking the Ethiopian judiciary is expected to fight rent-seeking, operate independently (especially from the influences of the affluent) and work in an atmosphere where developmental thinking is hegemonic.¹⁸⁷ As part of developmental state judicial bodies as institutions need to plan their overall activity in line with the dictates of a developmental state. The plan is expected to give much emphasis to socio-economic rights and justice. Accordingly reconstructing a new legal theory and practice is also a must in this respect. In the socio-economic sphere the judiciary is expected to protect property, enforce contracts efficiently, apply commercial laws effectively, be efficient in criminal, family, land law administration and give attention to social needs and poverty reduction. The judiciary is expected not only to work in cooperation with the Government but it is also expected to account or put a pressure on the Government towards alleviating poverty especially where rent-seeking dominates. In cooperating with the Government it does not work as a mere extension or instrument of the Government but works in its own specific interest and competence and to account the government when it fails to realize social justice. It should also form effective external ties with bodies including

¹⁸⁷ In this respect see the policy on Ethiopian Renaissance, FDRE (November 2011), *Ye'hidisie Mesimer Be'ityopia Hidasi*, pp. 39-57, 65-68. According to the policy the Ethiopian developmental state is modeled on Taiwan and South Korea models. There are two reasons why developmental state is necessary in Ethiopia: the first one is (probably the main one) the need to changing the hegemonic rent-seeking political economy and the second one is avoiding selectively and effectively developmental throttles that could be the causes of market failures. Ethiopian developmental state has three basic characteristics. These are considering development as question of survival and committed towards this, a politically and economically independent state from the affluent and creating hegemony of developmental state mentality. These elements consider poverty, lack of good governance and lack of democracy will lead Ethiopia to its collapse. It too considers ownership by the government of key economic sectors (resisting the neo-liberal campaign to privatize) and strengthening intimate relationship with the peasantry.

the non-formal decision making bodies as a prerequisite to effectuate developmental missions: broadening the room for the alleviation of poverty and narrowing the room for vulnerability to rent seeking. This demands the prevalence of meritorious, coherent and qualified judicial bodies engaging with non-formal systems of dispute resolution and monitoring the business and the state towards the state strategic plan. If Ethiopian judicial reform is not to suffer from the same mismatch effect, these local needs should be included in it. Reforming and building such judicial body remains of paramount importance.

4.3 Contributions of the Constitution towards social justice.

4.3.1. Making sense of legal pluralism

In a country of justice pluralism, State courts are not the only organs to serve justice and prevent injustice. The 1995 Constitution under Article 39(2) and (3) grants every nation, nationality and people the right to “administer itself, promote its culture, help it grow, flourish and preserve its historical heritage”. The corollary duty of this right is boldly stipulated under Article 91(1) of the Constitution which declares that the State is responsible to promote the equal development of customs and culture in so far as they are not inconsistent with the Constitution. The non-formal systems of dispute resolution mechanisms which operate outside the domain of the formal structure and formal recognition are included as beneficiary of such promotion.

Further the State is responsible to make use of the rich heritage of culture and dispute resolution mechanisms in pursuance of its aim to preventing injustice and realizing social justice. The realisation of the right to justice under Article 37 of the Constitution would be meaningful when the horizon of the forum for justice is broadened to include such social and cultural heritage. Giving due recognition to legal pluralism broadens the freedom of choice of litigants to suit their needs

towards realising their choice of ends of lives.¹⁸⁸ Despite their being located outside the sphere of the formal system, these systems however are expected not to drag or encumber the commitment towards sustainable development.

If dispute resolution organs are duty bound to sustain development as a result of the Constitutional imperative, both systems need to be treated as two competing systems with the outcome of achieving social justice. Thus, despite the lack of space given to non-formal systems in the global judicial reform endeavors, the Ethiopian reform programme cannot ignore the non-formal system. The pertinent questions would therefore be whether the role of these institutions in an era of proactive judicialisation of social justice can be balanced against proactive non-formalization of social justice whilst considering the possible intertwining of formal and non-formal systems.

4.3.2. The right to development

Abera holds that while a highly developed legal institution characterizes developed countries, underdeveloped countries are characterized by low standard of living and underdeveloped institutions (Abera 1998: 193). This might not hold true for Ethiopian Constitution.¹⁸⁹ The preamble of the Constitution declares that the Constitution is an expression of a strong commitment of the people to advance

¹⁸⁸ The way these non-formal bodies handle cases impacts (less, equal, more importantly) the lives of the parties who seek their assistance and administration on the issues they are faced with. Depending on the degree of conflict, the subject or object of a conflict (e.g. land, property or contract) their outcome influences the way the capacity of parties is enhanced towards their "being" or "doing".

¹⁸⁹ The Constitution is adopted on Dec 8th, 1994. The date which the Constitution is adopted is commemorated as the National Day of Nation, Nationalities and Peoples of the country. Despite her long constitutional history (dating back the days of Da'amat state-500B.C-100 A.D) the Constitution is "peculiar" (Solomon 2008:3) and, of course, "new" (Fassil, 1997: 15). Its peculiarity is characterized by many of the departures it had from the earlier constitutions. The language policy of the new Constitution, the utmost importance it gave to ethnicity and federalism, the coverage of human rights (particularly the right to self-determination up to secession) and the conception of social justice and sustainable development are amongst significant departures from the earlier Constitutional discourses. The issues surrounding their inclusion are vehemently debated but the most important thing here is rather seeing how new and how peculiar the Constitution is by and for the Nations, Nationalities and Peoples of Ethiopia.

their social and economic development in an orderly and peaceful fashion. This is what either the Monarchical or Marxist oriented constitutions aspired to achieve but subsequently failed to deliver (Fassil 1997: 49). Thus it is important to ask how orderly and peacefully the social and economic development will be attained.¹⁹⁰

The Constitution also recognizes the long established relationships and interactions of Ethiopia's people. The preamble of the Constitution stipulates that the people are convinced to live with their "rich and proud cultural legacies" and to develop their "common interest". The result of such interaction and conviction is the spring board to aspire their "common destiny." Hence there is a mutual recognition to continue a just past based on the mutual consent of Ethiopian people.

The discussion on the legal history of Ethiopia illustrated how the non-formal systems of dispute resolution had much continuity with the past. The primary rule to break the continuity is when the tradition of the past collides with the dictates of the Constitution. The hierarchy of norm arrangements in the Constitution gives prevalence to Constitutional rules. This holds equally good for dispute resolution mechanisms. Traditional values are not given a subordinate position where they can simply be tolerated or discarded by formal institutions. As any decision of a government body (including judicial bodies) cannot contravene the Constitution, the same is true for non-formal bodies. Thus provided this ceiling is respected the non-formal decision making process and bodies are allowed to operate as the formal ones do.

On the other hand the Constitution speaks in the language the Western world; that part of the Constitution is not unique to Ethiopia. The preamble once again

¹⁹⁰ It is not the conviction of the writer that in the way to development the "social" should necessarily come after the "economic" or vice versa. The attainment of the one makes the attainment of the other highly probable. It is only when all, not one, is well off/better off economically that society, most probably, will be better off socially-and hence a society of one economic order. The other way round, when there is a just society it is highly probable that the society will be well of economically. The peculiarity of the Constitution would be meaningless unless it bears to the people the fruits of such commitment and secure sustainable development.

forwards a desire to constitute a political community founded on a strong commitment to the ROL. Neither the Constitution nor enabling legislation clarifies the ROL. Moreover, one-third of the Constitution (primarily Chapter 3 of the Constitution) is devoted to issues of human rights.¹⁹¹ It uses the language of 'rights' more than 55 times, with one of them being when the right to development is recognised. It is wise and proper to be committed to such norms but also wise to explore how far Western language impacts the Constitution and the judicial reform programme. It is also important to draw parallels between the language of human rights and of justice.

Thus another important contribution of the Constitution is its recognition of people's right to sustainable development under Article 43.¹⁹² This right is recognized as a universal and integral part of the fundamental human rights (Fasil 1997: 171). It declares that the Ethiopian people as well as each Nation, Nationality and People have the right to improved living standards and sustainable development. The basic aim of development is to enhance the capacity of citizens for development and to meet their basic needs. The beneficiaries of this right in the Constitution are Nation, Nationalities and people who are vaguely defined under Article 39(5) of the Constitution. Thus the Constitution can be said to have hinted how issues of human rights and justice should be balanced in the context of Ethiopia.

The Constitution lays two main duties on the State concerning the implementation of the right to development. One is the duty to respect the right of the people at the grassroots to participate and be consulted in matters affecting their community.

¹⁹¹ On the other hand it uses the language of "justice" three times-twice when dealing with rights of persons arrested and accused and once when dealing with "access to justice".

¹⁹² The State is also duty bound to protect and ensure the country's right to sustainable development when entering in to global relations. Ethiopia is a signatory to many international conventions, including the convention to effect development. The constitution declares that conventions of such kind shall ensure and protect Ethiopia's right to sustainable development. The language the Constitution uses towards non-formal systems is essential to begin with doing or undoing justice. When policy documents and secondary institutions fail to effectively give life to the dictates of such basic institution, the need to reform secondary institution arises.

The other is a duty to enhance the capacity of citizens to sustain development. This includes realising the objectives of Sen's positive and Pogge's negative duties as discussed in the previous chapter.

4.3.3. Judicial objectives and Constitutional imperatives

Though the judicial bodies of Ethiopia are expected to respect, protect and realize the Constitutional imperative of development, the core expectations of the Constitution are not found in the law establishing the courts. However, from the dictates of the Constitution, the GTP and the policies of the country one can see that the courts are duty bound:

1. Not to contravene the Constitution (Article 9(1)) which includes the right to development
2. To exercise judicial tasks independently and to be directed solely by the law (Article 79 of the Constitution)
3. To see the right of development respected and enforced (Article 13(1) of the Constitution which in turn means that the courts are duty bound to:
 - 3.1. Improve the living standards of the people
 - 3.2. Enhance the capacity of citizens for development
 - 3.3. Meet citizens' basic needs
4. To interpret the right to development in a manner conforming to the international conventions ratified by Ethiopia (Article 13(2)). Among the conventions ratified by Ethiopia is found the 1981 African Charter on Human and Peoples' Rights (ACHPR). Article 22 of the ACHPR recognizes the right of all people to their economic, social and cultural development. This is more than identifying development with economic growth. Freedom and justice are identified as essential objectives for the realisation of the right (see the Preamble of the ACHPR). The ACHPR implies that the right to development is a human right and is a right to a particular process of development in which fundamental freedoms are realized. Each of the

rights has to be exercised with freedom, and the rights unequivocally confer obligations on duty-holders (as per Article 25 and 22FF of the ACHPR). Thus the right to development is a claim to freedom and justice towards a wider understanding of development and a duty on the part of the decision making body towards this objective.

Hence the documents assume that law (especially the Constitution) is a basis of development and institutions, both formal and non-formal, are equally important to effect development positively as understood by the Constitution. Accordingly, Ethiopian courts have tasks beyond the mere disposal of cases that requires a balancing of different interests in disposing of cases. The balancing exercise compels an effective decision maker effectively balancing social, economic and environmental issues.

Based on this the following section discusses what is to be expected of an effective decision making body towards contributing to attaining and sustaining development.

4.3.3.1 Effective decision making: basic needs, living standards and enhancing capabilities for development.

As has been discussed in Chapter One the desire to civilize, modernize and progress Ethiopia from the reign of Emperor Tewodros through to the *Derg* regime had not led to the country's aspiration being achieved. Contrary to this, the results coupled with other causes have been disappointing and accounted for the down fall of the States.

Post 1995 developmental concerns remained principally concerned with the alleviation of poverty. This concern persists alongside controlled privatization, structural adjustment and judicial institutional restructuring from International Financial Institutions. Post 1995 contribution of decision making bodies were measured to the extent that it balanced competing interests and alleviated poverty,

which remains the primary yardstick in measuring the effectiveness of decision making bodies.

In terms of the GTP and the Constitution poverty alleviation, this would require one of the following three things: raising the capability of individuals for development (social, economic, environmental), meeting basic needs of citizens (including housing, education, food, water, social security and quality service), and improving the living standards of citizens. Both individuals and groups would be expected to develop; individuals through their enhancing capacity and groups towards an improved living standard. These remain the objectives of development under the Constitution which decision making bodies too are expected to realise.

4.3.3.2. Standards of living and basic needs

4.3.3.2.1. Positive duty of decision making bodies

The conception of standards of living is a difficult but central, question in studying poverty (Sen 1985: 17). Sen held that it is “hard to think of an idea more immediate than that of the living standard” and associates this conception with “quality of living”. The standard of living has to be seen in terms of the objective minimum where the minimums including commodities, house accommodations, medical care, food, are “fair enough” as a direction to go but not places to stop (Sen 1985: 15).

Issues around living standards need to be seen in connection with a discussion around basic needs. The original formulation of basic needs takes into account certain minimum amounts of essential commodities such as food, clothing and shelter” which makes the literature imprisoned in commodity fetishism’ (Sen 1989: 45). If the concern is with the kind of lives people lead or could lead, living standards and basic needs should be formulated in line with functionings and capabilities (Sen 1985: 25). The issues are instrumentally, rather than intrinsically, important and must be converted to ends and in converting them to ends individual differences are significant. With a difference in the ‘conversion factor’ for

commodities living conditions may vary greatly in accordance with physiological, social, cultural factors.

Living standards and basic needs can be illustrated in the Ethiopian context. We can think of two cases where two different people possessing different commodities have different life styles (conversion factor) and litigating before a decision making body. A disabled person in case 'A'¹⁹³ could win 100,000 ETB which an able person 'B' might also win in another case. Both opulent to the same amount but it could not be said to have the same standard of living. In this case "B" (where physiological, medical, climate and social factors *citrus peribus* bear less of their influence on him) could be said to have a higher standard of living than 'A'. The disability 'A' has restricts the freedom of choice he/she may have. The focus has to be on what the winners in both cases can or cannot do can or can't be and whether the winners have the ability to achieve/be what they can with the 100,000 ETB. What they need in their life and how each one of them can convert their money into is what matters rather than pure possession of the Birr (Sen 1985: 25) as the value of living stardard lays in such conversion. The standard of living is such "functioning" and "capabilities" (Sen 1985: 16). The winner in this case will be capacitated when he secured the ability to win the case to the extent of 100,000 ETB, (his achievement, his doing, or his functionings), able to collect the Birr (his doing), and able to covert the Birr into what the winners reasonably want to live (of being). As functionings is the constituents of the person's being, this can vary from the money to being healthy, having a good job, and being safe, to more complex states, such as being happy, having self-respect, and being calm. This functionings is

¹⁹³ See Pogge (2007) *Could Globalization Be Good for World Health?* PP. 1-3. As a disadvantaged party in a litigation we can also think of women (suffering severe ill health than men), children under the age of 5 (accounting for 60 % of death toll), the poor and the poorer inhabitants (suffering from avoidable mortality and morbidity rate).

crucial to an adequate understanding of the capability approach; capability is conceptualized as a reflection of the freedom needed value from functionings.¹⁹⁴

Functionings and capabilities are also related to aspect of freedom (Sen 1985: 36). Meeting basic needs involves avoiding commodity achieving illegitimate obstacles. This necessitates enhancing individual freedoms whilst eliminating or reducing unfreedoms. In the scenario of 'A' and 'B' above both could win their case with or without the non-formal systems. If the non-formal system were not available or were inaccessible, the freedom 'A' and 'B' would be reduced to that extent which is in turn a reduction in capability. Accordingly it wouldn't be absurd to argue that there is some loss in the winner's living standard. The presence of alternatives increase the probability of winning. There is this "simultaneous and two-way relationship between functionings and capabilities" (Sen 1985: 36, 37).

In a highly traditional, communal and litigious society for the most part of its legal history, basic needs and living standards encompass a minimum which can be counted objectively (such as the 100,000 ETB) but also that which may not be feasible to count but which is impossible to ignore such as the justice provided by the State. The mentality of litigation throughout the nation will demonstrated the need to consider the quality of decision making as basic a need as the 100,000 ETB. Furthermore questions of basic needs and living standards as aspects and essences of quality pertains to opportunities decision making bodies can create for the parties so that they can fulfill their functioning of living therefrom. Thus the judicial service can not be below the minimum standard expected of the people.

This discussion urges us to critically consider the current trend of the Ethiopian judiciary in which cases are disposed of where, as shall be discussed in the next chapters, the consequences of the disposal either enhancing or undermining human functionings and capabilities are not given due space. There is thus a strong need to

¹⁹⁴ Sen, Amartya (1992). *Inequality re-examined*. New York Oxford New York: Russell Sage Foundation Clarendon Press Oxford Univ. Press. ISBN 9780198289289.

consider ends of life in the procedure decision making bodies follow or the decisions they arrive. Gains from the progress for decision making bodies should move in the direction of assisting in the realisation of these functionings and capabilities.¹⁹⁵ The expectation of these duties from the courts appears of a Senian nature but can only be completed by a discussion on the negative duties of courts.

4.3.3.2.2. Negative duty of decision making bodies

According to Pogge, the Senian capability thesis “gives rise to open ended questions”, is “over extended” and “implausible” (Vizard 2005: 2). Pogge’s conceptualization of poverty as a violation of human rights on the basis of the assumption that human rights imposes a fundamental positive duty to assist and aid the poor but rather a fundamental negative duty to reprimand conduct that causes harm or the institutions that cause sever poverty (Pogge 2004: 34, Vizard 2006: 6).

Thus realisation of social justice demands the decision making bodies to act to alleviate poverty and restrain from impoverishing the poor. Acts impoverishing the poor would narrow the real opportunity towards the realisation of social justice. This negative duty is equally important in the context of Ethiopian decision making bodies and can be breached in a number of ways resulting in harm to the poor. Such harm can be inflicted when judicial reform programme launched by these bodies doesn’t reflect the true notion of Ethiopian justice. Harm can also be inflicted through the substantive decision the courts make to the confines of procedural restrictions in place. If decision making bodies become insensitive to the social, economic and environmental harm of their decisions on the parties and

¹⁹⁵ To recapitulate it can be said that the judicial functions are deemed to be effective when they have fulfilled the objectives enshrined in the Ethiopian Constitution. More specifically they will only be effective when they promote sustainable development as per article 43; when they contribute to raising the living standards of the parties before them; when they shape behaviors of the citizens beyond the parties in dispute towards meeting basic needs and living standards..

beyond and do not expand the real opportunities of litigants in legitimately shaping the outcomes of their case, this harm prompts much needed reform.

This has to be the starting point in any major reform or design of judicial responsibility. Though it is not impossible to think that the realisation of a perfect justice in a polity, it would be good to start from what Sen called the removal of “clear injustices and the identification of redressable injustices” (Sen 2009: preface). Social justice demands this respect for the negative duty for Ethiopian decision making bodies, to be conscious of their wider responsibility and the implications they are responsible for. The duty to respect, defend and support capability enhancement lies in respecting these negative and positive duties of decision making bodies.

4.4. The Ethiopian judicial reform programme

Cognizant of the problems of social and economic justice¹⁹⁶ the Constitution recognizes the right to development with a desire for this to be realized to its fullest extent in a successful sustainable way. Considering the country's level of development its institutions including its ineffective judiciary need to exert their maximum focus to achieve its aim. The way Ethiopia uses and reforms its institutions is key to the attainment of this goal.

In the Ethiopian context the march from feudalism to socialism and then to developmental state has been a long journey in terms of time and content. As explained in Chapter One and this law reform programmes have this journey, but decision making bodies have been lagging behind this journey. The formal judicial

¹⁹⁶ It has been agreed that Ethiopia is materially underdeveloped and is one of the poorest countries in the world. The illiteracy rate is high, Gross Domestic Product and Per Capital Income is low, 85% of the people (more than 80 million) depend on agriculture with underdeveloped subsistence economy and social service provision. As a result, Ethiopia crafted a vision and adopted poverty reduction strategies. The central element in the vision is the alleviation of poverty, ensuring sustainable development to become a middle income country in less than twenty years. If this level of development could not be reached, poverty will lead to the collapse of the country. Global factors being *cetrus paribus*, the lack of peace, stability, conflict, strife and other evils will all pave the way to disintegration. Contrary to this the preamble of the 1995 Constitution reminds the aspiration towards one political and economic order.

bodies were established over 50 years ago but were deformed during the era of Emperor Haile Silassie, then formed but paralyzed during the *Derg* regime and now are expected to be re-formed and trans-formed. Despite this there is a mismatch between the current idea of justice and the practice in realising justice.

The competing and explicit interests represented by the law and the anti-law movements have been particularly important to countries like Ethiopia where formal courts have operated with non-formal mechanisms of dispute resolution. A study provided evidence that 85% of the population of Ethiopia rely on traditional mechanisms of dispute resolution (Getachew and Alula 2008: 1-9) in order to achieve social justice. The most important question which arises out of this competition is how the reform should shoulder the Constitutional responsibility between the formal and non-formal dispute resolution mechanisms. Balancing this involves synchronization of tensions or resistance and conflicts between competing bodies. As a natural consequence of the balance of power it has led to shifts in superiority from the one to another and it is now expected that the reform will anchor the two positions in a state of synchronization.

4.4.1. Pre-judicial reform programme change initiatives.

The Ethiopian judicial reform programme took place in FDRE after the *Derg* was ousted from power in 1991 by armed coalition forces known as EPRDF. The force suspended the *Derg* Constitution and convened a conference on 4th July 1991 and promulgated a transitional Charter on 22nd July 1991.¹⁹⁷ As a remedy to the social injustices the people suffered during the *Derg* regime, the Charter “dismantled the institutions of the *Derg* as detailed in the Preamble of the Charter.”¹⁹⁸ This subsequently required a complete overhaul of the justice system. The Charter also endorsed the UDHR “fully and without any limitation whatsoever” and laid the

¹⁹⁷ See FDRE (June 2014), *Ye’hiopian Hiziboch Tigilina Agerawi Hidasiyachin*, p.24. This is a policy document about the struggle of the Ethiopian people and its renaissance.

¹⁹⁸ Paragraph 5 of the Transitional Period Charter of Ethiopia reads “all institutions of repression installed by the previous regimes shall be dismantled”. Article 18 of the Charter states that the Charter is the supreme law of the Land (Negarit Gazeta, No.1, 22nd July 1991).

foundation for Federal Government and began the process of democratization and decentralization.

As the *Derg* Constitution of 1987 stipulated under Article 101(2) that the term of justices and judges shall be the same as the term of the *Shengo*¹⁹⁹ that elected him, no judge is expected to serve when the institution of *Shengo* was dismantled. This left a concerning vacuum in the judiciary. Further, the judiciary was decentralized which made the shortage of judges critical to impact the way dispute resolution mechanisms function. The acute shortage of judges in the courts triggered the need to recruit new judges. About 3000 judges and prosecutors were recruited all over the country and were given short term training (3 months) to fill the vacancies (Mandafrot 2002: 38). In collaboration with universities which included the Ethiopian Civil Service College and Bahir Dar University, these judges later upgraded their skills and knowledge during court recess time. The Federal Supreme Court collaborated with USAID to offer on the job training.²⁰⁰

As part of reform measures, the Court Administration Reform Program (CARP 1) began to be implemented in 2002, starting at the Federal Supreme Court followed by the lower federal courts (CARP 2). The programmes were meant to improve the administration of the courts. These programmes were fully supported by the Canadian International Development Agency (CIDA). The reform efforts were expanded to the ANRS under the National Expansion programme (hereafter NEP) which was fully funded by PSCAP through the Ethiopian Government. As shall be discussed later, in 2005 the NEP was incorporated under the FDRE Strategy and programme for Capacity Building (hereafter the SPCBP). This encompassed the judicial reform sub programme for the civil service reform programme. .

¹⁹⁹*Shengo* was the supreme state organ of the state during the *Derg* (the People's Democratic Republic of Ethiopia according to the constitution) the members of which were to be elected for a term of 5 years upon universal, equal, direct and by secret ballots (articles 62, 65 and 68 of the 1987 Constitution).

²⁰⁰ This effort later developed to establish the Justice Professionals Training Center (Proclamation No. 364/2003, A Proclamation to provide for the Establishment of Justice Organs Professionals Training Center.

The allegoric success of the project was the reason behind the expansion and replication of the Federal Supreme Court project to 126 courts and then a further 726 courts (Haile 2007: 15). These projects induced court reform thinking and activity in the federal and the ANRS courts. The programmes changed the traditional and archaic ways of court management and in particular, they changed the values and day-to-day efficiency of the courts whilst narrowing the opportunity that petty corruption may have proliferated due to any residual inefficiency. The introduction of color-coded filing system (the first in the reform activity) was one simple example of modernizing the old numbering system of files. Modern technology were introduced to record and transcribe the testimonies of witnesses and other important court proceedings. This to a large extent ended the hand recording of proceedings and made the operation of courts fast and reliable. It significantly reduced the time judges entertained cases from the bench and helped them take on more cases than ever before and further promoted accountability and transparency of the operation of courts (Haile 2007: 58).

The design and implementation of a court cases database was another significant contribution towards efficiency of the courts. The first version of this was a Court Recording System (CRS) later upgraded to Court Case Management System (CMS and CCMS) and provides information to the client of the court but helps the court staff to plan, monitor and evaluate court performance.

The introduction of a case flow management system, the quick production of client services, information desks, the quick production of court documents, computerization, use of photocopy machines, scanners, printers and templates also led to increased efficiency. The introduction of photocopy machines resulted in quick production of documents which could previously take months to find a file (Haile 2007: 59). The use of information technology also improved access to justice in the ANRS (Haile 2007: 17).

These have been introduced in all the federal courts and 72 courts of the ANRS. Other successes which were reported included a backlog free courts owing to the

fast disposal rate of the courts and the expansion of mobile courts, establishments of waiting terminals (with TV, radio entertainment), information desks,²⁰¹ sign posts, suggestion boxes, suggestion books and court buildings (including a building for the ANRS Supreme Court). Training in all these areas including training given to the court leadership team was also a significant achievement of the project. Accordingly reform awareness training for 3635 court staff members, service delivery and client handling for 4177 staffs, basic computer training for 449 staffs, leadership course for 134 staffs, database for 50, and court recording and transcribing for 154 staffs were conducted. Professional training was given to judges (Haile 2007: 15-16). Owing to the training on strategic thinking given to court leaders in 2004, and again in 2005, court performance began to be planned and courts began to evaluate their performance based on the plan. Before the training, the courts' performance was believed to be unplannable as a result of which a judge was only expected to give decisions to cases that appeared before him.

These efforts increased the efficiency of courts which will be discussed more fully in the next chapter. As can be seen from the achievements of the projects this promoted access to justice through elimination of case backlogs and the modernization system (Haile 2007: 61). However, capacity, transparency, service delivery, accountability, federal/regional collaboration, and effectiveness were still cross-cutting issues. Furthermore, no significant achievement was registered on a well-studied and harmonized non-formal system of dispute resolution and legal aid services. The achievements were "fragmented and piecemeal" and didn't consider the justice system as a coherent whole (Mandafrot 2002: 41, Haile 2007: 61). Thus a much more comprehensive justice reform was needed.

²⁰¹ Some however misapplied the introduction of the information desk. During a visit to a Woreda Court by the researcher as a president of the ANRS court, one of the courts placed the information desk at the back of the courts in order to be secretly informed by the public of the way the courts function. The information desk however was meant to be placed at the entrance of court houses so as to provide one stop service to court clients.

4.4.2. Brief history of the comprehensive justice reform programme

In 1991 a shift in the political economy of the country meant the withdrawal of the *Derg* from politics, the commitment to human rights meant allowing citizens to realize their basic rights to development and prosecution of perpetrators of human right violations during the past regime, the radical shift in the structure and substantive content of the new regime meant constitutional reform. Following the declaration of the 1995 Constitution further action was carried on which included the adoption of policies such as the FDRE Strategy and programme for Capacity Building Programme (SPCBP) and Democratic System Building Policy (DSBP) that were both adopted in 2004. These policy documents indicated the need to reform and the direction of the judicial reform programme.

The SPCBP was comprised of three parts: Part One dealt with general matters, Part Two dealt with matters of education, and Part Three dealt with the civil service reform programme. Judicial Reform was a sub programme within the Civil Service Reform Programme. According to the programme the main aim of the judicial reform was to enable the courts to execute and interpret laws designed to promote the development and democratization of the country. This required giving special training to judges, improving the way the courts function and the way they are organised (SPCBP 2004: 281, 289). Other goals include making case processing by courts speedier and modern, ensuring independence and accountability of the courts (SPCBP 2004: 287, 289). The Justice System Reform Programme was charged with designing a comprehensive reform plan to attain these objectives.

In the same year the Government also adopted the FDRE Democratic System Building Policy (DSBP). This policy emphasized effective service before and above all else as the foremost role of the Government's developmental role. The document underlined the only option left after the fall of the *Derg* regime was to build a democratic system in which good governance was secured (DSBP 2004: 4). The judiciary was assumed to play a key role in the democratization and development

process of the country (DSBP 2004: 8). According to the policy document Democracy and Good Governance are important in alleviating the circle of poverty and ensuring peace in the country. The objectives of good governance were articulated as fighting corruption and ensuring fair, transparent, accountable and speedy Government services to the public (DSBP 2004: 8, 82, 86). Owing to the reform that has been done in enacting the new law and establishing institutions,²⁰² as parts of the people-centered development measures, these were not sufficient to realize justice to a level which met expectation of the people. The question that remained was what actions with regard to the judiciary was expected to alleviate poverty and realise justice for the people. Underlying the role of the judiciary in the democratization process the document (2004: 88) stated that the judicial body has the task of ensuring the rule of law in an efficient and fair way. It accordingly emphasized the need to ensure accountability for those who act contrary to the law and regulations that were aimed at facilitating the free-market through the exercise of freedom of contract. Judicial transparency, independence and accountability were assumed to be instrumental in ensuring these objectives (DSBP 2004: 84, 88-95). The judicial system had to be reconstructed on “a new and strong bases with a sense of urgency” (DSBP 2004: 96).

In 2002 the then Ministry of Capacity Building (hereafter the MoCB) conducted a workshop where four papers were presented.²⁰³ One of the objectives of the workshop was to:

identify the general framework for the development of a comprehensive justice system reform programme that is appropriate for the establishment

²⁰² The enactment of the new penal code, family code, proclamations to amend and complement the commercial code, the labor law, the establishment of the Ethiopian Human Right Commission, Office of the Ombudsman, Anti-corruption Commission are among the reform measures.

²⁰³ See MoCB (2002), *Proceeding of the workshop*, p. 3, 23, 205. One of the papers was presented by an Ethiopian from Ministry of Capacity Building and the three by experts from Canada, France and UNDP. The CIDA and UNDP funded the workshop. 166 people from different Federal and Regional government sectors, NGOs (APAP, Forum for Social Studies, Evangelical Church), Embassies (America, Italian, china, Canada, Norway, Nigeria, Finland, Austria), academia, USAID and UNDP participated in the workshop.

of a constitutional democracy wherein the rule of law and human rights are fully respected (MoCB 2002: 1).

Following the workshop, the Office for the Justice Reform Program (JSRPO) under the MoCB prepared and tendered terms of reference for international consultancy. The Center for International Legal Cooperation (hereafter the CILC)²⁰⁴ responded by conducting a technical and analytical assessment of the justice system. CILC is an independent Dutch non-profit organization founded in 1985. It provided expertise to developing countries and countries in transition engaged in legal and judicial reform. Its beliefs are “a functioning, reliable legal system is a critical precondition for the political, economic and social well-being of a country’s population. Its mission is promoting “the rule of law by initiating and implementing international legal cooperation projects” for a variety of challenges within developing legal systems. It was an academic and independent partner of the World Bank yielding independent and substantive contribution to the legal systems of developing countries and countries in transition.²⁰⁵ It was one of the “law and justice technical assistance providers” of the World Bank.²⁰⁶ Regarding justice and legal reforms CILC shares the ethos of the World Bank discussed in the previous chapter.²⁰⁷

As a result of the CILC response, a contract was signed between Ethiopian MoCB and CILC on 27th May 2003. The contract mandated CILC to review the overall Ethiopian justice system and develop a baseline needs assessment of the justice

²⁰⁴ See CILC 2005, p.52. CILC acted as an adviser and catalyst in the project. It is composed of international and local experts. While international experts were recruited by CILC in the Netherlands, France and Sweden, the local experts were recruited by the JSRPO.

²⁰⁵ See Inside CILC, why and where it all began-stories from the founding fathers (1-3), “<http://www.cilc.nl/cms/wp> and also See <http://www.cilc.nl/inside-cilc-why-and-where-it-all-began-stories-from-the-founding-fathers-2/>, last visited 26 Mar.2016.

²⁰⁶ See also the World Bank, <http://go.worldbank.org/5JCB612CAO>, last visited 24 Mar. 2016.

²⁰⁷ CILC involvement in Indonesia was not uncomplicated. While there was strong critics of the human rights practices and politics of the Indonesian government under the Suharto regime, the World Bank and others supported its involvement on the believe that “to invest in and engage with the legal structures of the country would benefit the corporate sector” and that in order to be “part of the world economy, national economies and legal systems needed to be modernized to create jobs, growth and prosperity”. This indicates shared ethos between the World Bank and CILC. For details see <http://www.cilc.nl/inside-cilc-why-and-where-it-all-began-stories-from-the-founding-fathers-2/> last visited 26 Mar. 2016.

system with a view to identifying shortcomings and suggesting remedies. The JSRPO was a counterpart of the study while UNDP was part of the discussion and covered the funding for the research (CILC 2005: 11, 51).

4.4.3. The comprehensive justice system reform programme.

As the previous discussions made it clear the judicial and legal sector of Ethiopia presents various complicated challenges. Moreover, the sectors institutions were affected by the long and complicated history of the country (World Bank 2004: v11). The Justice System Reform Programme (hereafter the JSRP) too identified the complex legal history as hindrances to the Ethiopian administration of justice.²⁰⁸

Thus it was important to determine the specific and contextual reform demands of Ethiopia. The reform, had to contextualize the answer to key questions such as:

- a) The specific nature of the judicial reform
- b) The direction and priorities of the judicial reform
- c) The unique elements in the country's judicial reform programme
- d) The historical context under which the judicial system is working
- e) The symmetric or asymmetric power arrangements of formal and non-formal decision making bodies
- f) The best ways in which disputes are resolved to serve legal and social justice.

As shall be explained more clearly later it has only been through the JSRP that the country has attempted to transform the legal system in a more comprehensive way. The most important question in this study is therefore how effective is the judicial reform in the context of Ethiopia.

²⁰⁸ As is discussed in Chapter One the legal history of the country has been suffering from a mix of civil and common law countries, embraced secular and modern law together with religious and traditional law which was identified one of the problems. This mix co-exist as well as conflict with each other and at times replace one another.

When the justice sector reform programme was crafted in 2002, the workshop organized by MoCB, in cooperation with United Nations Development Programme (hereafter the UNDP) and Canadian International Development Agency (hereafter the CIDA), invited different people to make remarks in opening the workshop underlining the objectives of the judicial reform. According to John Sheram, a Canadian Ambassador to Ethiopia, whilst addressing the workshop establishing a modern and efficient justice system was emphasized as the objective of the reform. A representative of UNDP, Mr. Samuel Niambe, shared this thought but further noted that the reform should go beyond organizing the justice sector and help the judiciary discharge its main objective which was to protect human rights, settle social conflicts in an impartial and effective way as a partner in human development (MoCB 2002: 24).

On the other hand the then Minister of MoCB identified the main objectives of the justice sector reform programme which included:

1. Overhauling the justice system in order to achieve a maximum level of justice as desired by the people and the Government
2. Enabling justice organs as learning institutions to act proactively and sensitively to the needs of the public and empower them in contributing fully to achieve good governance and justice in the true sense (Mandafrot 2002: 30, 36, 41, 42).²⁰⁹

To realize the objectives, the base line study undertaken by the CILC identified many problems in the judiciary of Ethiopia. Three main problems of the Ethiopian justice system were identified as: inaccessibility and unresponsiveness to the desires of the people, prevalence of corruption and abuse of power through political interference in the administration of justice and inadequate funding of the institution aggravating the deficiencies in the administration of justice (CILC 2005: 14, 170- 190). The more specific problems regarding the judiciary (CILC 2005: 15,

²⁰⁹ MoCB 2002, pp. 16-17. This in particular was addressed by the then Minister of Ministry of Capacity Building, Tefera Waliwa. See also Mandafrot 2002: 30, 36, 41, 42.

159-179) include a lack of responsiveness to the poor, trust, confidence, basic information, independence, transparency, training, accountability, court administration, case management, backlogs, speedy trial, poor working atmosphere, and poor archive system. The lack of sufficient study in ADRMs and the lack of research in the use of these rich ADRMs in the formal system were also identified as another problem.²¹⁰

As the list of the problems makes it clear problems identified look similar to the list of problems identified for other countries discussed in Chapter Three section 3.1. For example, the Honduras reform programme identified issues of gender, the youth, indigenous people and small business as judicial branch challenges, whilst the rest of challenges identified in Ethiopia were similar or identical with what has been identified in Honduras.

4.4.4. Reform recommendations and goals

The baseline study for the judicial reform programme has a list of recommendations as solutions to the problems identified and the reform programme relied on these subsequent reform recommendations. The study boldly expressed that the

210 The CILC 2005: 15, pp. 159-179 has also identified other problems. The problems identified included the unresponsiveness and inaccessible of the courts to the poor who are forced to seek alternative justice, lack of basic information on the part of the courts (courts lack automatic access to the official Negarit Gazeta, their libraries were poorly equipped or non-existent and most court decisions were not published and reported) and low perception of the independence of the judiciary. Other problems include:

- selection and promotion of judges is insufficiently transparent, the criterion being too general and lacks input from other legal professionals, civil society and citizens,
- lack of training and accountability of judges,
- Weak court administration and case management,
- Delay of cases and high congestion rate, unnecessarily costly, complex and Unpredictable justice system,
- Protracted criminal justice system in violation of speedy trial,
- Inability to tackling corruption, biasedness and political interference,
- Poor working atmosphere, poor salary scale of judges compared to international standards,
- Low level of competence among support staff
- Absence of initial and continuous training for the staff, poor filing system and poor court administration
- Poor court administration and archive system, excessive but unproductive support staff.

recommendations were forwarded bearing in mind the “international rule of law principles” (CILC 2005: 214). According to CILC the principles have at least elements of an independent judicial system, demanding for courts interpreting and applying the law and regulations in an impartial, predictable, efficient and transparent way, consistent enforcement of decisions of courts and access to justice for all.²¹¹ It emphasized the desire to secure judicial independence so that the power of Government would be limited to protecting the rights of individuals (CILC 2005: 213FF).

Bearing in mind the global ROL conception, the document further enumerates some 26 recommendations including for the establishment of a Human Rights Commission, Office of the Ombudsman, encouraging Civil Society and Piloting the projects. The recommendations emphasized that enhancing judicial independence and its professional capacity had to be a high political priority. Other recommendations included limiting the power of the Supreme Court presidents and transferring their power to Judicial Administration Commissions, establishing transparent recruitment and promotion system for judges on the basis of objective competence and transparent criterion, establishing judges associations, improving judicial education and training, developing judicial career paths, strengthening transparency of courts and judicial accountability, developing period performance evaluation of judicial performance based on transparent and relevant quantitative and qualitative criterion and integrated into training programmes, improving initial and continuous training for judges and other staffs, government financing for the training of judges in a stable and sustainable way, deploying court managers for administrative tasks of the court and giving the administrative staff professional training, computerizing the court system, giving priority to reducing backlogs, strengthening legal clinics, establishing execution department, creating accessible

²¹¹ CILC 2005, 213-214. The baseline study recommended that this includes professional capacity and should be given a high political priority so that the judiciary will be free from the influence of the executive. Thus the judiciary needs to administer its budget and its administrative staff (2005: 213),

copies of court decisions to lawyers and the public, improving the working atmosphere of courts, making the Bar responsible for licensing, training on all matters related to the functioning of a lawyer, accessing copies of court decisions to the lawyers and the public at large, commenting on court decisions by academics and making the comments available to judges, lawyers and prosecutors offices, printing selected decisions of the Federal Supreme Court, improving working conditions of the courts, seeing the possible use of ADRMs to address the backlog of criminal cases, training of corps of specialists of ADRMs, and study the nature of social courts (CILC 2005: 21, 25, 214-227).

These lists of recommendation, summarised in ten goals including one for monitoring and evaluation, have been endorsed as the Comprehensive Justice Reform Programme.²¹² So far these goals have been in place as of 2004.

4.4.5. Implementation

The then MoCB was the responsible body to implement the programme. A high level committee, National Justice Reform Steering Committee (NJRSC), chaired by the Minister of the then MoCB whose members were drawn from the various justice sectors (and the three levels of Government) of the federal and regional states (including courts, prosecution and parliament) coordinated the implementation of the programme (Mandafrot 2002: 44). The NJSRC oversaw the programme and sat policy intended to guide implementation of the programme.

While the MoCB bore the responsibility of implementing the reform programme, the JSRPO, staffed by a director and three experts within the ministry, acted as secretary to the NJSRC and facilitated and co-ordinated the implementation of the programme. It monitored, evaluated and produced reports of the technical implementation of the programme (Mandafrot 2002: 44-45). The actual implementation of the programme was the responsibility of the various

²¹² The goals have 38 activities as subsets. The ANRS also contextualized, approved and implemented this programme as of from 2002.

implementing agencies having a project manager/focal person.²¹³ There were also offices organized in each sector to facilitate the implementation. For example, a National Court Reform Project Office at the Federal Supreme Court coordinated, monitored and evaluated judicial reform performances of all courts.²¹⁴

The implementation recorded many success stories. According to reports it helped the introduction of change environment in the courts, introduced the use of modern technologies in processing cases, introduced color coded filing system, recording and transcribing system, case management system (data base-versions CRS, then CMS now CCMS), improved client service (case flow management system, information desk systems, sign posts, waiting terminals, service counters, quick production of court documents (templates or forms, photocopiers), provided court leadership trainings, use of ICT in courts, (including computerization, e-litigation at the federal supreme court level and tele-conferencing), increased in disposal rate, expanded mobile courts and increased legal aid. These were registered as successes of the reform programme both in the Federal and ANRS courts.

4.4.6. Some contradictions in the programme

The success of the reform programme had to be in line with its realisation that pertained to the constitutional expectation of the courts. In this respect there were some contradictions which related to the local demand for reform and how and to what extent it was contextualized. The attempt to identify local problems but to propose solutions on the basis of the international conception of the ROL is one

²¹³ CILC 2005, 292-93. These agencies at the Federal level include the Ministry of Justice, the Federal Police Commission, Penitentiary Commission, Ministry of Education, Various Law Schools, and the Federal Supreme Court (CILC 2005: 292).

²¹⁴ According to Zewdineh (2007: 4) much of the blame for slowing down the reform process during PSCAP should go to the MCB/BRCB and the World Bank who are empowered to be the clearing houses for consolidating reform plans and implementing procurement requests. With a slight difference (example the chairperson of the steering committee being the president of Regions) similar structure/arrangement is replicated at the regional level. Regional structures include Regional Steering Committee, programme co-coordinating Office and local implementing agencies. The Office also facilitates the purchase of modern equipment (initially including the color coded files) by the MoCB and distributes to the various regions. Besides equipping courts the projects also helped to further identify problems in the courts and thus paved the way for the comprehensive reform programme (Zewdineh 2007: 34).

indication of the problem. Furthermore, some kind of alignment with the ROL was visible when an independent judiciary (applying laws impartially, efficiently, and predictably in a transparent way) is recommended mainly to “limit the power of the Government and protect individual rights” (CILC 2005: 214). The global conception of the ROL leans towards the neo-liberal conception of reform which, expecting a much less role of the government, had been initially resisted by the Ethiopian developmental State.²¹⁵

Furthermore it was noted that the unique problems in the Ethiopian judiciary was what triggered the reform programme. The lists of Ethiopian justice problems identified were however similar to the list of problems in other countries where the World Bank had its initial involvement in judicial reform projects. The list of recommendations for “equitable justice” in the Honduras project matches sixteen or more of the recommendations for Ethiopian reform. Stressing the unique and complex legal problem of the country, this cannot simply be a mere coincidence; it is at least more than coincidence or at most deliberate.

The recommendations also have other contradictions. For example, while the problems envisage a possible study and use of ADRMs, the recommendation reduced this to a study to see if ADRMs could reduce the backlog in the criminal justice. ADRMs application was further curtailed when the programme emphasized that numerous and grave failures of the court system should be thoroughly resolved before considering the involvement of ADRMs. According to CILC the utmost should be done to address first of all other issues of the courts before tackling the complex issues of entrenched religious and customary law (CILC 2005: 213). This does not only seem contradictory but disconnects the formal system from the non-formal system, reducing its capability of being a learning institution, and was against the targets of Ethiopian developmental state as underlined in the GTP2.

²¹⁵ See for example the FDRE policy documents , *Supra* note 11, p.58.

It is also important to see if the list of activities reflected the desires of justice in the eyes of the people in “its true sense”. In this respect the language of the reform programme demonstrates how homegrown the programme is. Pragmatism over the issue of human rights, governance and economic development seemed to be the normative backdrop of the reform programme. The reform sought to make public institutions responsive and efficient, empower citizen participation and promote good governance and accountability. Accordingly, a modern and efficient system is emphasized by all the papers and the programme is expected to protect human rights, good governance and the rule of law. The judiciary is one of the justice sector reform programme components and effective delivery of justice by judicial organs is expected as one output. A reformed judiciary attracts foreign capital and encourages investment (MoCB 2002: 20-21). Despite all the problems and research, the underlying emphasis is a substantial contribution to the Government’s market-driven growth strategy (Mandafrot 2002: 45) as opposed to the wider notions of social justice.²¹⁶

Thus despite the call for justice in its true sense the protection of private and property rights and the enforcement of contracts are still central pillars of the reform programme. A predictable, sound, strong, independent and accountable judiciary is what is expected of the reformed judiciary. Effectiveness is seldom mentioned and when it is mentioned it is either incomplete or lacks the necessary connection with social justice. It seems that the on-going reform programme is part of a post-colonial global reform project spearheaded by international financial and

²¹⁶ It is also important to see how the recommendations were well taken note of. Contradictions are noticeable in the goals of the reform: see how efficiency (Mandafrot 2002: 36-39) and effectiveness (Mandafrot 2002: 43) are conceptualized in the document. It’s conception of human rights does not fit the conception of justice and the right to development in the Constitution. The means to realizing justice are not distinguished from the ends of justice, rather the means are considered as ends. The power given to the Federal Supreme Court to give binding interpretation of laws on all courts of the country is against the advice given in the reform document to establishing system of *stare decisis* in Ethiopia (See the CILC 2005: 172). Proclamation number 457/2005 was promulgated the same year against this recommendation.

major Western donors whose objective is to promote “participation, accountability and good governance” (Faundez 2010).

Despite that the lack of clarity on concepts imported from outside was another complicating factor. For example, the reform programme lacks clarity on how the judiciary is connected to development. The programme has also made use of conception of the ROL that has not been made clear so far. Problem also lies in the lack of consensus on what judicial reform is meant towards alleviating poverty in Ethiopia and how the reform gets (positively or negatively, causally or otherwise) connected to the country’s development. The lack of clarity on the point makes the objective, direction and Constitutional achievements of the reform programme unclear.

Mandafrot (2002: 36) stressed that the reform programme improved the courts organization, administration and way they functioned. This was good as a starting point but not a point to which to end, for the people and the Government desire justice in “its truest sense” towards development Constitutional understood as realizing functioninigs and capabilities.

Conclusion

Ethiopia has declared a democratic developmental State. This is unique as it encompasses elements of developing its policy targeted towards poverty eradication and growth from within, whilst creating an accountable state towards tackling rent-seeking and corruption. Being a democratic state also emphasized making use of the traditional system of dispute resolution. In reality, the Ethiopian justice system relies heavily on the traditional system of dispute resolution.

However despite the desire, the reality and the GTP expectations, these systems remain underdeveloped. The CILC well noted the impact of the decentralization and the lack of study into a consideration of constitutionally tested ADR methods (CILC 2005: 56) but to date relied heavily on the formal system. Non-formal systems matter in realising social justice and reform should include this peoples’ experience

from merely studying the formal legal actors (including law maker, courts, police, public prosecution) alone. This should have included study on the identification of non-formal systems. The JSRP's baseline study was devoid of such a study. It has lacked qualitative interviews with the people including local justice actors which need to ask why and who make use of them and how and what made them effective. As the baseline study did not incorporate their perspectives on these important wide range issues of social justice it excluded village experts versed with non-formal justice, local problems of social justice and issues of the non-formal justice. The chapter has indicated that the Ethiopian reform programme hasn't identified these problems and created determined solutions to combat and rectify them.

Like other programmes it focused on the court budget, legal aid, staff, lawyers, the users of courts, information, technology, modern equipment, treatment of cases, backlogs and length of proceedings, and enforcement of their decisions. Values like judicial independence, accountability, control, efficiency, access to justice, legal certainty, impartiality, and predictability, and ROL have also a focus. But it lacks focus on issues of legal pluralism and the realisation of social justice as a result the Ethiopian programme does not necessarily follow the Ethiopian context, but is very similar to other programmes. The underlying approach being to giving priority to improving that part of the formal judicial system related to the market.

Moreover, the global conception of the ROL is the base of the reform recommendations that Ethiopia has adopted. This international agenda of formal justice had been promoted from the reform programme in Honduras to the Ethiopian project ignoring the much needed local good governance and ROL agendas as key to the attainment of social justice. As Paliwala and Kamchedzera indicated "justice indicators are generally formulated by, or on behalf of, agencies involved in promotion of good governance, the rule of law and justice at a global

level” in an attempt to achieve “their own top-down objectives” (Paliwala and Kamchedzera 2014: 4).²¹⁷

The reform follows the hegemonic discourse that makes the relationship between alleviating poverty and serving justice and halting impoverishment as indicated in the GTP and the Constitution problematic. In the Ethiopian context the fulfillment of basic needs and living standards of the people are indicators of measuring social justice but the reform programme does not mention them. A reform programme that contributes to the overall quality of the life of the people at this level should have incorporated these elements so as to build the appropriate and effective Ethiopian justice system.

When the reform programme speaks in terms of global demands for good governance, the ROL and legal justice, this formalized liberal conceptions and bracketed the issues that the citizen’s prefer most namely social justice, the forum for serving it, the outcome namely preventing injustice and serving social justice from these forums. As reform programme would then become hegemonic top-down impositions of identified justice problems and recommended justice solutions, justice would then not capture the human dimensions of living, and the actual experience of the people on the ground.

An alternative approach to this hegemonic approach would have been designing a counter-hegemonic people-centered institutional reform programme that gave priority to justice issues and forums identified and chosen by the people. This would give priority to:

1. Halting impoverishment, alleviating poverty; considering rules and activities to the extent of reduction of injustice and serving justice

²¹⁷ Paliwala and Kamchedzera :4. Thus the agencies involved include agencies of the UN such as the UNDP, UNHCHR, international financial institutions such as the World Bank, organizations of the rich nations such as the OECD; and developing country aid donors such as USAID, DFID (UK), CIDA (Sweden), SPFG (Spain).

2. Enhancing people capability to meeting their very choice of justice and forums of serving justice; studying success, failures, capacity and complexity of the forums, and designing ways these forums could cohabit while keeping their autonomy,
3. The nature and application of basic and derivative institutions, the way they produce injustice or justice individually, and the way justice is being served or injustice halted in Ethiopian plural society.

As indicated in Chapter Three Section 3.1 the World Bank began designing pro-poor policies. This shift towards greater responsiveness and consultation is most welcome as it gives the chance to explore issues of social justice from the contributions of decision making bodies towards the improvements of the qualities of peoples' experience and lives. It would be of paramount importance to the people that this approach would be bottom-up to emancipate the people and fulfill their ambitions. It would give the people a chance to fight any further progression towards injustice.

This desire to consult and be responsive to people's needs has been reflected in the Constitution and the GTP of Ethiopia where it was declared that every endeavor in every institution is designed towards alleviating poverty and enhancing people's capability. Pious as this might look it is not reflected in the Comprehensive Justice Reform programme that should have been focused on the choice of the people at the bottom of the hierarchy. Further the choice would have got bigger chance of being realized had the non-formal systems of doing justice been given enough space in the reform programme.

The next chapter explores in more detail the success of the Ethiopian reform programme and examines how significant these successes were in progressing the agenda of legal and social justice.

The Success and challenges of the Ethiopian judicial reform programme

The previous chapter demonstrated that the Ethiopian judiciary operates with several key issues which call for its structural reform. Some of those challenges have been discussed in Chapters One and Four. With a political willingness to reform, the judiciary operates within the opportunities of formation and reformation of the justice system. It operates within the global system where judicial reform programmes are the spearheaded agenda of Ethiopian international partners. The chapter also explored that despite the desire to serve justice in its truest sense, namely in a way which the people and the government want, the executive direction selected distanced the people from real experiences and their everyday lives. One of the key programme directions was to focus on the judiciary as learning institution. This was firstly to see if, and how, the courts could learn from the non-formal systems towards achieving legal and social justice, and how they could expand the delivery of these practices in the long term.

This chapter examines the profile of cases in the Federal and ANRS courts (to be explained in Section 5.1), the challenges in the courts and how this impacts the current pursuit of justice. It empirically shows how and to what extent the Ethiopian judicial reform was tailored to the Ethiopian context in solving its unique legal challenges in the administration of justice. The discussion of this Chapter is based on information obtained from the court database, the files examined in the courts, information obtained using questionnaires, interviews, observations and focus group discussions. As shall be fully indicated in the introduction of the next chapter a total of 84 questionnaires, 53 files, 34 informants and 4 focus group discussions were administered to get relevant information for this study in nine courts. On

these bases the chapter discusses the achievements and challenges of the Federal and ANRS courts while implementing the reform programme.

It has two main parts and two clusters. Cluster One deals with the performance of ANRS courts while Cluster Two deals with the performance of Federal Courts. Following a discussion of the demographic and a brief introduction to the judicial bodies of the Federal and ANRS Courts, the first part highlights the litigation profile of the country. The litigation profile of the courts is supported by data from the court database and helps to explore the performance of the courts and how this performance is connected/disconnected to the issues of legal and social justice. The performance of the courts creates incentives and disincentives for litigants which shall be discussed in this part of the chapter.

The second part discusses the challenges and opportunities of courts in serving legal and social justice. The challenges that the formal courts are facing demonstrate that formal courts still have unresolved problems that remain an agenda for the future. Finally the chapter discusses the future agenda of courts to be followed by a brief conclusion.

5.1. The Ethiopian Judicial System

The judiciary of Ethiopia is one of the three branches of Government. As is discussed in Chapter One the EFDR Constitution, following the Federal arrangement, established a dual formal court structure: Federal and State courts. These courts have three tiers: First Instance Courts at the lowest level, High Courts in the middle and Supreme Court at the apex of the hierarchy. The Supreme Courts have first instance, appellate and cassation jurisdictions in their respective jurisdictions.

Judicial power is vested upon these courts that have ordinary jurisdictions (general competence) over civil, criminal and labor matters. The Federal courts apply federal laws while regional laws apply both the regional (and federal laws in handling federal cases). In a largely civil law country, both of the procedural laws have

common law orientations. The courts are subject to no authority but the law.²¹⁸
Security of tenure of judges is for 60 years with no possibility of extension.²¹⁹

The Constitution does not clearly demarcate matters that fall within the jurisdiction of either the Federal or Regional judicial bodies. The jurisdiction of the courts is defined by statutes and thus the law establishing the Federal Courts, instead, does this demarcation. The Constitution, however, delegates the ANRS Supreme and High Courts with Federal High and First Instance Courts powers regarding Federal Matters that arise in the Region.²²⁰ All other judicial matters are under the jurisdiction of the regional court.

In both the Federal and State courts ordinary jurisdiction is administered by professional judges. Judicial posts are assumed by appointment by the respective law making bodies (Councils or Parliament). According to Article 11 of Proclamation No. 684/ 2010, eligibility for a Federal judicial post requires the judge to be an Ethiopian, volunteer to serve as a judge, being 25 years of age or above, commit loyalty to the Constitution, have a first degree in law from a recognised university with good results, successful result through interviews and examination, have a good reputation, diligence, successful completion of a pre-candidacy training course and have clear criminal record.²²¹ For the High Court or Supreme Court, a judge must have completed 6 and 10 years of service as a judge or in a related practice. The Judicial Administration Council recruits candidates and submits the list via the Prime Minister to Parliament for appointment.²²²

²¹⁸ Articles 78 and 79 of the 1995 Constitution.

²¹⁹ This is unless a judge resigns of office upon his consent or removed by the parliament from office on grounds of breach of discipline or gross incompetency (article 79(4) of the Constitution).

²²⁰ Article 78(2) of the Constitution.

²²¹ See Proclamation No. 223/2015, *Zikre Hig*, for the ANRS. This is more or less the same in the ANRS Courts except that there is no age limitation in the Region.

²²² See Proclamation No. 684/2010 according to which members of the council include the presidents of the three courts, vice president of the Supreme Court, three members from the parliament, the Minister of Ministry of justice, a judge selected by all the judges, a lawyer appointed by the council, a law academic and distinguished citizen appointed by the council (articles 5 and 6 of Proclamation No. 684/2010). As per Proclamation No. 209/2014 of the ANRS the ANRS Judicial Council is constituted of the President and vice presidents of the Supreme Court, two members from

All the First Instance Courts have a single presiding judge whilst all the Supreme Courts presided over by at least three judges with greater numbers for cases like cassation. The High Courts of the ANRS Courts are presided over by three judges. While the civil benches of the Federal High Court are presided over by a single judge Criminal benches in cases with the possibility of imprisonment of more than 15 years are usually presided by three judges.²²³ While giving recognition to customary practices that do not contravene the Constitution, the Constitution also recognizes religious and customary courts with jurisdiction on personal matters. These non-formal courts lack criminal jurisdiction. Below the First Instance Courts (Woreda Courts) are also found Social Courts but having no Constitutional recognition.²²⁴ Alongside the formal courts, there are also two tiers of Municipal Courts in Addis Ababa that hear appeals from the Social Courts.

Jurisdiction on matters of the Constitution and Constitutional interpretation is under the jurisdiction of the politically constituted House of Federation.²²⁵ The formal courts lack judicial review power over proclamations passed by the legislative body of the state. As far as other laws (including laws by the executive, customary laws, government decisions) are concerned courts power to judicial review is further curtailed by Article 3(1) of Proclamation 798/2013 which declares that “the unconstitutionality of any law or customary practice or decision of government or decision of government official” shall only be interpreted by the Council of Constitutional Inquiry or the House of Federation.²²⁶ While Article 84(2)

the Regional Council, one judge from the Supreme Court, two judges from the High Courts, three judges from the Woreda Courts, Head of Justice Bureau, one distinguished citizen selected by the Council, one lawyer and one member from Women Association (Civic Society).

²²³ This is alleged to compromise justice in the court and a draft proclamation is submitted to the parliament to make the Federal High Court an appellate court with a sitting of three judges.

²²⁴ The ANRS established social courts as per proclamation No. 151/2007. The Social Court judges are to be selected in a traditional way, are expected to proceed, summon witnesses and give decision based on the tradition of their locality. Thus, it can be said these courts are more of customary than formal.

²²⁵ See article 62 (1), 83(1) and 84 of the 1995 of the Constitution.

²²⁶ The researcher as president of the FHC and ANRS Supreme Court observed this as a claim by judges not to directly apply and give reality to the constitutionally recognized rights including the right to development.

of the Amharic version of the Constitution limits the power of the HOF or the Inquiry to interpret “law” proclaimed by the legislative branch of the government, the proclamation (and the earlier proclamation No. 251/2001 under article 3(2)) broadens the scope to include regulations, directives, customs and decisions given by the Executive and other branches of the government. Thus the proclamation can be said to have limited the courts from interpreting the unconstitutionality of such a wide range of laws directly impacting the peoples’ life with a potential to distancing them from giving due regard to the right to development as recognized by the Constitution. This too however may require Constitutional Interpretation by the House of Federation.

5.2. Relationship between formal and non-formal systems of dispute Resolution

The formal and non-formal systems of dispute resolution mechanisms in Ethiopia are connected in various ways. The structure of the courts is discussed in Chapter 1 but the following discussions indicate the level of connections the courts have at different levels.

After the 1960 Civil Code failed to abolish the non-formal ways of dispute resolution mechanisms, different kinds/level of relationships exist between the formal and non-formal systems in Ethiopia. For example, while the social courts in Addis Ababa are strongly connected to the formal courts in Addis Ababa, the social courts in ANRS are loosely connected to the formal courts. The social courts in Addis are fully incorporated into the Addis Ababa Municipality Courts. The municipal courts not only train and supervise them but also review their decisions. Social Courts in Addis Ababa apply traditional mediation mechanisms but are within the Government’s lowest administrative (*kebele*) structure with a right to appeal and lodge cassation complaints to Supreme Court. The judges are selected by the local people but appointed and disciplined by the government structure.

The social courts in ANRS are within the lowest level of the Government structure but are loosely connected to the formal courts. This makes them more non-formal

than formal. Article 9 of Proclamation No. 151/2007 (of ANRS) requires that any person assumed competent to be a judge by the people and who volunteers to serve the society shall be elected as Social Court Judge. The courts have the objectives of realising the rights protected under the Constitution.²²⁷ They are expected to apply the customary procedural and substantive laws in both civil and petty offence cases they handle. The remedy they can award is limited by the proclamation.²²⁸ The Sharia courts in the Federal and ANRS courts are arranged in a more or less similar way. In both the Federal and Regional states they use Islamic law for adjudication and civil procedure code for conducting proceedings.²²⁹ They are recruited by the Islamic Affairs Council, but appointed, promoted, disciplined, financed and remunerated by the Judicial Administration Council. Thus these courts are incorporated into the formal system to a great extent.

Other kinds of non-formal dispute resolution mechanisms are connected to the formal system on an *ad hoc* bases. For example, *Ye'betezemed Shimigilina* (Family Council) is connected to first instance (Woreda) courts in handling family cases. The courts are expected to send family cases to the council before rendering a decision on the merits of the case. The chairperson of the council is selected by both parties in common and appointed by the court while the remaining members are appointed by the court after being nominated by each party.

There are also other kinds of non-formal courts that are not legally connected to the courts but several courts are connected to them by offering parties with the opportunity to use non-formal systems. Parties in litigation will also resort to non-formal systems when doing so would be cost-effective. The Civil Procedure Code (and the Civil Code) under Article 315 and following articles allows arbitration

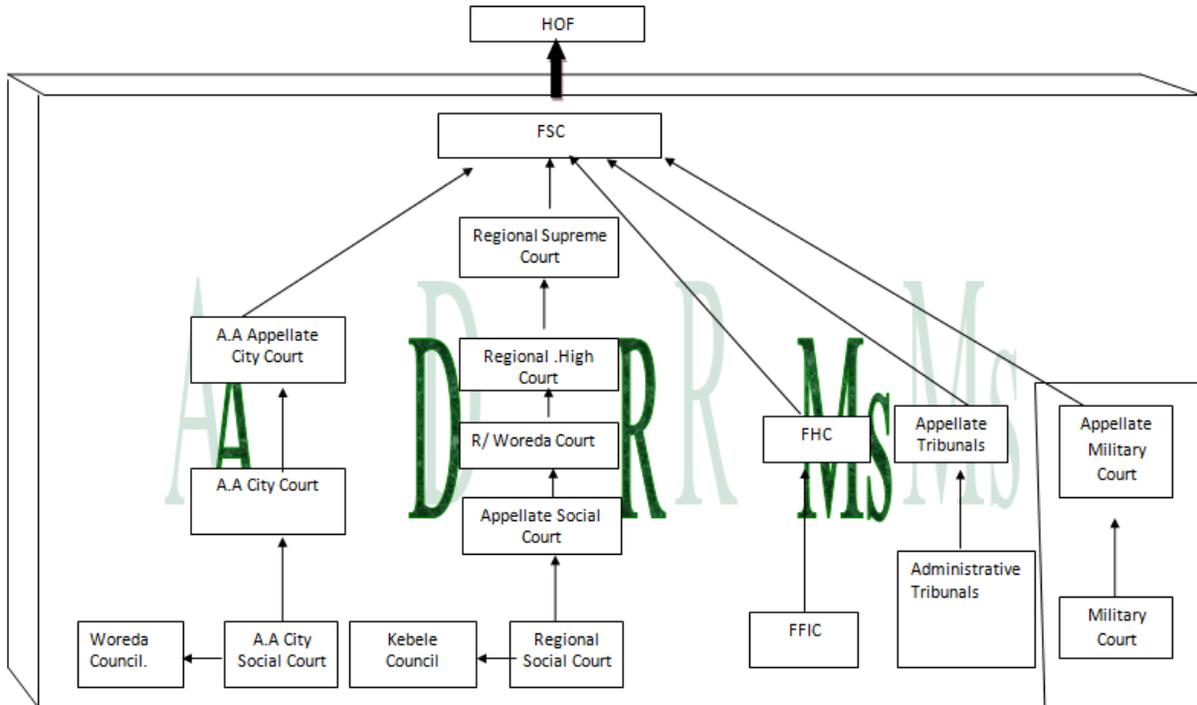
²²⁷ See article 4 of the Proclamation. Other objectives include creating conditions for solving problems of Good Governance, enhance the culture of peaceful neighboring relation of the people by settling conflicts through arbitration, mediation and negotiation.

²²⁸ According to article 12 of the proclamation the power is up to Birr 1500 for any dispute involving pecuniary claims of movable property. The Courts have power over petty offences and may order apology, compensation to the victim based on local custom and impose fine up to Birr 300 or compulsory labor for a period of seven days to a month (see article 15 of the proclamation).

²²⁹ For example see proclamation No. 188/1999 for the Federal Sharia court.

within or without formal courts. In other instances, as shall be explored in the next chapter, non-formal systems do operate without being connected to and recognised by the formal system.

Chart 1: The structure of Ethiopian Courts and other Decision Making Bodies.



N.B. 1. Sharia Courts are located in the formal courts at all levels. 2. Tax, Public servants, social security, labor, trade practice and consumer protection, privatization, Arbitration and similar cases are located in Administrative tribunals. 3. The Arrows to FSC indicate Cassation while the arrow to HOF indicates complaints on Constitutional questions from all decision making bodies. 4. ADRMs are found in and out of all decision making bodies.]

5.3. Selection of research areas

The research, constrained by time and other resource limitation, tried to select areas as representative as possible.²³⁰ The study covers the three Federal Courts (Lideta FFIC, FHC and Federal Supreme Court), three First instance (hereafter the Woreda Courts), two High courts and the Supreme Court of ANRS. These areas are selected based on the severity of poverty in the areas and hence the need to do social justice, availability of rich sources of information, prior information of sources

²³⁰ More on the method and methodology is given in Chapter Six.

of the areas and availability of judicial training centers and academic institutions.²³¹ In these areas the majority and most important players²³² of justice in the formal and non-formal systems, which handle a huge number of cases, are located. And the implementation of the reform programme began there. The areas are also convenient for the researcher which provides limitations on time and financial while burdened with administrative duties.

5.4. Litigation profile, type of cases, litigants and performance measurement

5.4.1. Cluster One: The ANRS Courts

After the implementation of the judicial reform programme the number of cases brought to ANRS courts has dramatically increased and is gently on the rise for the last five years. With the increase in the number of cases the disposal rate of courts also increased. The following table illustrates this fact.

Table 1: Cases lodged and disposed in ANRS Court.²³³

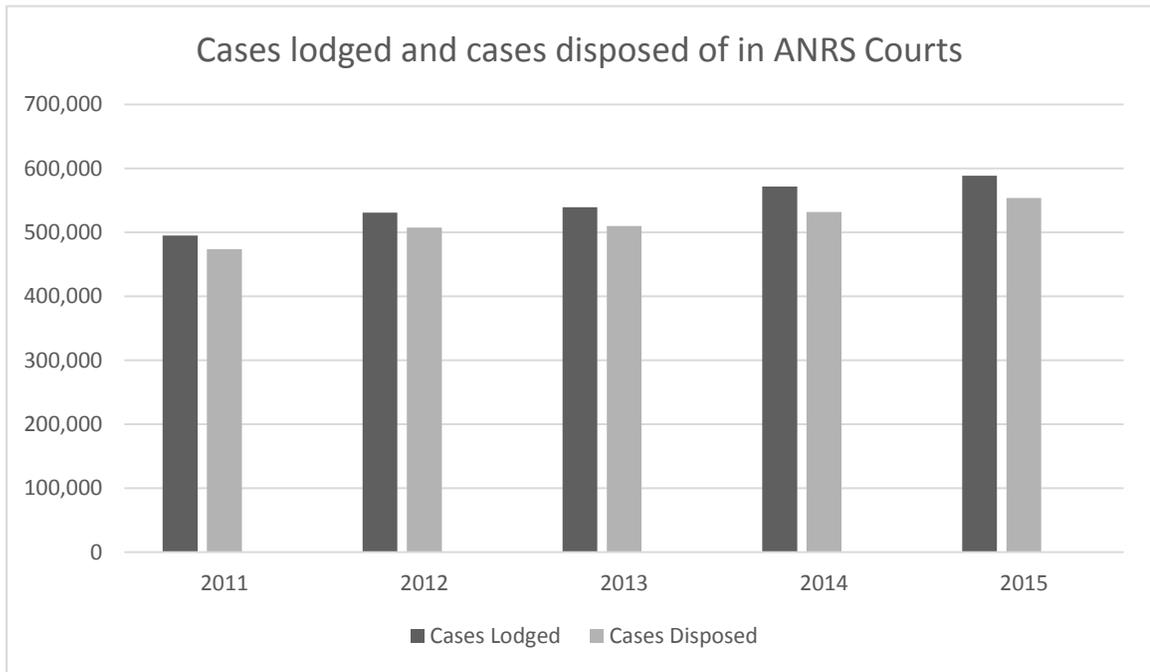
Period	2011	2012	2013	2014	2015	Total
No. of cases Lodged	494,906	530,939	539,124	571,552	588,504	2,613,275
Cases Disposed	473,431	507,461	510,139	531,740	553,621	2,578,392

²³¹ See the works of Fassil (2005), *Enough with Famine in Ethiopia, A clarion call*, Commercial Printing enterprise, and the ANRS Bureau of Finance and Economic Development (2015), *2013/14 Budget Year Annual Statistics Bulletin*. A study by Netsanet Telehymanot (2009), *Dynamics of poverty in Addis Ababa*, FSS Research Report No.3 also indicated that Lideta sub-city of Addis Ababa is the most deprived one, p.3.

²³² The attempt to get key relevant informants (as can be seen in the next chapter) who are rich with information from all sides helped a lot in the areas where the size of informants is not large enough.

²³³ Source: ANRS Supreme Court report, 2011-2-15.

Figure 1: Table 1 in graphical format.



The table makes it clear that the number of cases brought to the ANRS courts reached its peak at the end of 2015. The number of cases brought to the courts of the region increased from 494,906 in 2011 to 588,504 in 2015 the difference being 93,598 cases.

With the demography of the region we can observe that significant number of the ANRS population was litigating in each year. The following tables show this comparison.

Table 2: Demography of ANRS, 2015.²³⁴

Place	Population	City	Rural Area	Male	Female	Students (Grade 1-8)	Students (Grade9-10).
ANRS	20,018,999	3,126,997	16,892,002	10,011,204	10,007,204	2,066,419	484,733
NS	2,074,012	324,813	1,749,199	1,067,726	1,006,286	225,638	52,438
WG	2,474,254	312,221	2,162,033	1,220,477	1,253,774	272,580	59,558

The table shows 84.3% of the ANRS people live in a rural area. The proportion of male and female citizens is almost equal, and a significant number of children are in elementary schools. If we assume there to be two people involved in a single case, as plaintiff and defendant (excluding third party litigants, witnesses in a case, families affected by a case), 6% of the population was involved directly with litigation in 2015.

The NS High Court report for the year June 2011 to June 2015 shows that 44,135 people were involved in 14,022 court cases that are settled through mediation. This implies that three people on average were involved in any single case. If we simply project this figure for the region at the risk of oversimplification, 1,765,512 (9% of the) people were having their days in the courts in 2015. This number totals 8,175,075 for the year 2011-2015. This implies that 41% of the people were having a day in courts within the last five years.²³⁵ The court could potentially and meaningfully constrain or expand behavior of litigants and the people towards social justice in the region.

The number of cases brought to the court has to be seen in relation to the performance of the courts. The following table shows the performance of the ANRS courts for the last five years.

²³⁴ Source of date: Bureau of Finance and Economic Development, ANRS: (WG stands for West Gojjam Administrative Zone, NS stands for North Shewa Administrative Zone).

²³⁵ The number shows almost half of the population having a day in a court. This is excluding other people including extended family members, third parties and witnesses that could directly or indirectly be involved and affected in a case.

Table 3: Performance of ANRS Supreme, WGHC and NSHC.²³⁶

Court	No. of Cases	No. of Disposed Cases	Less than 6 months (%)	Clearance Rate	Congestion Rate	Total No. of Judges	Case per Judge
Supreme	N/A	N/A	56.6	N/A	N/A	146	N/A
WG High	43,673	43,071	91.2	98.8	1.06	728	504
WG Woreda	323,663	321,154	96.4	99.9	1.01		
NS High	26,405	25,870	95.8	100.3	1.02	973	314
NS Woreda	279,650	278,312	99.9	99.7	1.01		

The table makes it clear that courts measure their performance based on time and speed of performance. In this regard courts are performing well in terms of efficiency. Accordingly, 56.6% of the cases in the Supreme Court, 95.8% of the cases in North Shewa High Court and 91.2% of the cases in West Gojjam High Courts are disposed in less than 6 months. For the Woreda Courts the figure is even higher 99.9% for North Shewa and 96.4% for West Gojjam.

The five year reports of the respective courts indicate that for the last five years the clearance rate²³⁷ for the Woreda Courts range from 99.4% to 102.8%, their performance ranges from 96% to 97.7% and the congestion rate ranges from 1.02% to 1.04%. The lowest

²³⁶ Source: Report of ANRS Supreme Court (2011-2015).

²³⁷ According to the Evaluation Report of ANRS Supreme Court (2015), p.15 the plan was 99.5%, 95.55% and 92.5% for the Woreda, High and Supreme Courts respectively while the performance on average was 100%, 196.9% and 102% respectively. The report for 2015 is for the nine months performance of the courts. The evaluation report indicates that the plan was 1.0, 1.1 and 1.2 for the Woreda, High and Supreme Courts while the performance on average was 1.04, 1.14 and 1.38 respectively.

rate is with the Supreme Court with performance rate of 72.7%, clearance rate of 89.6% and the highest congestion rate of 1.40. According to the five-year plan of the courts while the expected performance of the Woreda, High and Supreme Courts was 98%, 95% and 85%, the average achievement was 96%, 87.4% and 72.7% respectively.²³⁸ While this is for the entire Region, the performance for the three courts is given through the following table and figure.

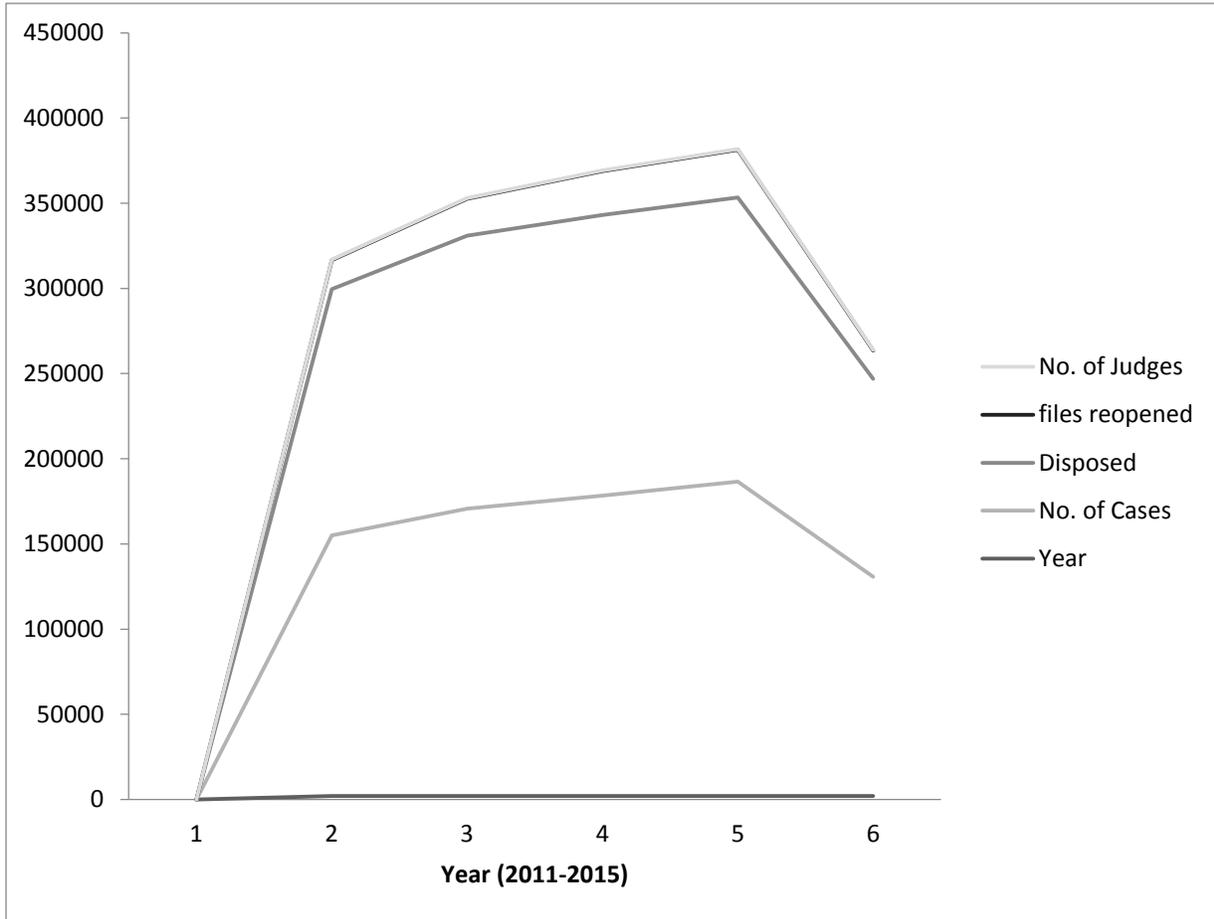
Table 4: Performance of ANRS Supreme, WGHC and NSHC.²³⁹

Year	2011	2012	2013	2014	2015
No. of Cases	152,942	168,758	176,290	184,546	128,751
No of Cases Disposed	144,582	160,228	164,856	166,796	116,128
Files reopened	17,092	21,640	25,640	27,998	16,658
No. of Judges	367	416	424	370	267

²³⁸ The Evaluation Report, *Supra* note 18, p.12.

²³⁹ Source of Date: the ANRS Supreme Court database.

Figure 2: Table 4 in graphical format.



The figure makes it clear that the number of cases brought to courts, the disposal rate, the number of files re-opened and the number of judges increased dramatically at the beginning of the GTP and thereafter it was on the gentle rise. The efficiency is commendable despite the decrease in the number of judges in the ANRS Supreme Court, WG and NS High courts from 424 to 373 and then to 267.

This mechanism however does not indicate the quality of court performance. The court measures Quality mainly using the amendment or reversal rate by a court higher in the

hierarchies.²⁴⁰ The following table shows amendment and reversal rates for 2015. The less is the reversal and amendment rate, the higher is the quality.²⁴¹

Table 5: Reversal and Amendment Rate of ANRS Courts²⁴²

Court	Affirmed (%)	Reversed (%)	Amended (%)	No. of mobile benches	Cases seen By Mobile Benches
Supreme Court	54.98	20.6	18.7	7	18,867
NSHC	60.52	17.04	13.28	118	20,110
WGHC	51.7	17.26	12.04	30	29,718
Total	N/A	N/A	N/A	155	68,695

The table makes it clear that the higher in the hierarchy the higher the reversal and amendment rate. At the beginning of the GTP (2011) the reversal rate of High Courts was 18.3% and the amendment rate was 9.3%. After five years the figure is raised to 20.4% and 11.7% respectively. This indicates a decline in the quality of Woreda Courts performance which implies that while the courts perform well in terms of efficiency, their performance in terms of quality is low. On the other hand, the Supreme Court reversal and amendment rates of 22% and 21.5% in June 2011 have declined to 14.8% and 13.2% in June 2015.²⁴³ This indicates improvement in the quality performance of High Courts.

The table also indicates that accessibility to the court in terms of the expanding mobile benches is appreciable.²⁴⁴ In the region there are a total of 465 mobile benches. The mobile

²⁴⁰ The evaluation report, *Supra* note 18, p. 27.

²⁴¹ *Ibid.*

²⁴² Source: ANRS Supreme Court Performance Report for 2015

²⁴³ As the evaluation report indicated the plan was to keep the rate on average 6% at the end of June 2015. Compared to this plan the ANRS Courts still need to do more on assuring quality in their performance.

²⁴⁴ For the last five years (excluding 2007) a total of 215,013 cases were decided by mobile benches.

benches operate in a fixed area. This means that one mobile bench covers an area of 143,152.5sq.m. This accessibility however has to be seen with the geography of the region. The statistics of the Bureau shows that major mountains, lakes and rivers of Ethiopia are found in this region (and in WG and NS Zones). Both WG and NS are located 1500 meters above sea level. WG (covering 13,295.8 sq.m) has 407 *kebeles* and NS (covering 15,954.9 sq.m) has 439 *kebeles*. This geo-geography of the region necessitates the inevitability of arranging mobile benches. Thus more effort in democratizing decision making bodies, in the content and process of the formal system, more accessibility to the courts, the use of tele-conferencing and deployment of the increased use of the non-formal systems of dispute resolution was expected.

5.4.2. Cluster Two: Federal Courts

Table 6: Federal Courts performance the data for the First Instance Court is only for Lideta Branch.²⁴⁵

Court	Number of cases				Performance measured using mechanisms developed by the reform programme.			
	Transferred From previous yr.	New	Reopened	Total	Clearance rate	Congestion rate	Backlog	Transferred to n/year
Supreme	2558	57,587	302	60,447	99	1.09	0.09	4606
FHC	4793	57,180	5472	67,445	94.4	1.14	0.14	8274
FFIC:Lideta	4039	56,780	20113	80,938	97	1.08	0.08	6095

As the table makes it apparent the clearance rate, congestion rate and backlog of the three courts are satisfactorily within acceptable range. Over the last five years filing in the Federal courts increased²⁴⁶ most cases being criminal. Most (28% at FFIC) civil cases are disputes between individuals for declaratory judgments. With the increase in the court

²⁴⁵ Source: Federal Supreme Court, High and First Instance Court (July 2011-July 2015).

²⁴⁶ The FSC database for the years 2011-2015.

loads, productivity has to increase otherwise backlogs will increase.²⁴⁷ The table makes it clear that a large number of files were closed which were re-opened later. Files reopened later were the files that were closed without being finished. As identified from the database the reasons for reopening a case included demand for recovery of cost of litigation, finding of evidence or defendant, appearing at another time, finding of new evidence or legal argument.²⁴⁸

Table 7: Top Five Civil Federal Cases (2011-2015).²⁴⁹

Period	Court	1st	2nd	3rd	4th	5th
2011-15	Supreme	Agricultural Land	Property (house, land)	Inheritance	Monitory Claims	Enforcement of
	FHC	Family and inheritance	Labor	Monitory claims	Contract	Property
	FFIC	Monitory	Enforcement of decision	Family	Property	Inheritance

As the table makes it apparent, agricultural land cases (accounting for 28.5% of all the cases) were top in the hierarchy of the Federal Supreme Court. This may be due to the huge number of cases coming from the Regional courts in the cassation

²⁴⁷ See also The World Bank (2009), *Uses and Users of Courts, Ethiopia*. This gives more meaning when seen in relation to the number of federal judges. The number of Federal judges for the years 2012, 2013 and 2014 and 2015 was 180,160 and 228 respectively. The number of cases disposed per judge is 587.5, 530 which indicates the decrease in the overall productivity of judges. While the number of diploma holders decreased from 3 to 2, the number of judges holding LLB and LLM increased. In the 2005 plan every judge was expected to give decision for 66 files per month. The 2006 and 2007 plans amended this and a judge was expected to give decisions for a number of cases depending on the level of courts he/she is in and the type of benches he is presiding over. This ranges from 6 to 70 files in a month.

²⁴⁸ See that the total number of files reopened for the years 2011-2015 for the Federal Supreme Court, FHC and FFIC Lideta Branch was 25,887 which is 12.4% of the cases brought to these courts: The Courts database last accessed on August 2/2015.

²⁴⁹ Source of date: Federal Courts data base.

division of the court. This is followed by property litigations. Monetary claims were top in the First Instance Lideta branch while contract and monetary claims were top in the Federal High and First Instance Courts. Enforcement of decision is among the top cases, being the six in the Federal High Court.

Some claim that most of these cases have chain effects. Family cases trigger company cases while company cases trigger labor cases. For example, money and contract cases in the High Court were entertained by the 6th, 7th and 8th civil benches of the court. The money cases in the benches pertain to commercial and non-contractual liability cases. Out of the decisions given in 2015 by these three benches 83 (of 231), 113 (of 368) and 88 (of 301) were brought by private limited companies or public company cases.²⁵⁰ Thus private limited and share company cases amounted to 31.5% of the disposed cases. An informant in this research told me that most company cases pertain to family cases where the desire to divide shares arose after divorce is granted in the Federal First Instance Court.²⁵¹

The database misses such information. The files also do not tell of this story but the researcher has observed these effects from many files whilst working as president of the ANRS Supreme Court and FHC. It is thus easy to see that multiple effects of divorce cases have not only had on the social fabric but also on the economic performance of the country.

5.5. Challenges of the Formal Courts

As the tables have made clear, the post reform efficiency for the Federal and ANRS Courts has significantly increased acceptably and satisfactorily but this performance has to be seen in terms of whether the courts actually served legal or social justice. The real experience of litigants on this ground is problematic. When cases are

²⁵⁰ Source Federal High Court data base, last accessed 12 Aug. 2015.

²⁵¹ Interview with Academic 'D' (PhD), University Lecturer and Practicing Lawyer (Former Judge at the Federal Courts), 22/9/2015.

investigated on a one-to-one base, this performance of the courts may not be as satisfactory as the efficiency drivers have indicated in the above tables.

The database of the courts gives the information indicated above but misses details of a case that are found in the file. As most of these details are not accessible to the general public, they give individual attention to the details of a case known to them and shape their behavior accordingly. In this respect the disposal rate of courts gets problematic when cases are seen on such an individual bases. From a one-to-one attention to cases, the following table shows how the outcome of a disposed case selected randomly is reached in different courts. The tables indicate different challenges that the courts face in rendering legal or social justice some of which are related to getting decisions, enforcing decisions and high attrition rate of courts. These challenges shall be explored below.

Table 8: Getting and enforcing decisions: Debre Birhan Woreda Court.²⁵²

File No.	Amount claimed and About(in Birr)	Cost Incurred (in Birr)	Duration	Number of Adjournments	Bases of Resolution
(010)10515	40,000 (Loan)	1490.50	8 days	3	N/A
(010)10433	3785 (Equb Money)	162.50	7 days	2	Court Decision based on Admission
(010)10423	2856 (Property Damage)	125.50	13 days	5	Mediation
(010)9863	26,000 (Loan)	986.50 and lawyers fee	15 days	5	Court Decision
(010)10424	Family	25 plus 10.50	25 days	8	Mediation
(010)10384	70,000 (Family and property)	25 plus 10.50.	54 days	12	Court Decision
(010)10068	60,000 (Family and Property)	25	50 days	10	Court Decision
(010)9396	Family, 60,000 and land	25	9 months and 10 days	25	Court Decision and executed
(010)9213	Family	25	6 months 16 days	13	Court Decision
(010) 10781	Family and land	25	5 months and 7 days	4	Court Decision
(010) 10668	Family (Liaka case ²⁵³)	25	1 month and 1 day	7	Mediation

²⁵² Source files from courts visited on 22/7/2015 and 18/8/2015.

²⁵³ This case shall be dealt with in more details at the end of chapter six.

It is clear from the table that for the Woreda Court, the minimal amount of judicial fee (less than a dollar in family cases) incentivizes the parties to litigate. The table makes it apparent that a greater number of cases are completed through mediation. The number and duration of adjournment was shorter in cases where parties either admit a case or when mediation is involved. With an increase in the kinds of disputed items, though the case is the same, litigation is protracted and delayed. Thus, keeping other factors constant, non-reform factors can be seen to contributing to the success.

More or less the same incentives and dis-incentives are observed on the files at Bahir Dar Woreda Court. Of the Bahir Dar files randomly and selected and examined 6 of 14 files were mediated and closed.²⁵⁴ Two of them were closed for non-appearance. The others three were closed after the liquidator is appointed, divorce granted and the money claimed was awarded.

One of these cases (File number 37093) was a case where a guardian of an insane²⁵⁵ young man (with severe mental health problems) who had claimed to sell his house so that he could get hospitalised and treated. In this case, the witnesses testified that the guardian didn't have enough money to take care of the young man. Based on this the court gave the decision in a very short period of time with only 3 adjournments. This can be said to be efficient. I got the chance to talk to the lawyer of the guardian eight months after the file was closed. He did not know if the young man had been hospitalized but told me that the young man was always on the streets of Bahir Dar, as he did before the guardian brought the court action. Thus, it was difficult to claim that social justice was served in this case. So far he has not

²⁵⁴ The files are 37903, 38694, 38684, 38681, 36322, 36843, 36821, 36535, 37908, 37904, 38689, 38690, 36362 and 38691. Six of these files pertain to family cases. One of them pertains to case of inheritance, one monetary case and others are property cases.

²⁵⁵ Under article 339 of the Ethiopian Civil Code a person is insane when as a consequence of his being insufficiently developed or as a consequence of a mental disease or of his senility, is not capable to understand the importance of his action.

been hospitalized and his requests for treatment, his capability of being, have gone unanswered.

Enforcement of decisions too is challenged from several perspectives. Court decisions may be enforced either voluntarily or with the help of decision making bodies. It is true that many institutions serve to secure property and enforce contracts. Some of them entirely non-formal (not relying on Government) and some of them are governmental. Economic theory does not tell us which of these mechanisms of securing property and enforcing contracts is the best, and in reality they are all far from perfect. As private enforcement may degenerate into violence, enforcement by the government may be 'captured and corrupt'. Economists have been generally most optimistic about courts as institutions of security and have devoted little attention to analysing their limitations (Shleifer et al 2003: 453). The following discussions indicate the involvement of their limitations with respect to enforcement of decisions.

As indicated above enforcement of decisions is one of the most frequently entertained cases in the courts. After a case been disposed the Ethiopian Civil Procedure Code requires a second separate litigation action to enforce decisions. Further the Ethiopian reform discussed in Chapter Four requires the establishment of a separate department to the enforcement of decisions. This has been established in the federal courts. The ANRS courts have none.²⁵⁶ One of the reasons parties prefer courts to non-formal ways of doing justice has been due to the better enforcement of decisions. Despite that the files in the table indicated that enforcement of decisions is not as efficient as giving decisions is. In most of the cases judgment creditors did not move to enforce the decisions and the status of enforcement is unknown.²⁵⁷ In some cases it was difficult and inefficient without

²⁵⁶ In the Federal Courts the court that gave the decision receives application for the execution of the decision and gives an order to execution department to complete the execution. In the ANRS courts the same court that gave the decision complete the execution. This is in accordance with article 371 of the civil procedure code.

²⁵⁷ File No. (010)10515, (010)10424, (010)10424, (010)10068 and (010)10781.

the involvement of non-formal systems. Appellate Courts have also suspended enforcement of decisions which decision they finally affirm.²⁵⁸ There has also been the possibility of closing a file without execution being finished.²⁵⁹ In one of the cases two sheep, whereupon injunction order was given, were dead pending enforcement of the decision.²⁶⁰ These facts are problematic as they put a court decision in to jeopardy thereby increasing the risk involved in contract. Getting and enforcing decisions becomes more problematic as the amount in dispute gets higher. The following tables from the ANRS Supreme Court and Federal High Court data indicate how enforcement gets tougher when the amount involved gets higher.

²⁵⁸ File No. 9863 and 10384. Interview with Academic 'B', University Lecture and Practicing lawyer, Former Judge at the ANRS Supreme Court, 19/8/2015 also revealed that appellate courts finally affirm the lower courts decision. This makes the suspension meaningless.

²⁵⁹ File No.10423, 9213 and (010)10668.

²⁶⁰ File No.9396.

Tablw 9: Getting decisions: ANRS Supreme Court.²⁶¹

File No.	Claim Amount	Duration	No. of Adjournments	Bases of Resolution	
308884	1,374,014.85 ETH for Bodily injury) 74,014.85 ETB	2 years and 10 months	14	<i>Shimigilina</i> (settled for 50,000 ETB ²⁶²	<i>Shimigilina</i>
32706	Land possession dispute	3 months and 22 days	4	<i>Shimigilina</i>	Left to Land Administration Authority
30789	1,706,494.91 ETB (Contract of Sale)	4 years	54	Mediated for 1,074,631.09 ETB	Mediated after cassation
31799	783,332.70 ETB for bodily innjury)	2 years and 10 months	19	<i>Shimigilina</i> for 55,000 ETB.	Excuted immediatly.
35101	1,055,500.00 ETB for Damage claim for negligencet homicide)	N/A	15	Mediation	<i>Shimigilina and settled for 35,000 Birr</i>
35081	Inheritance dispute	N/A	N/A	N/A	<i>Shimigilina</i>
34795	Paternity dispute	N/A	N/A	N/A	<i>Shimigilina</i>
34588	Land	2 months 15 days	N/A	N/A	<i>Shimigilina</i>
39811	inheritance	11 mths and 15 days			Sent back for retrial.

The table makes it clear that efficiency is problematic at the ANRS Supreme Court. It is also clear that the involvement of non-formal ways of settlement is visible in a number of cases at the apex of courts. In most of the cases parties, after prolonged adjournments, resort to non-formal ways of dispute resolution and mediate for a lesser amount.

The table also makes it clear that some of the cases are closed but unfinished. For example, File Number 39811 is sent back for a retrial while file number 32706 gave judicial power to land authorities which may be against the very purpose of litigation. This may leave parties at the mercy of the land authority that litigants might be fighting against.

²⁶¹ Source: Files visited on 17/8/2015-19/8/2015

²⁶² This is one kind of informal system of dispute resolution. Chapter six shall discuss the details about it.

5.5.1. Getting and Enforcing Decisions: The Federal High Court

As per Proclamation No. 25/1996 dictates the most important national cases are tried by the Federal High Court.²⁶³ Owing to the large amount of money involved and the complexity of the cases, both getting and enforcing decisions are problematic in the court. As indicated above the Civil Procedure Code requires Judgment creditor to reopen the “dead” file for the enforcement of the decision. In this respect the practice is in tune with this procedural dictates. As Table 7 indicated the enforcement of decisions ranked as one of the top five cases in the Federal courts but it was the most problematic as a result a significant amount remain unenforced. The database does not show the exact figure in this respect and there is no mechanism to visualise post decision status of the parties, and hence realisation of social justice. The following table shows the prevalence of the challenge.

²⁶³ These include crimes against the state, the constitution, foreign states, the tax system, forgery, the security of states, diplomatic cases, substance abuse, and crimes between religious or ethnic groups. Civil cases include Federal cases worth Birr 500,000 and above, nationality issues, cases of foreigners, negotiable instruments, banking and insurance cases, *habeas corpus* cases and Intellectual property cases. For the details see proclamation Nos. 25/1996, 321/2003, 138/1999, 254/2001 and 454/2005.

Table 10: Table 7 Getting and Enforcing Decisions in tabular format.²⁶⁴

File No.	Amount Claimed and for.	Duration	No. of Adjudgments	Bases of Resolution
130542	3,493,577.93 ETB (Contract of Sale)	2 years and 4 Months	22	Award 1,846,000 ETB
138582	793,792.95 ETB(Contract of Sale)	3 Months and 21 Days	6	Claim Granted
138542	3,009,257.75 ETB (Guarantee)	5 months and 5 Days	7	Case lifted and closed.
138490	13,252,236.51ETB Construction Case)	6 Months and 12 Days	6	Award 6,419,526.01 ETB
116843	1,190,838 ETB (Construction Case)	2 Years and 36 Days	27	Award 1,259,754.15 ETB
138127	655,162.40 ETB (Property Damage)	1 Year an 11 Months	21	Claim Granted
138244	2,245,520.95 ETB (Property Damage)	6 Months	5	Claim Granted
111397	1,640,743ETB (Loan)	3 Years and 9 Months (including Cassation)]	N/A	Mediated after Cassation
117028	886,832 ETB (Carriage)	2 Years and 4 Months	N/A	Mediated

As can be seen from the table both efficiency and enforcement of decisions, hence legal and social justice, is problematic.²⁶⁵ The table makes it apparent that the higher the litigation rate the more difficult getting decision. The files did not show if parties moved to enforce the decree as a result of which the status of the enforcement is not known at the time the files were visited.²⁶⁶ Contrary to getting

²⁶⁴ Source: files of FHC visited 22 Sep. 2015 015.

²⁶⁵ This holds true for the other files that are consulted but not indicated in the table. These files 111479, 111343, 108085, 111397, 117028, 111474, 116905, 128174, 125370, 138706, 134543, 138468,111501, 125454, 138843, 134547 and 116905 also witness the same challenges as those in the table went through.

²⁶⁶ The files were visited from 22 Sep. 2015-26 Sep. 2016, Addis Ababa.

the award and realising the capability of doing,²⁶⁷ judgment creditors incurred additional costs (impoverished to that extent) after ended up as winners. For example, the winner in file No. 138582 claimed 66,353.51 ETB as a cost incurred in the process of litigation and was awarded 39,689.51 ETB.²⁶⁸

Both the Regional and Federal files indicated that when the enforcement of decisions begins the real battle too begins. Judges informed me that there are many challenges in the enforcement of decisions and in the process courts face many obstacles. Accordingly, judgment debtors deploy various techniques to paralyze the execution. Debtors hide property, refuse to pay, protest against the value of asset, try (and at times commit) bribery, cause third party interference in the process as right bearers, conspire during auction, avoid asset (seizing, valuing, sale), use other dilatory techniques (including appeal, interest, calculation of debt, other creditors (government or custom authority), claim insolvency or refute the validity of the decision during execution.²⁶⁹ The winner could not control all these and would be forced to litigate vigorously. Thus enforcement in most cases requires more time and effort than obtaining the initial judgment.

²⁶⁷ In this respect the researcher has a shocking experience when he visited one of the prison houses in Addis Ababa having more than 10,000 prisoners. At the conclusion of the visit the researcher chaired a meeting with the representatives of the justice organs where the prisoners unanimously and bitterly stated that the government thinks that they were being rehabilitated when they actually were released after being sardined. If so enforcement in criminal cases is not realizing the capability of the state and the prisoners.

²⁶⁸ Compensation to an amount of 345,857 ETB was also claimed in File No. 111397. The winners were awarded 135, 372 ETB on File No. 138490, 57,486 ETB on File No. 116843, 229,602.80 ETB on File No. 138127 and 352,337 ETB on File No. 138244 as costs incurred in the process of litigation. These costs are huge for a poor country. None were enforced at the time of the visit. The costs are a double blow to the winners who happened to be technically winners but losers in real terms.

²⁶⁹ Interview with Judges R (A judge at the civil bench of the Federal High Court, served as a judge for more than 10 years) and Judge S (judge at the civil bench of the Federal First Instance Court, served as a judge for 6 years). A judge at the Federal Cassation Bench, judge Q who served as a judge for more than 23 years also shared these views. Other factor like lack of clarity in writing judgments was also noted as a challenge by the execution department when the 2014 budget year court performance was evaluated by all Federal Judges.

Enforcement was one of the top five cases²⁷⁰ in the courts but the files, at the time of being consulted, did not show the completion of the enforcement. That may be one reason why enforcement of cases ranked one of the top five cases in the Federal Supreme Court too. The more enforcement of decisions is appealed, the higher the rate of inefficiency in courts performance making neither the entry nor the exit to litigation easy.

5.5.2. Attrition rate of Courts

Though the disposal rate of court is significantly large, this does not necessarily mean legal justice (and social justice) is served to the litigants. In both the Federal and ANRS Courts a significant number of cases are closed without being decided or judged. For example, in 2011 the ANRS Justice Bureau report indicated that of the 33,894 and 8632 cases prosecuted at *Woreda* and High Courts 1249 (5.2%) and 827 (13.13%) respectively are prematurely closed for either the witnesses or defendants did not appear before the courts. There are many reasons for their non-appearance but reasons identified by the ANRS Justice Bureau (Dessie 2004: 167-172) include:

1. Delays in court including the adjournments of cases without hearing witnesses
2. Lack of interest in testifying (unless for a close relative): due to lack of trust on courts and lack of trust on prisons as places of rehabilitation
3. Choice by victims of non-formal forums to settle their cases
4. lack of a witness protection scheme
5. Fear of forced seclusion from social ties (*edir, senbetie, debo*)²⁷¹
6. Presence of individuals escaping justice without being held accountable
7. Unpredictability on the part of the justice system

²⁷⁰ The same is true for the ANRS courts. The *Gera Keya Woreda Court* report for the year 2010-2015 indicates this fact.

²⁷¹ According to Woldemichael, Haile (1973), *Social and Economic impediments in Ethiopia* (PHD dissertation), UTAH, these are traditional, social and economic institutions and cooperatives in Ethiopia. Haile examined the different kinds of social, customs and economic practices that impede social and economic development in Ethiopia.

8. Migration in search of jobs
9. Low level of allowance for witnesses (almost 1 USD a day)

An effective judicial reform has to increase the probability apprehension, deterrence rate, highest marginal productivity and confidence in business. Despite that the list of problems identified by the Bureau indicates that defendants and witnesses weigh the pros and cons of the formal systems. They calculate the expected cost of committing a crime multiplying the probability of being apprehended by one or more of the variables in the list. This makes victims (and the government) incapable of realising their capability of getting decisions (of doing) towards the fulfillment of one of their basic needs-justice. Furthermore the Federal Court report demonstrates that a huge number of cases were closed without getting a final decision. To the extent that significant number of cases are closed without being finished (prevalence of high attrition rate), legal and social justice would remain un-realised by the formal system.²⁷²

5.5.3. Challenges of the Litigation Process

Countries inherited formalized or strict procedures from countries like UK or France either by conquest or colonization.²⁷³ In the Ethiopian case chapter one indicated

²⁷² This compromises party's right to access justice as granted under article 37 of the 1995 Constitution.

²⁷³ See Shleifer et al (2003) *Courts, Supra* note, 51, P. 51. See Shleifer et al (2003) *Courts*, The Quarterly Journal of Economics, Vol.118, No.2, p. 507. According to Ahleifer Montesquieu held that "judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor" As it is held that "form is the sworn enemy of arbitrary rule, the twin sister of liberty", non-formalism is associated with vulnerability to subversion by the powerful. Thus the desire to control court outcomes, and lack of trust on courts, forces law makers to design heavy-going procedures that the courts should follow. That is why the French revolution and Napoleon did not trust judges and codified procedural laws to control judicial discretion, all inclusive, as a guarantee of freedom. It can thus be argued that greater formalism in some countries can reduce error, advance benign political goals, and protect the judicial process from subversion by powerful interests. In such cases greater formalism is an efficient adaptation to a weaker law and order environment (Shliefer et al 2003: 460).

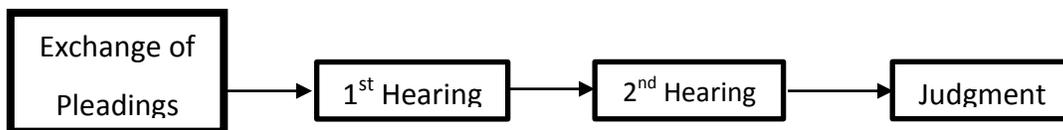
Research also revealed that countries that have inherited legal systems with heavily formalised dispute resolution end up with lower quality of legal systems, at least for simple disputes. It can thus be argued that extreme legal or practical formalism brings extreme cost and delays, unwillingness by potential participants to use courts, discourages litigation and forces litigants to resort to other primarily ignored forums. Extreme formalism could thus reduce litigant material benefit and be a

that Ethiopian inherited procedural laws. Litigation is mainly channeled by the Civil and Criminal Procedure Codes. In both cases oral litigation is the mainstream litigation.²⁷⁴ The general rule in the codes is that litigations pass through ordinary procedures leaving expedited procedures as exceptions.²⁷⁵

As procedure is a means to an end it should, as far as possible, be as simple as possible. In this respect ordinary procedures in civil litigation include exchange of pleadings, first hearing (to frame issues), second hearing and a judgment. With the exception of some preparatory works (for example, exchange of statement of defense that can be done by administrative staff (registrar of a court), all are done by the sitting judge. In criminal trials the litigation is simpler as the code envisages continuous and preliminary oral events that include preparatory matters, trial and judgment.

The litigation diagram for civil and criminal litigation:

Figure 3: Civil litigation

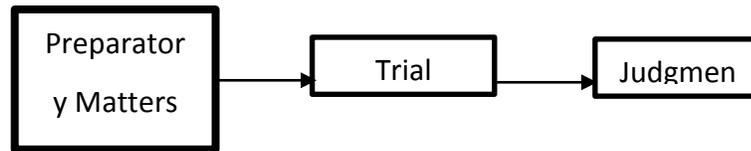


potential source of injustice. On the other hand, the judges in the UK were assumed to be on the right track as a result of which the political process accommodated great and more judicial independence. Thus the common law was accommodated which placed less emphasise on formalism.

²⁷⁴ Exceptions include statements of claim and criminal charges that need to be submitted in a written form.

²⁷⁵ Exceptional procedures include summary and accelerated in civil litigations and special procedures for offences like petty offences and the real time dispatch practice currently adopted in criminal litigations.

Figure 4: Criminal litigation.



The figures show the three phases in litigation: the procedure till the case is ripe for a decision, the time to render decisions and rendering decision. The enforcement of decisions also passes through the same three steps. This generally does not discourage litigation. However, the practice in courts deviates from these procedural imperatives and fall short of the codes expectation.

Adhering to laws is one of the reasons motivating reforms discussed in the previous chapter. The files examined in the field research reveal that the litigation processes largely rely on written submissions, fragmented, detracted by interlocutory submissions and less continuous. This is so if litigation in practice is mostly led by the party's in litigation rather than being led by the judges. The files examined show a cumbersome procedure (though not necessarily complex) employed in the courts. Judicial reform programme can relieve this source of injustice by taking lessons from other systems with a reduced and less cumbersome formalism. Other reforms redesigning workflows or processes could redesign and ease the process.

In addition to the files that I have seen in the courts my observation in the courts demonstrate that in significant number of civil cases first and second hearings are lumped together. At the hearing stage parties in some cases simply read their statement of claim and defense.²⁷⁶ By the same token the most important part in the criminal process at the trial stage happened to be dry, recording machines simply recording or registered what a witness narrates.

²⁷⁶ These are two separate stages where the court hears to frame issues and hear or receive evidence based on the issues (See articles 241, 249 and 257 and following articles of the civil procedure code). Under the criminal procedure code trial is continuous (articles 123-149 of the Code indicate this fact).

5.5.4. Challenges regarding the free movement of property.

A free market economy cannot exist without free flow of property, finance and labor. In this respect the way courts handle assets freezing or unfreezing bear an impact on realising social justice. Courts have power to give a temporary injunction²⁷⁷ order as per Article 154 of the Civil Procedure Code if property is damaged in various forms with an effect to impoverishing a litigant. Developmental as the article may be or construed to be, the practice is not always so. My informant told me that frivolous litigations (let alone genuine ones) are freezing assets worth millions and all procedural designs to protect this are practically made shaky at a frustrating rate.²⁷⁸ The procedural codes demand proves by way of affidavit to show the damage. Despite that the courts in most cases give injunction soon they receive statements of claim. My informant²⁷⁹ stated that the moment litigation starts plaintiffs bring affidavits to freeze assets of defendants and courts grant the order automatically. Most benches have developed templates to facilitate this. The files examined demonstrate injunction orders given on houses, machineries and other immovable properties.²⁸⁰ The injunction orders were not set aside at the

²⁷⁷ According to article 154 of the Civil Procedure Code this is an order given to restrain a party from doing a particular act or requiring him to do such an act. This will be given where action taken with respect to property will prejudice the other party or where in a suit to restrain the breach of contract or the commission of an act the defendant is threatening to breach the contract or do the act pending litigation. As per the article the court has to be convinced that the applicant has *prima facie* case that protection is necessary so that the applicant will not suffer irreparable injury.

²⁷⁸ Interview with ex-Judge 'A', ex-head of Federal Courts, 4/10/2015.

²⁷⁹ Interview with Retired Judge 'A', *Supra* note 8. The researcher as ex-president of the ANRS and FHC also observed same practice.

²⁸⁰ When the non-formal system tries not to disconnect parties from the market and the social circle he is in, the formal system does not always operate so. In criminal cases public prosecutors argues against bail rights of defendants which in principle and in practice freezes people (Interview with retired judge 'A', *Supra* note 57). If Injunction is not administered as per the civil procedure code it negatively impacts the economy of the country. In one case court made an injunction order on money in all accounts of the defendant in Banks which collapsed the construction of Ashegoda Wind Farm-now generating 120 MW the largest of its kind in Africa. The injunction was latter set aside when the judge found that the court lacks jurisdiction to entertain the case. In another case the Construction of stadium in A.A capable of holding 60,000 persons was suspended as a result of an injunction. In this case too the court was found to lack jurisdiction at the end of the day. In another case an injunction order was given on the money and assets of a judgment debtor (monetary claims and has nothing to do with the dam) which oosed a great treat to the construction of the Great

conclusion of the case and some have even lasted until the cases were disposed at the cassation bench of the Federal Supreme Court. For instance the case in File No. 111397 has ended on *erq* at the Federal Cassation bench on 28 July 2015 and the suspension was lifted only on 29 July 2015.²⁸¹ Neither of the properties so frozen was sold at auction to effectuate enforcement of decision.

Problems of this kind arise as a result of inefficiency in courts which according to one judge interviewed as part of this research one source of possible delay in courts is the process by which defendants or third parties began to lodge complaints in order to get the injunction order set aside.²⁸² This diverts efforts in getting the main issues resolved towards interlocutory matters and de-capacitates people and assets which is a big damage to a poor country like ours.²⁸³

5.5.5. Challenges in measuring quality.

The performance measurement mechanisms of the court did not show whether legal justice or social justice was being served. The mechanisms mostly measure the efficiency of the courts and give us the general picture of the courts' judicial performance. The database generates numerical reports including number of cases, the date it is opened, the date of closure, number of adjournments, period of disposition and the bench handling the case, clearance rate and similar items. Most measurements are general and numeric and did not show the individual attention the court gave to each case. Numbers tell much but not all. The emphasis on basic needs and standards of living demands measurement beyond numeracy. From these perspectives the reports or the data bases of the courts are of little help.

Government organs entrusted with the administration of the courts have not developed ways to assess whether social justice has been served by the courts or

Ethiopian Renaissance Dam-currently under construction on Blue Nile River and expected to generate 6,450 MW upon completion.

²⁸¹ It lasted nearly for four years without purpose.

²⁸² Interview with Judge 'B', a senior judge at the ANRS Supreme Court, Preside over the Cassation Bench, 19/10/2015.

²⁸³ Interview with Retired judge A, *Supra* note 57.

not. The Judicial Administration Council and the plenum of the Supreme Courts that monitors the overall performance of the courts nor the Parliament to whom the courts are accountable assure the prevalence of social justice on a one-to-one base.²⁸⁴ No other organ assures the quality of their performance. The very laws establishing the court did not entrust them with the power to set such standards.²⁸⁵

Accordingly, the courts themselves are in charge of both developing and testing quality of court performances. In addition to measuring mechanisms discussed above currently the FSC endorsed indicators to assess the quality of federal courts performance. This mechanism measures volume of work, efficiency, cost and quality of service. Quality indicators pertain to impartiality, equality, independence, professionalism, case flow management, reversal rate, consistency, rule of law, trust and confidence (FSC 2015:1). Despite that the five year evaluation report stated that these indicators were not implemented.²⁸⁶

5.5.6. Seeing opportunity as challenge

As indicated above the courts have opportunities that may be utilised to serve social justice. Among these opportunities the increase in litigation and trainings given will be discussed in brief. In Chapter One it was indicated that no one could or

²⁸⁴ Other *ad hoc* organs including the National Steering Committee (earlier chaired by the president of the court), the Cluster (Replacing the former National Steering Committee of Reform programme) and composed of same members but chaired by the Minister of Ministry of civil service too did not follow the very day to day operations of the courts.

²⁸⁵ The ANRS Courts Re-Establishing proclamation No. 169/2002 and 223/2015 (except stating that the regional courts shall be efficient, effective and accessible based on rule of law, transparency and accountability) also has the same arrangement but the plenum had none of its meetings. Members of the Plenum are President of the Supreme and High Courts and Judges of the Regional Supreme Court (For further details see article 28, 29, 30 of Proclamation No. 223/2015 of the Region). Federal heads of courts (not willing their names be mentioned) are not sure if the plenum had more than one of its meetings (and do not remember the agenda) so far. As per article 32 of Proclamation No. 25/1996 members of the plenum of the Federal Supreme Court include President and vice-President of the Supreme Court and judges of the Supreme Court, Presidents of the FHC and FFIC and the Regional Supreme Courts. Under article 33 the plenum is entrusted with: the power to deliberating on problems in the administration of justice, the power to approving directives that help to improve the judicial practice of the federal courts and the power to performing other functions that help the judiciary to be efficient and strong.

²⁸⁶ Five years evaluation report of Federal Courts, 2015: So far the courts largely depend on the reversal and amendment rate to sense quality of justice. This may be helpful in indicating the level of internal coherence between courts, but remain short of assuring quality in the Ethiopian context.

would be indifferent as far as question of justice was concerned or the more important question of injustice. Furthermore, people increasingly present their cases to the courts in the hope of getting their social, political, and economic problems resolved. Despite the courts gradualist and individualist approach to realise justice, an increase in litigation is a great opportunity to shape so many lives beyond the litigants. Most of the cases are disposed of in less than six months. This is another opportunity for the courts to reduce further disputing and have fewer cases at their disposal and gear efforts towards quality. Most cases are similar and repetitive so that it will be an added advantage to fair and equal dispensing of justice and shape the behavior of the potential parties to similar litigation.

However, judges and lawyers view the increase in litigation as a hindrance to the speedy resolution of disputes. Moreover, the increase in litigation is viewed as increasing the possibility of corruption as a means to get speedier arrangements or decisions. Owing to this, professionals and the people talk about the prevalence of delay, corruption,²⁸⁷ and nepotism on the part of the courts. Be this real or simply something perceived the perception cannot out rightly be rejected. If this evaluative judgment persists when courts are congested but dispose cases within a short period of time, then the courts need to address the root cause of the problem and be more accountable, accessible and transparent in their achievements.

The increase in the volume is also a challenge to courts where there is shortage of judges, where the most experienced judges leave the courts and join the bar. As Table 4 demonstrated the number of judges in the ANRS Supreme Court, WG and NS High courts decreased from 424 to 373 and then to 267 within the last three years. This will be challenging when the appointment process to replace judges

²⁸⁷ In 2014 two judges from the FHC and FFIC are sentenced to 8 years rigorous imprisonment for committing corruption. On the other hand the ANRS evaluation report indicates that 16 judges are dismissed and 51 judges are penalized with money up to 4 months of their salary (The report, 2015 *Supra* note 18, p.26, 36). Besides that the corruption perception of the people is more damaging than the reality in the courts (CIDA, (2008), *Independence, Transparency and Accountability in the Judiciary of Ethiopia*. 2008).

takes not less than a year.²⁸⁸ The experienced judges could have ended up in being good lawyers in serving justice in its true sense had the atmosphere of the bar would have been comfortable to this positive connection.²⁸⁹ These two facts are not in tune with the dictates of a developmental state.²⁹⁰

5.5.7 Challenges in the competitiveness of non-formal decision making bodies

The judicial performance of the courts discussed above indicates that the sector operates in the midst of many challenges and opportunities: the non-formal sector being one of them. As explained above most litigants in Ethiopia utilize the non-formal system of dispute resolution under the impression that it is efficient and benefits both litigants so that no party lose out at the end of the litigation. Beginning from ancient time's courts used to refer court cases to non-formal systems for better outcomes. This is a good opportunity as well as a challenge to courts who can, as "learning institutions", take good lessons from the non-formal sector.

Currently courts in Ethiopia are implementing the Business Process Reengineering (hereafter BPR). One of the reasons why the BPR is introduced in the court is that courts are functioning in an atmosphere of fierce competition.²⁹¹ The competition

²⁸⁸ The Regional Council meets twice in a year and so far appoints judges once in a year. Federal Judges are also appointed once in a year for years now.

²⁸⁹ Interview with Academic 'A', University Law Lecturer, Former Judge at the ANRS Supreme Court, Bahir Dar, 21/10/2015.

²⁹⁰ Other challenge also pertains to training given. The reports of both courts indicated many training (some of them sudden) given to judges. The opportunity that this training gives to make judges able ones towards enhancing the capability of parties has not always been positively accepted by the judges. These training to a large extent are quality and service oriented so that they pave the way towards securing social justice. Contrary to this judges have the impression that most training, though good, are unplanned and interrupt the usual judicial business and create court arrears on its part.²⁹⁰ When opportunities are viewed as mere challenges realisation of justice would be distanced.

²⁹¹ See Ministry of Capacity Building, *Business Process Reengineering* (2014: 5) which states that other reasons include change and customer need of courts. As far as courts are concerned these same issues were the overall objective of the BPR. The reengineering is believed to change the way courts process cases so that every change to this effect is introduced. Thus the reengineering tacitly replaced the reforming.

between different forums amounts to alluding the existence of different forums claimed to render quality judicial service at the right time and in the right way. In this respect a competent decision maker expands the real freedoms of the people by meeting basic needs and standards of living and meets parties and constitutional expectations more effectively than other decision makers.

Competitiveness in the decision making can be measured using quality of service, productivity of courts (such as services produced per unit of courts human, capital and other resources) cost of delivery of service and time of rendering service. Competitiveness can be measured using factors of case disposal, the demand for the services of decision making bodies, and the conditions in the nation governing the creation, organisation and management of formal and non-formal systems and the nature of domestic rivalry and the extent to which these bodies are available locally. Certainty and predictability to win a case, Government factors and a culture of litigation do also determine the fitness in the bodies.

Informants to this research have stated that the non-formal system has competitive advantages with respect to low cost service, quality service, trust, respect, lasting solutions and in rectifying the wrongs of the formal system.²⁹² Despite competitive advantages over reform achievements the formal system lacks competitiveness on these points. While the people demand justice in its true sense the legal history of Ethiopia and researches reveal that the courts were not well reputed in this respect (CIDA 2008).²⁹³ This is one of the reasons for choosing the non-formal system for resolution. As will be discussed in the next chapter, a significant number of judges and professionals also prefer non-formal systems.

²⁹² Interview with academic A, University Lecturer and Practicing lawyer, 21/10/2015; Academic B, University Law Lecturer and Practicing Lawyer, 19/8/2015 and judge B, a senior judge at the ANRS Cassation Bench, 19/10/2015.

²⁹³ This is a study by the National Judicial Institute for the Canadian International Development Agency (2008) on the *Independence, Transparency and Accountability in the Judiciary of Ethiopia*. CIDA agreed to conduct an assessment and prepare action plan on these areas. It was commissioned by the FSC who in turn was commissioned by the National Justice Steering Committee to commission the study. This research indicated that Ethiopian courts are negatively perceived, P.195.

5.5.8. Establishment of other formal institutions

As the legal history and the earlier discussions made it clear the competition between the formal and non-formal system is fierce. So the formal system needs so much flexibility in its process, so much productivity in its outcome and so much innovation in its process and ends. Much effort in improving the courts is expected from the Government.

Despite that the Government's current move in establishing other bodies with judicial power poses a significant threat to the very purpose of courts existence. Besides parties desire to resorting to non-formal sectors the legislative effects or Governments resort to establishing other decision making bodies (for example the recent establishment of patent courts, unfair trade practice tribunals-taking almost all tort cases from the formal courts)²⁹⁴ are not to the benefit of the court's competitiveness. This may diminish the trust and power of the courts in the future and disputants might be pulled in many directions in search for justice. The locus of justice will be in the multiple justice sectors (local, private and government regimes) and this further complicates the existing legal problems.²⁹⁵

²⁹⁴ A research by Yosef (2014), *Bethiopia Yeseber Sir'eat Ymecheresha Wusani*, The Cassation Question in Ethiopia, Addis Ababa University School of Law. Yosef identified 16 (later 17) decision making channels from which the FSC Cassation bench receives cassation complaints. See also proclamation No. 410/2004 (as amended in 2014) and establishing Proclamation No. establishing through which See proclamations No. 685/2010.

²⁹⁵ This is apparent marginalization on the legal profession and another impediment to realizing legal and social justice.

Other competitive advantages of the formal system include the following. 1/ Supply side of Litigation: In terms of what courts employ and pay (professionals and skilled man power), high technology to monitor performances and resources (infrastructure, administrative, information infrastructure, scientific and technological infrastructure) courts excel informal system. Imputes of courts like the number of cases brought to the courts (demand for justice), the numbers disposed by the courts, the number of judges and other staffs, the educational level of the judges, the number of training given to the judges and the budget of the courts excel the informal system. This potentially could make courts competitive and excel in performance. The increase in imputes, however, is not equally matched by an increase in the productivity of the courts. 2/ Related and Supporting Sector of Justice: The external connection that courts have with other bodies also influences the choice of forums. The more courts are connected to the external sectors (the public included), the more the opportunity to render quality justice. This is so in so far as the external tie does not compromise the independence of the judiciary. In this respect the courts effort to celebrate "justice week" for the last five years and the joined up committees at various levels (reform steering committees), are

5.5.9. Challenges posed by change instruments

As explained above the Federal Courts and ANRS have introduced various change instruments within a decade to this effect. The instruments multiplied and intensified efforts to reform the system from various angles. In addition to those discussed above the emerging change instruments include quick wins, the BPR (as of 2006), the team Charter (as of 2012), Citizens Charter (as of 2012) and the Balanced Score Card (BSC) (as of 2011).²⁹⁶

Ethiopian judiciaries function under severe restraints on. The judiciary suffers from dismal conditions of service, staff shortages, a lack of adequate training, debilitating infrastructure and logistical problems (World Bank 2004: 10). This has been so after the 2015 evaluation.²⁹⁷ Accordingly, the World Bank (2004: 10) recommended that “capacity building and reform should be staged or sequenced to reduce the potential for overburdening the sector’s institution”.

However later efforts to reorganise the work flow of the courts became complicated and fragmented due to the extensive reforms so far exerted. The effects of the recently introduced change instruments neutralise the success of the reforms. For example, the introduction of BPR in 2013 diluted and took over the judicial reform programme.²⁹⁸ BPR meant changing the status quo, starting over

good beginnings towards benefiting from the external connections. This is a good opportunity for the courts but unless properly utilized is a challenge as well.

²⁹⁶ These change Instruments include: Court Administration Reform programme (CARP 1997-1999)-study and piloted by the Federal Supreme Court; Court Administration Reform Programme (1999-2004)-replicating CARP 1 in ANRS and Benishangul Gumuz Regions and all Federal Courts, and the Judicial Reform Programme and the Civil Service Reform Programme (as of 2005) that overlapped CARP 2. In addition to the success of the reform programme discussed under chapter 4 other fringe benefits of the reform programme are mentioned during the field research of this study. One of the informants said that the judicial reform programme is still being implemented while other “change instruments” feed it. My informant said that the command post for Good Governance is one such instrument. It is also mentioned that the programme brought justice sectors closer so that the judiciary has got the chance to present the challenges of the court to the administration. It also benefitted the court so that courts may defend unfounded allegations of the administration against them (Interview with Judge ‘E’, a senior judge and head of a court, 7/8/2015).

²⁹⁷ See the ANRS evaluation report, 2015 and the FSC BSC, 2011.

²⁹⁸ The BPR reintegrated Police, prosecution, courts and prison administration in the criminal justice administration. The BPR for the civil justice system is done independently. Singapore and Asian

with a “fresh start” and blank sheet (MoCB 2014: 11). Hammer and Champy defined BPR as:

“...the fundamental rethinking and radical redesign of business processes to achieve dramatic improvements in critical, contemporary measures of performance, such as cost, quality, service and speed.”²⁹⁹

This definition pertains to the efficiency and effectiveness of courts and is fully endorsed in reorganising the Ethiopian courts. The dissatisfaction on the part of litigants was the main reason to launch the BPR. The main problems that the BPR tries to address include the inability on the implementation of the JSRP to satisfy the people and the ineffectiveness (high cost and delay) of the justice system.³⁰⁰ Accordingly, the BPR is meant to change work process radically, dramatically and fundamentally. It requires beginning everything from a clean sheet. Initiated by the Federal State, the implementation began in Oromiya and Southern Nations Nationalities and People Regional States³⁰¹ followed by ANRS and Tigrayan Regions. The Federal Justice System joined this effort latter in 2008. Despite that judges have lingering questions relating to change instruments introduced after the reform programmes. They doubt if the BPR, originally developed for private business improvement, could be implemented in the public sector particularly with in the judiciary. Judge ‘E’ told me that one of the judges in judges’ meeting raised his doubt if a “client in a court could be treated like a king” just like he might be treated in a private business dealings for which BPR was initially designed.³⁰² According to Academic ‘B’ the independence of the judiciary is compromised under

countries are bench marked in the design of the BPRs thus adding countries in the list of the legal history of the country.

²⁹⁹ See Hammer and Champy 1993: 32). This book is the main, or rather the only reference to design and implement the BPR in Ethiopia.

³⁰⁰ As per the decision of the National Justice Steering Committee, *minute no 110 of National Justice Steering Committee, February 16/2008*, other reason include the inability to integrate the criminal justice system (from investigation to prison administration) end-to-end. The reform began from the Federal Courts and then expanded to the ANRS then other Regions.

³⁰¹ Note that these regions were late comers in the implementation of the judicial reform programme.

³⁰² Interview with judge E, senior judge and a president of ANRS High Court, (served for more than 15 years), 7/8/2015.

the guise of these later initiatives. He further remarked that the lack of confidence on the part of judges arose from these arrangements and that is why the conviction rate of courts increased and the meritorious judges left the courts.³⁰³ He further added that practically public prosecutors at times happened to be decision makers.³⁰⁴ If that is the case the effect of the BPR would be against the demand of the reform programme to give judicial independence a top political priority.

BPR was overlapped by BSC in 2011 the introduction of which underscored the dissatisfaction on the part of the people owing to the limited achievements of the reform efforts of the past, despite the BPRs' desire to radically transform.³⁰⁵ In this respect too judges question whether BSC is a science or a tool to implement the BPR.³⁰⁶ As their predecessors did, these later efforts totally ignored the non-formal systems of justice.

5.6 Agendas for the future

5.6.1. Unresolved challenge of the Courts

When launching the implementation of the five year judicial plan in 2011 the ANRS Supreme Court had identified two thematic areas as main objectives of the court.

³⁰³ As table 4 indicated more judges have been leaving the courts and joining the bar. With the experienced flying off, spread wing judges could join the bench. This may not result in losing the more experienced lawyers, capable of understanding current legal developments and implementing policies and handling challenges and problems from within and without. On the other hand the courts may lack able judges to handle seemingly simple but complicated cases with the growth trajectory-of business litigation, of horticulture litigation, of labor disputes, of complex issues of land, etc. If the courts could establish healthy relationship with the flying off judges joining the bar and the lawyers do at the same level of commitment, courts could do more with mediation. This is not always so as the lawyers consider this as treat against their income (Interview with Judge 'P', senior Woreda court judge, 21/10/2015). Academic A, assistance professor and a practicing lawyer, (*Supra* note 72) agree on this point and added that too much mediation would be "contaminated" when lawyers were involved. He mentioned a case (ANRS Supreme Court file No. 20012) where mediation was practically difficult to arrange in a dispute in which 9 brothers were involved. They were not only litigated among each other but also consumed their economy and brotherhood. Though the lawyers made the mediation difficult, the winner of the case at the apex of the court finally mediated and settled the case realizing that his brothers are more important than winning the case. After the settlement all are doing well.

³⁰⁴ Interview with Academic B, *Supra* note 72.

³⁰⁵ Federal Supreme Court, BSC, 2011: 15.

³⁰⁶ Interview with judge E, *Supra* note 82.

These were making judiciary service accessible and ensuring adherence to judicial ethics and accountability.³⁰⁷ These thematic areas had different goals including:

1. Ensuring efficiency in the courts
2. Increasing the disposal and clearance rate of courts
3. Increasing tele-conferencing and number of mobile benches
4. Increasing institutional competence
5. Reducing reversal rate of court decisions (to assure quality)
6. Increase judicial inspection, support and follow up
7. Increase the capacity of court leaders and other staffs.

During the implementation of the plan training (covering wide areas including land laws, management of cases, labor cases, service delivery, change management, policies and strategies and implementation of reform programmes) were given to realise these objectives (ANRS 2015: -7). After five years, the completion of the plan, in 2015 the court evaluated its performance.

Despite the many pre-service, in service, and long term training as well as education given to judges to realize the objectives of the court the evaluation report of the court states that lack of quality, fairness in decisions and adherence to traditional ways of disposing cases in the majority of the cases were the main complaints against the courts. These have compromised the quality of court decisions (ANRS 2015: 3-5). According to the report the quality of court decisions is understood in terms of giving decisions based on the truth of the case. Training were given to this effect and judges discharging their duty based on patronage and corruption are made accountable (16 dismissed, 51 judges given decision ranging from warning to a penalty up to 4 months' salary (ANRS 2015: 36).

External factors also account for the lack of quality in the performance of the courts. Perjury and production of forged documents by some government bodies

³⁰⁷ See the ANRS evaluation report, 2015: p.1.

were among such factors. To dispense with these problems and arrive at the truth of the case the ANRS Supreme Court tried to work in collaboration with land authorities and municipalities so that these bodies shall provide legal evidence based on proper scrutiny. Despite all the efforts a wide range of complaints are still heard of in the way land cases are handled. This had compromised the quality of court decisions and much more effort is expected to be exerted to tackle these problems.³⁰⁸

The same held true for the Federal courts. As indicated above the Federal courts receive cases of national interest from all corners of the country. As an organ of a developmental state the courts were expected to perform their tasks based on the plan³⁰⁹ they adopted in line with the GTP and the five year strategic plan of the justice sector. The yearly plans for the year's 2012-2015, with a slight difference in figures, are more or less similar. While the 2014 plan introduced the drafting of a Citizens Charter, evaluation of the judicial sector and the reorganisation of office of the Judicial Reform Programme, the 2015 plan on its part added the preparation of ADR project and endorsed the plan to implement the Human Rights and Good Governance plan of the government. Building institutional capacity, serving efficient, effective, accessible, predictable justice and expedited execution of decisions and contributing to the building of the rule of law and good governance were the strategic tactics towards implementing the plans.

At the conclusion of the 2015 budget year, the Federal Courts also evaluated their performance and found that, like the ANRS Courts, the courts still carry on

³⁰⁸ The quality problems are identified as problems related with procedural fairness, ethics and problems related to evidence served by land authorities. And the solutions include increasing penalties in criminal administration of justice, curbing perjury, capacity building (the Evaluation Report: *Supra* note p. 26-27).

³⁰⁹ The plan, including the ANRS Courts plan, did not reflect the achievement of justice from the socio-economic angle as was expected of an organ in a developmental democratic system.

repeating the same problems they had some years before. The problem with respect to measuring quality of court performance is paramount.³¹⁰

Thus the Federal and ANRS courts are still far away from serving quality justice. At the end of 2015 the attainment of legal justice is still a problem and the attainment of social justice was found a far-fetched exercise.

Conclusion

This chapter has suggested that the Ethiopian Judicial Reform Programme has made significant achievements in the administration of justice. Despite the courts being engulfed with an ever increasing demand for justice, especially achievements in areas of efficiency, use of technology in courts, training, planning and measuring court performances are significant. When the achievements are seen vis-à-vis the realisation of people's demand of justice in its true sense so that the basic needs and standards of living of the litigants towards the realisation of social justice is explored the chapter identified various challenges.

Accordingly the investigation of cases on a one-to-one bases revealed that the formal system is still some where away from serving social justice. The increase in the rate of litigation is found to be not healthy. Had the courts effectively resolved the cases there wouldn't have been a dramatic increase in cases. On the other hand, though courts resolve the cases speedily, a significant number of them are resolved without being finished. A large number of those finished remain unenforced.

With the lack of properly designed external connections to the ADRMs, the court has also missed many opportunities that could have enabled them to become

³¹⁰ Other challenges identified include lack of techniques to measure the court performance based on Balanced Score Card, lack of adequate knowledge, skill, and attitude and impute to measure the court performance based on the BSC, non-participatoriness-particularly in the preparation of their plans-continuation of business as usual in the operation of the courts, lack of ownership and commitment in managing changes, the low level (below expectation) of attitude to serve and the inability to measure impacts that training have yielded to judges (FSC: BSC 2015: 253).

“learning institutions.” Among many factors the mismatch between law and practice and lack of reform in engagement with non-formal system remain major issues. It can also be said that the court mechanism of measuring quality is problematic. These were major problems of the pre-reform era and remain agendas for the coming years.

Realising these challenges the courts have introduced other change instruments (basically the BPR) as a panacea. The very assumption of the BPR (starting from the clean sheet) is problematic seen vis-à-vis reform achievements. Unless the BPR deliberately targeted the realization of basic needs and living standards of the litigants as an outcome of reforms, unless it gives enough space to the non-formal systems so that both forums operate in an atmosphere of cooperation (rather than competition) it will repeat the mistakes of the reform programme. Whatever the name a reform that does not base issues selected by the people might be doing a job which is important but distanced from realising both legal and social justice.

It is therefore important to question why the realisation of social justice is far-off the formal courts. In searching for solutions the next chapter is based on case studies and further investigates the roots of the problems in this regard.

Lessons for formal decision making bodies processing and deciding the outcome of cases

The previous chapter has explained that litigation in Ethiopia has significantly increased after the implementation of the reform programme and is continuously on the rise. The mechanisms developed by the reform programme to measure court performance indicated promises in the efficiency of the courts but a closer look at cases revealed contradictions and challenges in the system. Specific cases demonstrated how reforms distanced issues of the people and could impoverish disputants. The challenges indicated that efficiency does not necessarily guarantee legal and social justice. It highlighted the need to undergo a paradigm shift in the conception, design, implementation and evaluation of reforms. It also suggested a need to have a shift that includes designing reforms from a bottom-up approach and working with the non-formal system. This cannot be fully comprehended without appropriate knowledge of the reasons behind the challenges.

On the bases of field research, this chapter investigates the challenges from the perspectives of different office holders so as to explore the reasons why the formal system did not serve social justice, finds out how the non-formal system works in this respect and investigates the relationship between the formal and the non-formal system towards the attainment of social justice.

Furthermore the chapter explores whether the formal system can take lessons from the wisdom of non-formal systems of settlements. As indicated in Chapter One, Ethiopia is known for its wisdom in non-formal systems and one of the places where such a forum is widely practiced is the ANRS.³¹¹ The case study hence investigates the existence and strength of the practice in securing social justice through

³¹¹ The specific areas of the case study include Bahir Dar (the capital city of ANRS), Debre Birhan (the capital city of North Shewa Administration) and Gera Keya woreda (one of the Woredas of North Shewa Administration). The areas are selected based on the criteria indicated in chapter 5.

enhancing the capability of litigants. It also tries to indicate how the forums expand the real freedom people have in accessing justice for the purpose of capability enhancement and tries to highlight the root causes of the challenges of the formal systems.

The chapter is organised into two main parts. The first part pertains to the formal system and the second part is devoted to the non-formal system. After introducing the method and methodology of case studies, Section 6.4 and the following sections deal with issues of social justice and discuss the *how, what, and why* of social justice in the formal system and the practice in realising it. Following this the second part discusses the same issues from the perspective of the non-formal systems. Finally, a brief conclusion wraps up the chapter's discussion.

6.1. Methodology of the case study

In 2005 and 2012/13 the researcher participated in study to identify the grassroots justice in Ethiopia.³¹² Based on the study the researcher wrote articles on these mechanisms but also, as the president of the ANRS Supreme Court, was able to conduct open public consultative meetings every six months with the general public. The study enabled the researcher to become more familiar with the traditional systems in Ethiopia and helped make the selection for this research of the council of elders (*Shimigilina* in Amharic) as the most representative non-formal system of the region a little easier. The participants of the consultative meetings, from all sectors of the people, were profoundly enthusiastic to indicate the strength and drawbacks of the formal system against the non-formal traditional system of doing justice. These benefited the researcher a lot. Later on, while doing this

³¹²The studies were published in two different versions. For the details of the studies see

- Gebre Yintiso, FekadeAzeze and Assefa Fisha (ed.) Woubishet Shiferaw (2011), *Customary Dispute Resolution Mechanisms in Amhara National Regional State: the Case of Wofa Legesse*, Customary Dispute Resolution Mechanism in Ethiopia, Vol. 1,
- Assefa, Getachew and Pankhurst Alula (ed), Woubishet Shiferaw and Melaku Abate (2008), *Customary Dispute Resolution Mechanism in Amhara Region: the case of Wofalegesse in North Shoa*, Grass-roots Justice in Ethiopia, Center francasisd'EtudesEthiopiennes.

research, the researcher learnt that the public meetings helped to develop confidence and trust between the researcher and the informants in this research.

This is a socio-legal research, in which analysis of the legal system is combined with empirical research on how people in a particular context use that system in practice. The approach incorporates research on the substance and procedures of formal/non formal systems and investigates problems fundamental to social injustice. It examines people's own ways for seeking remedy and connects poverty, markets, institutions and governance.

The research tries to investigate the formal/non-formal capacity to address and resolve problems of social justice. The purpose is to diagnose the reasons and gaps in the deficiencies towards realising legal justice and social service as core thematic area of this study. The case study concentrates mostly on land and family cases because they present best practices in which the people demand realisation of social justice.

The field study is informed by the conceptualisation of justice examined in Chapter Two, on available literature sources in the subject matter and the legal history of Ethiopia. It also benefited from the various reform documents stating various success stories and factors in the judicial performance, various challenges and risks of the court. The field study tries to re-connect the various conceptualisations with what actually is going on in the real life of the courts and the people.

The field study also benefited from secondary data collected from different institutions, particularly from the most recent reports for the 2011 to 2015 performance of the courts: the end of the first five year reform performance (and end of the five year strategic plan) and the beginning of the GTP2 (and the beginning of the following five year strategic plan) for all the courts under study. Office holders allowed unlimited access to the data and archive workers were

cooperative but heads of the court at the apex could not get sufficient time to go through all the thematic areas of the research. Thus, a brief discussion was arranged with them.

With this background the researcher visited North Shewa and West Gojjam in 2015 Administrations twice each. The researcher triangulated methods of data collection. The multiple methods helped not only to get more data but also increased the validity and reliability of the findings. The field study thus was accompanied by observations followed by document survey, examining files (totaling 53 files), administering questionnaires and interviews. It also benefited from the observation of the researcher in his capacity as ex-president of the ANRS Supreme Court and FHC.

This helped to get a direct knowledge on the challenges of securing social justice. Questionnaires were administered to get a general overview and broader empirical understanding of the problems in the process and outcomes lying behind the challenges of legal and social justice from a relatively large group of participants. The high level of confidence and anonymity on the part of the respondents, the trust established between data collectors (research assistants) helped a high rate of response. Accordingly, questionnaires were distributed to over 84 judges, academic lawyers and other office holders. The researcher was able to get responses from 78 respondents. Four public prosecutors in North Shewa did not return the questionnaire. Three indicated they were busy while one gave no reason. The responses helped to structure the much more concrete interviews with key informants.

The rationale of an in-depth interview is to have plain-spoken knowledge and understanding about the real opportunities and challenges of decision makers, the decision making process of dispute resolution mechanisms, the understanding of responsibilities on these plays of justice, impact of decision making on the real economic and social lives of litigants and the people and the potential impact that the process and the outcome of decisions have on the environment. This is

conducted with a belief to getting targeted deeper information from a targeted selection of informants, to get a high response rate. This is particularly important in Ethiopia where dialogues make challenges clearer.

Interviews were conducted with key informants involved with social justice. The selection was facilitated by court leaders and elders in the research area using snowballing techniques. Clients who went through both formal and non-formal dispute settlement mechanisms were interviewed to see how a single case could end up with different outcomes impacting the capability of litigants at significantly different scales. Overall, the researcher managed to have in-depth interviews with 34 informants (presidents of courts, reform experts, elders, clients of decision making bodies, religious leaders, professionals and academic lawyers) from all these areas who are well-reputed with long walks of life or long walks of professional experience.³¹³ The interviews were managed in four regional rounds, whereas the interviews in Addis Ababa were conducted at the most convenient time for the informants.

The discussion was meant to be open and free so that there was no particular reference to a specific court or other decision making body during the interview. In conducting interviews the researcher understood the ethical considerations, especially the safety of the informants, despite their openness. Accordingly, the method of data collection kept the anonymity of informants with a clear understanding of the possible risks in mentioning their names in the research. Thus, codes representing participants is used in this research.³¹⁴ They were informed of their privilege not to participate in the research, and were enabled to control their level of participation. Thus, various techniques (including use of research

³¹³ This includes those involved in focus group discussion.

³¹⁴ Participants in the interview are given codes as for example Judge A, B for Judges; Academic A, B for Academic lawyers and Elder A, B for Elders.

assistants³¹⁵ and recording) were used to get as much and free information as possible from the informants.

The interviews were conducted under a setting which enabled exchange of information with trust. Informants fully participated in sharing their views, experience and observations. As the exchange of information was open and free, informants were free to tell me that they were not serving justice in its fullest sense. I was told that the report presidents of courts submit to the legislative bodies were only what the law makers want, not what the profession or the people want. Dissatisfaction on the judicial performance was obvious in the interviews with the lawyers consulted.

In addition to the interviews, focus group discussion and observations were also conducted. A total of four focus group discussion were conducted with judges and elders.³¹⁶ The selection was facilitated by the previous interviews, head of courts and leaders of elders and was made on voluntary bases. The group discussions were important to interrogate the responsibilities of dispute resolution bodies towards realising social justice. Observation of the selected sites by the researcher both as a researcher and head of FHC helped a lot in filling the gaps and complementing the discussions.

The researcher encountered some challenges in conducting this research. The first pertains to the schedule of the informants which did not coincide with the schedule of the researcher who run chronic shortage of time for holding different assignments in the judiciary besides the research. The lack of organised data (especially from the non-formal system side) was also a challenge. The researcher was also persuaded to explain the new developments in the field of justice

³¹⁵ Melaku Adnew (practicing lawyer at DebreBirhan), Andualem Adenagir (Judge at Gera Keya Woreda Court), Chekol Gedefaw (Head of public relations office, ANRS Supreme Court) were used as research assistants.

³¹⁶ A total of 14 are involved: four in each group at the ANRS Supreme court, Bahir Dar Ketema Woreda court and Elders in Bahir Dar city. And three judges at the Federal court constituting of judges from the three tiers of courts stand for the fourth group.

(especially conceptions of social justice) to make the respondents being informed about the new developments and the research. This is so as neither relevant literature nor court jurisprudence in this respect is developed in Ethiopia. Though comprehensiveness is not claimed the researcher was forced to examine many files as possible in order to get enough information pertaining social justice.

Despite these difficulties, the field work generated important information into the challenges in securing legal and social justice, problems and prospects in the march towards social justice and the possible harmonisation of the formal and non-formal systems. The field work and the theoretical analysis mainly conclude the findings of the study.

6.2. Tools of questionnaires and interview

Information from interviews and questionnaires were gathered using tools prepared ahead so that full and free information could be gathered. Structured and semi-structured interview tools containing predetermined questions were prepared. There were common issues in the tools used to collect data but some room of flexibility was maintained to adapt the tools to the speciality of the informants. For example, the questionnaires and interviews from the universities gave more of an emphasis to the theoretical aspects of the research while the ones for the courts and the non-formal system focused on the reality on the ground.

The questions used the same language and open questions to the range of informants so that rooms were left for follow-up interrogations and open discussions on areas the informants have much of their expertise. The questions were arranged logically, including a hypothetical case, and were given to the informants ahead of time so that the quality and reliability of the response is increased. Specific questions were arranged with in the questionnaires so that

respondents might exclusively focus on these specific questions.³¹⁷ Sample tools developed and used in the research are annexed.

6.3. Doing the field work

Officers in the formal sector who are believed to give much information on issues of social justice were interviewed selectively while the rest were given questionnaires to fill. The questionnaires contained open ended questions which they could answer at the depth they deem proper. Those on the non-formal side were interviewed not only for their wisdom in interrogation but also for being less literate. Almost all the interviews were conducted by hand-note taking face-to-face interaction with the exceptions of two informants who were interviewed by a research assistant using a recording device.

Interviews were conducted at several stages. After control questions were developed, they were given to the respondents to see and reflect upon them including passing decisions either to participate or abandon the involvement in the research. All, except two Supreme Court judges in Addis Ababa and three in Bahir Dar, fully participated in the research at the time and place they chose convenient. The two judges in Addis had ran short of schedules, the ones in Bahir Dar had field work some more than 300 kms away from Bahir Dar.

In conducting the interviews, the researcher explained his capacity as a student fully (my professional capacity was also explained although this is known to most of them) as well as the purpose of the research. Most of them were happy to participate as the area was of great interest to them. They were given consent forms to express their level of participation and level of consent. In some cases questionnaires were administered by research assistants who could more freely

³¹⁷ The tools broadly cover: Issues of justice, institutions and Ethiopian Judicial reform, the way justice is conceptualized by the reform programme, the court, the parties and the general public, various issues of non-formal justice system in the respective areas, practical application of the conceptions of justice and implications of procedures and outcomes in the formal and non-formal process.

approached by the respondents. This raised the level of participation and response rates.

After the conclusion of the interviews the researcher exchanged addresses with the informants in case a need to follow up the interrogation arose on the part of the researcher or to receive calls if there arose any inquiries about the participation in the research. The researcher received no calls of the latter sort.

6.4. The Formal System

The discussion in Chapters 1 and 4 demonstrated that attempts to reform the legal system of Ethiopia suffered from the transplant effect. The judicial system of Ethiopia also suffered from this lack of contextualisation. These facts coupled with the following factors disoriented the search for social justice. In the discussions that follow the research explores the how and why of challenges of the formal courts in addressing social justice. These how's and whys include the perception of disputes by professionals, the reaction to it, the way justice is understood by them and the societal conception of justice, how judges and society match justice and administration of law and truth. The following sections explore these points.

6.4.1. Disputing and Perception.

According to the informants disputing in Ethiopia is increasing. Many explanations are offered for this. According to my informants the increase in litigation is owing to one or more of the following factors:³¹⁸

1. Increase in population with the possible increase in demand for justice, marriage and divorce
2. Chance (example, there was so much inheritance litigation when the HIV epidemic was at the peak, issues of health was crippling the justice system)

³¹⁸ Interview with retired judge 'A', senior judge and ex-head of Federal Courts, 4/10/2015.

3. Economic growth (increase in litigation over labor and construction issues)³¹⁹
4. The increase in the awareness of society
5. The prevalence of rent seeking and the lack of good governance in the system

In addition to these causes of disputing, poverty and scarcity of resources (especially land), mentality of corruption and embezzlement,³²⁰ failures on the part of the executive branch of the Government are mentioned as possible causes. While Judge A sees family cases having these roots, Judge B said that it is a result of problems in the executive that 90% of the cases in the regional courts are land or land related cases and so much litigation is brought against government enterprises like EELPA and ethio-telecom these days.³²¹

In relation to what has been said, it is interesting to see that the number of cases brought against the Government ranks next to the number of cases brought against individuals. In 2011 and 2015 a total of 2,395 and 1,624 cases respectively were brought against the government in the Federal High Court alone. In 2011 and 2015 a total of 23 cases were brought by government bodies against another Government bodies. As the government cannot be a defendant in criminal cases, this is huge number for the government in civil litigation.

Courts are also possible causes of disputes. According to Judge D the failure on the part of the courts to address the root cause of a dispute is mentioned as a possible cause. This problem is a cause to repeated applications to be lodged at the cassation bench of the Supreme Court despite the Court's binding ruling on same issues. The same informant also noted the presence of decisions given in violation

³¹⁹ Labor cases are one of the top five cases in the Federal Court (See table 6). When the implication of construction cases on the economy of the country and work force of litigants became complex, in 2014 the Federal High Court opened a special bench for litigation over construction matters.

³²⁰ Interview with judge B, senior judge at the ANRS Supreme Court, preside over the cassation bench, 19/10/2015 and Academic B: academic lawyer, ex-judge at the ANRS Supreme Court, 9/8/2015.

³²¹ Interview with Judge B, *Supra* note 10.

of clear laws, for example in the violation of the Federal Sentencing Guideline. Since judges are not held accountable despite such violations, the problem is proliferated.³²²

In some cases ethical issues in the society and archaic laws generate litigation. Judge D mentioned that shifts in societal values makes a father to abjure his son, a brother being greedy against his brother with a result in increasing litigation. On the legislative side the legislature's inability to issue clear laws on areas including inheritance, period of limitation³²³ is also noted as a cause.

Most informants connected dispute to the very nature of human beings (as social animals) who have divers conflicting interests and consider dispute as inherently natural, inevitable, unavoidable and destructive. The most important thing is making use of this potential for constructive goals. If one cannot make constructive use of disputes, disputes escalate into conflict and consume lives in millions. Judge B added on this and argued that business transactions and the level of understanding in heterogeneous society like ours makes dispute unavoidable. As destructive as it is it normally abolishes trust, peace and security that negatively affect the smooth and free flow of goods, which in turn increase collateral transactions and reductions in investment. If it is unavoidable it is better to learn the most effective way of managing it.³²⁴

On the other hand others³²⁵ argue that what makes disputes constructive or destructive is the way decision making bodies handle the dispute. It is constructive

³²² Interview with Judge D, a senior judge at the Federal Supreme Court, served as a judge for more than 15 years and preside over the Cassation Bench, 11/11/2015.

³²³ For example FSC Cassation division interpretations of period of limitation on cases like labor and inheritance.

³²⁴ Interview with Judge B and Judge A, *Supra* note 10.

³²⁵ Judge E, senior judge and a president of the ANRS High Court, (served for more than 15 years), 7/8/2015.

if we can reach at the truth of the dispute.³²⁶ It too is constructive if it is the result of a demanding society and the decision making bodies strive to arrive at the truth of the case. If decision is given on the bases of forged documents it disturbs peace and will be destructive.³²⁷

Thus, institutional inability on the part of the formal courts to make constructive use of disputes escalated disputing in Ethiopia. This failure accounts for distancing social justice from the people so that litigants learn legal and social justice from what courts do to them rather than shaping their behavior towards social justice in accordance with what courts do to other litigants on similar grounds.

6.4.2. What constitutes the good

In serving social justice what the practitioners consider as the common good of the society is important as this can be reflected in the realisation of basic needs and standards of living. They were asked what they prefer in their life. As members of their society their preference reflects their society's reflections of its hierarchy of needs and has aspects of social justice within.³²⁸ Accordingly, many of the lawyers and professionals (43.3%) preferred health as good in their life. A total 53.3 % of the judges also preferred health. A total of 13.3 % of the lawyers prefer education, 3.3% preferred participation in a society and 6.6% preferred serving their society. A total of 10% of them chose all of these things as good in their life. Next to health, 21.9 % of judges surveyed preferred education while 2.4 % preferred having a positive relationship with society, 9.7 % valued participation in the community, and 7.3 % named serving the society as their driver. A total of 12.1 % preferred all of these things as their good.

As far as the common good in the locality is concerned Judge E stated that peace and the fulfillment basic needs is what the people place first in its hierarchy. In line

³²⁶ Academic A, University law lecturer, ex-ANRS Supreme Court Judge, 21/10/2015.

³²⁷ Interview with Judge D, *Supra* note 14.

³²⁸ The respondents earn above Birr 600 a month and live above poverty line.

with this Elder I³²⁹ noted that progress and the utilisation of fruits of progress is what the people need most. Academic B on the other hand stated that since the people live in a very mountainous area which made access to electricity and transportation difficult, fulfilling infrastructures is what people needed the most.

Accordingly, judges preferred the common good they envisaged for society as within the domains of basic needs (health and infrastructure) as discussed in Chapter 3. It provides a lesson on what constitutes common good and has to be individualized and locally tailored by citizen and judges alike. If justice is to carry meaning, it accordingly has to be tailored to local needs and context. For example as indicated above the geography of the ANRS makes the reach of justice to the people difficult. As a result, the difficulty on the part of the people to reach the judicial system cannot be underestimated. Disputants would be forced to travel several days, mostly on foot or using local means of transportation, to reach and appear before the hearing court while unrepresented. This could erode the significance of courts and social justice to the very rural people.

If courts cannot make the Government capable of constructing roads, they have to devise ways of making the people capable through, for example, making justice geographically accessible. These could be the starting point to do justice for the people where physical distance and associated costs create barriers to the formal courts' legal and social justice. Then it is natural to ask what really motivates office holders to act towards what they think is the common good.

6.4.3. What motivates action

The real standard of action motivating judges to reduce injustice and enhance justice in the community matters if we are to realize social justice. This is particularly true in poorer countries like Ethiopia where poverty makes the absence of justice more vivid. The late PM of Ethiopia Meles Zenawi is quoted in Gill as

³²⁹ Interview with Elder I, Served as an elder for more than 30 years, on 6/8/2015.

saying "...most powerful motivation to work daily for economic development is the humiliation of poverty" (Gill 2010: 4).

Respondents were asked what motivates to achieve the goals of their office. Most of the lawyers and university lecturers (60 %) and 63.4 % of the judges chose ROL as their real indicator of justice. This choice is followed by security and safety, quality life and quality of justice system-all of them on equal footing (6.6 %). Quality of justice (24.3 %) stands second for judges' while security and safety (9.7 %) and quality of life (4.8 %) stands third and fourth. 7.3% them chose all of them. On the other hand, the primary choice of the lawyers is followed by security and safety, quality life and quality justice system- each of them chosen by 6.6% of them.

Thus, Rol is what motivates most professionals to act in the play of justice. As the recommendations of the judicial reform program was based on the global ROL initiatives, it is important to see if this conception of the officers is either motivated by these conception or if it is a home conception of ROL. On the other hand, it is also important to see how the ROL or quality of justice motivation is related to what they consider as the common good. These can be seen from what they understood and work towards justice.

6.4.4. How justice is understood

As justice is justified by a particular principle of justice and justification have direct relationship. Some of the conceptions of justice are justified based on entitlements, deserts, equality, or needs. The principles must find a minimum consensus in society by accrediting their existence and rectifying any situation of injustice (Scherer 1992: 4).

To the question how Ethiopian lawyers understood justice, radically different conceptions of justice are observed among the informants. Judges and lawyers have different answers to what the role of a judge should be in an environment where, for example, political cases are made judicial issues. As members of a society the difference would naturally be as wide as the difference in the public opinion unless

judicial jurisprudence, reform or policy narrows their conception of justice. For the lack of these guidelines in the context of Ethiopia the justification for justice by the lawyers and academicians is diversified. They claim that justice is a matter of being rational, correct and truthful (not serving oneself) towards an equal distribution of wealth, benefits and burdens in the society. It is also claimed that justice is a matter of giving solutions to victims in a society, an instrument in the enforcement of rights and benefits. According to some this is done by the application of law that takes the moral and other values in society into account. One of the respondents replied that when justice is to be served, human political, economic and social conditions would be in a position better than they were before the decision was made. Justice is a bases for peace, growth and equality of humans.³³⁰

Equally important, judges' conception of justice is as diversified as that of the lawyers. That is why one of the judges stated that as justice is relative, two different decisions could be given by two different judges presiding over the same case. Justice depends on the judge who handles the case.³³¹ Another judge stated that as justice is not a commodity special care should be taken in rendering justice but did not specify what kind of care and to which result this care should be taken. Though the judges emphasized values like equality and ROL in their respons, the indicators of justice as stated by the judges were very diversified and include:

1. Enforcement of rights impartially, as per the law and procedures and make people use their rights
2. Human beings capacity to make use of resources which they acquire on equal bases
3. Giving remedy to victims based on law and evidence
4. Mere application of laws

³³⁰ Ibid.

³³¹ Interview with Judge F, A senior judge at Bahir Dar Woreda court, now a presiding judge of a Woreda court, 21/10/2015.

5. Serving the people impartially, equally, without being corrupt and without due consideration of ethnicity, allowing equal opportunity, being accountable and respect people's right to be heard
6. Searching for truth
7. Giving correct decisions
8. Is a bases for peace of the nation, growth, love and security in the nation
9. A means to produce and use wealth
10. End result of economic or social grievance
11. Rectifying infringed or lost rights
12. Serving equally with the least (reasonable) cost and time
13. Distributing benefits and burdens in accordance with substantive and procedural law
14. Identifying winners and losers based on evidence and reason
15. Not inflicting harm, rewarding the productive and punishing the guilty
16. Right to be heard, express one's opinions freely

The informants also have diverse conceptions of justice. Judge E, for example, understands justice to mean recovering lost rights, leading a secure and peaceful life where basic things are fulfilled.³³² He understands justice from a practical point of view. On the other hand he conceives of the justice system conceiving of justice as an instrument to fulfill good governance and so that the forums may not handle people roughly.

³³² Interview with Judge E, *Supra* note 17. Judge E chose to learn law and become a judge in 1999 because it is a "respected profession and can be used to make real rights and justice".

This list makes it discernible that radically different conceptions of what constitutes justice are held by the judges. The list makes consensus hardly possible. It is difficult to see which principle of justice is the best way to realise the developmental state demands of social justice. Some look into consequences of action or inaction (deontologists) from a moral right/wrong obligation perspective while others look utilitarian-with a widely varying version under both categories. Others share the idea that justice has to do with entitling persons according to which theory "a person has the right to one's possession (holding) and rectification when such is violated" (Scherer 1992: 20). It is clear and simple that the difference in principles of justice for individual judges is also different from principles of justice for institutions.

The inconsistency in the conception of justice implies difficulties in realising the acquisition of opulence as a means to capability enhancement based on a coherent principle. Accordingly what determines the outcome is the choice of acts, or strategies, or conceptions of justice by the lawyers, judges and litigants that results in unpredictability that makes guaranting any outcome difficult. In such instances there would only be a right to the choice of action by the parties and 'chance' at this level matters to determine the outcome of a case. As the dissection in the conception of justice continues today, the search for justice arise from the specific combination of the legal culture and of these widely differing legal convictions, principles, concepts and underlying postulates.

The inconsistency further creates problems in searching for the truth of a case despite some informants conviction that searching the truth of the case is what constituted of justice. Some informants believed that the search for truth has to be the standard of action and bases for sensing justice. Judge D believed that justice has to make use of the law in the search for truth. Justice is the search for truth in the demands of the plaintiff and the defendant using the procedural and

substantive laws. According to Judge J³³³ justice is a dynamic concept which serves: to deter bad behaviors and create stability in the community and reveal truth. Judges, however, decide cases against (at times knowing) the truth of the cases.³³⁴ They assume their responsibility as mere application of the law despite the truth. However, if judges cannot interpret laws against crystal clear false cases, they may be administering the laws but are not serving justice. In line with this Academic B stated that far above this court render decisions in contrary to laws and evidence- which are the minimums in the administration of justice.³³⁵ As the formal system did not search the truth of the case, it gives decision on shallow bases and only treats the symptoms of litigation and manifestations of the dispute rather than its root cause. Mere application of laws compels judges to speak in the language of the law jargons the play of which disconnects unrepresented litigants from their history and their case. The great majority of sitting judges are doing their business on the belief that mere application of the law is administration of justice.³³⁶ What comes as an extreme case is considering courts disposal rate as equivalent of serving

³³³ Interview with Judge J, a senior judge at the Federal Supreme Court and preside over the cassation bench, served as a judge for more than 20 years, 22/11/2015.

³³⁴ Judges have important stories regarding the implication of the mismatch between the truth and justice. Judge J, for example, stated a case where an innocent was convicted of a crime where he:

...was denied of review of judgment-not because he did not have enough evidence to demand revision but because there is no procedure to revise a conviction verdict after decision by the federal cassation bench. The convict was advised to ask for pardon. He admitted the crime (one condition to get pardon) that he didn't commit and was pardoned.

³³⁵ Interview with Academic B, *Supra* note 10. Judge B (*Supra* note 10). He further stated that courts report as serving more justice when more files are disposed because that is what the government demands. Thus, the mechanisms to measure courts performance should focus on quality, fairness, impartiality and the extent they reduce corruption.

³³⁶ Interview with Judge A, *Supra* note 8. The formal system gives decision on the symptoms, non-formal systems resolve the cause. The formal system may reduce grievance, but did not resolve it. At the end of the days judges would not even resolve a dispute. Judge P (interview with judge P, a Senior Woreda Court Judge, served for more than 20 years in this capacity, 21/10/2015), also shared this view. In the focus Group discussion with the Bahir Dar Woreda Court Judges, 21/10/2015, it was stated by judge L (and shared by all) that when parties exclusively focus on issues of facts and fairness judges rather focus on the interpretation of laws. This trend leaves a land law, for example, to be interpreted to the benefit of one of the parties but in fact sharing the land could benefit both and serve justice in the eyes of the parties. Thus, the search for truth makes parties more pragmatic than judges. Judge L concluded that it is our backwardness and poverty that did not allow the proper implementation of the best laws we have in this pragmatic way.

justice. According to Judge B and Judge C, some of the sitting judges believe that disposing a case is dispensing justice.³³⁷ Judge B further noted and attached the problem to the entire justice system. He boldly expressed that the justice system in general recognizes justice as effectuating the interest of the government at the cost of the society and rule of law: and the judicial system recognises it by the number of files killed by hook or crook.³³⁸ Thus, the mechanisms to measure courts performance should focus on quality, fairness, impartiality and the extent they reduce corruption.

The diversification in the conception of justice and the mismatch between justice and truth create gaps between litigant expectations of courts and the normative justice principle the courts follow. Lack of agreement on the fundamental moral principles, which Locke assumes under his state of nature, and the presence of the veil of ignorance in the core principles to which judges should adhere (is central in Rawls original position), should have been the core area where reforms rectify and create consensus.

6.4.5. What influences conceptualization of justice

In Chapter Two it has been indicated that the idea of justice is influenced by many factors (like society, educations, emotions) and would ultimately be either goal or consequence oriented. This has been tested empirically in the context of Ethiopia and is found true to some extent. Judges inner (professional) socialization and their

³³⁷ In the Focus Group discussions with the ANRS, 19/10/2015, these judges in particular emphasized that some of the sitting judges believe that disposing a case is dispensing justice. Practically judges' performance is measured by how many decisions they gave, how much they dispose. Political, social or whatever implication of the decision would not be taken account of in performance measurements. This would open the door for rent seeking behavior and yield a huge encumbrance to justice. The judges conclude that this has forced judges to increase the disposal rate-so that cases are closed for alleged lack of cause of action, period of limitation, even against clear interpretation of the cassation decision. In this respect Judge J (*Supra* note 26) guessed that 35% of the cases at the Federal Cassation bench are sent back for a retrial as the cases are disposed without being exhaustively dealt with (let alone the truth).

³³⁸ Judge B stated that courts report as serving more justice when more files are disposed because that is what the government demands. Thus, the mechanisms to measure courts performance should focus on quality, fairness, impartiality and the extent they reduce corruption.

loose attachment either to the other branches of the government or the general public creates the impression that their conception of justice will be influenced by the special position they assume in the profession. Thus the influence that the outer circle bears upon them has largely been ignored. But the fact is that the understanding of justice of judges is mainly influenced by their interactions in the society.

In this respect respondents were asked what influenced their conception of justice and it was found that the lawyers', public prosecutors', police officers' and university lecturers' conceptualisation of justice was influenced by many factors. A total of 20 %, of them are law diploma holders while 40.5% and 12.1 % of them are respectively L.LB and L.LM holders from recognised Universities. One of them is a Ph.D. candidate. However education had only influenced 16.6% of the lawyers' conception of justice. Their conceptions of justice were mainly influenced by a myriad of other factors. The society bore its influence on 16.6 % of them. While 3.3 % of them are influenced by work place 10% were peer influenced. The rest are influenced by tradition (10 %), instinct (3.3 %), and global factors (10 %) and by a combination of two or more of these factors (16.6 %).

Moreover most judges and have got their L.LB (43.9%) and L.LM (41%) from recognised universities. One of them holds law diploma. As can be seen from the previous discussion they have gone through many and repetitive legal training. But the majority of their conception of justice (21.9%) is shaped by the community in which they are living. Education (12.1 %) and work place (12.1 %) have equally shaped their conception. While 4.8% of the judges stated international influences, 30% chose more than one of all these. 2.4% of them had tradition as their bases of conception of justice while 9.7 % found something difficult to express (including instinct) as shaping their understanding. This is true as Schmitz (2006: 179-180) puts it "some part of Justice may not be analytically built into concept, and may not be immutable, but it will be hard to believe a theory that excludes

them.” The responses prove the need to preserve a room for subjective reasoning in realizing social justice as there are situations where neither education nor society bears their influence on some areas of conceptualisations of justice.

Thus, the most important factor in the judges’ understanding (and other players of justice) of justice is society followed by the formal education they have been through. This contradicts the role assigned to education in the old law and development movement discussed in Section 2.8.1.

If society significantly influenced judges’ understanding of justice, it would be wise to see how they work towards this understanding. In this respect most judges look to procedural thinking to attain the pursuit of justice.³³⁹ In fact 26.2 % of them preferred procedural justice. On the other hand 9 % and 5% of the lawyers and academic lawyers have chosen procedural justice as the primary and secondary bases of justice. The remaining ones, 6.6% each, chose acceptance in the community, reducing poverty and leading a life style one choses, equal distribution of benefits and burdens, equality in general, being entitled to something, avoiding clear injustice. None of them chose effectuating others’ good as the bases of justice. On the other hand none of them have chosen equal distribution of wealth, capable of being and doing, effectuating the good of the strong, equal distribution of benefits, improving standard of living as their primary choice.

The same number of judges (26.2%) preferred equality. Equality will be most contested when trying to understand what to divide, how to divide and why. Distributive justice (and decision making theory) first require choosing which goals are to be met. It involves treating either all involved equally or equitably. The equality rule focuses on everyone receiving the same outcome, de-emphasising differences among receipts, and it is more frequently applied in intimate

³³⁹ Procedural justice is concerned with both the policies made and the perceptions about the fairness of how the policies are made. Ground rules, decision structure, selection of agents, safeguards to ensure against abuse, information gathering, appealing unsatisfactory decisions, and change mechanisms are procedural elements-to evaluate the fairness of the procedure (Flax 1993: 161).

relationships, while the contribution rule requires allocation based on contribution and requires being measurable (Stum 1999: 160). In this respect 21.9 % of the judges chose total equality, 4.8 % equality in sharing burdens, 2.4 % equality in sharing benefits and wealth. While none of them chose serving others' good, serving the powerful and being entitled to something as their choice, 14.6 % chose avoiding clear injustice, 9.7 % capable of being and doing, 4.8 % reducing poverty, 2.4 % chose serving self-good, 2.4 % improving standard of living. Some chose more than one while 9.7% chose getting recognition in the community.

As is not uncommon as professionals, but not common as influenced by society, the majority of lawyers are procedure advocates with a preference for procedural justice.³⁴⁰ Econometric, distributive, and sociological understanding of justice in terms of achievements, power in society, entitlements, were also significantly observed. Being influenced by the society in the understanding of justice, it is puzzling not to see capability of being and doing enhancement, poverty alleviation and the avoidance of clear injustice not coming to the front. It is thus important to see how the judges and other professionals perceive of their society's understanding of justice.

6.4.6. Judges perception of how the People understand Justice

Justice has to take account of the peoples' context as "justice is about giving people their due" (Schmidtz 2006: 13). It will be problematic if the perception on the part of judges and the reality in the society mismatch.

Most informants believed that people's understanding of justice is connected with the search for truth. In a focus group discussion, some participants had the

³⁴⁰ This will be further explored in the discussion on the non-formal system in section 6.5.

conviction that people conceive of justice in a wider perspective than mere application of laws by the courts.³⁴¹ They stated that the people find justice in the search for truth and expect justice organs to search for truth and arrive at it in making decisions. Values like respect for equality, ROL, impartiality and importance of reasonable time in arriving at decision, have meanings in so far as the truth is reached at. Furthermore, the people understand prevalence of injustice comprehensively when the Government falls short of its expectations, be it in providing electricity, justice or food.³⁴² Thus, the inability on the part of formal courts to reach at the truth of a dispute is understood as prevalence of injustice.³⁴³

The informants contended that the people consider justice as being lost on the judiciary as it is not serving justice in this sense. Corruption is mentioned as of the causes for prevalence of injustice.³⁴⁴ This has got its various implications. Justice may be twisted to serve the wealthy, an instrument to punish the unwanted and the poor by the powerful and the stronger. As one of the judges stated this is one of the reasons not only for the increase in litigation but also the production of false cases and fabricated evidence before the courts. This accounts for an artificial rise in the number of cases in the courts.³⁴⁵ Another informant claimed a need for research but stated that courts send people to jail based on false evidence, give decisions taking evidence which is not genuine, from municipalities, land authorities and transport bureaus as conclusive.³⁴⁶ In a focus group discussion judges stated that people come to courts bearing non-proportional costs to search for a truth of

341 In a focus group discussion with the ANRS Supreme Court Judges, judge B and Judge C, the Supreme Court judges of the supreme court, 19/10/2015.

342 Ibid.

343 Ibid.

344 Bearing this in mind an informant told me that some have changed the adage "*one is presumed innocent until proven guilty*" in to "*one is presumed innocent until proven wealthy*" (Interview with judge Judge G, a Woreda court judge at DebreBirhan, 7/8/2015). Another judge also stated that people are accustomed to a saying that one cannot predict what a judge and a cow delivers which implies that what a judge delivers cannot be predicted (Interview with Judge H, a senior Woreda Court Judge at Bahir Dar, .20/10/2015).

345 Interview with Judge A, *Supranote* 8.

their case which they lost in one of these administrative organs but the same evidence from the administrative bodies would serve as a bases of court decisions. That is one of the reasons litigants try to exert every effort to win a case in unacceptable way.³⁴⁷

6.4.7. Lawyers' perceptions of how the people understand justice.

The academic and practicing lawyers consider that the society understands justice in its thin form. They stated that the people did measure formal justice on individual bases rather than seeing the overall impact that formal decisions might have on the political, economic and social life of the people. Based on this conviction the people speak in terms of getting correct, rational and predictable decision. One of the academic lawyers stated that the people still adhere to the adage "a chicken lost without justice is more cause for concern than a mule gone fairly judged."

Bearing this in mind academic lawyers consider the people as thinking the formal system not serving justice. Courts are perceived as forums where people get what is not their due. They consider courts as weapons and forums where the powerful revenge the poor and the innocent, and the selfish get unfair shares. To this feeling of prevalence of injustice in the formal system the people respond by either taking justice in their own hands, or resort to non-formal ways of doing justice (like a recent increase in litigation at *Zebr-Gebreal*)³⁴⁸ or resort to the production of false documents or practice of perjury.³⁴⁹ Hence the peoples' perception of formal justice was resulting in the production of perjury and other false documents, and is paradoxically widening the injustice gap.

Thus it is possible to see the paradoxes in the theory and practices. While judges and other lawyers perceive society as demanding the truth of a case in giving

349 Interview with Academic A, (*Supra* note 18), Academic B (*Supra* note 10) and Interview with Academic 'C' (*Supra* note 22).

meanings to justice, their understanding of justice and motivation to action is not geared towards searching for the truth of the case.

6.4.8. A hypothetical case about a flute

The real standard of action for justice and bases of sense of justice was tested using a hypothetical case whose idea is taken from Aristotelian and Sen's conception of justice. The judges and lawyers (informants and respondents) were instructed to assume an "original position" and detach themselves from their legal education and position and give a verdict on a hypothetical case. The case pertains to four children having an uncompromising interest to inherit a flute from their deceased father. The first child 'A' is a musician and in love with music, the second one 'B' is very poor and intends to sell the flute as a means of survival, the third one 'C' is not poor but intends to share the proceeds of the sale via auction with his brothers while the fourth one 'D' intends to keep the flute as a tribute to his father.

While 7% of the lawyers and academicians preferred 'C', none of the judges preferred 'C' as sole heir (heiress) of the musical instrument. The majority of lawyers and academicians (43.3 %) chose 'A' while 23.3 % and 10 % of them chose 'D' and 'B' respectively. The majority of judges (60.9 %) also chose 'A', while 34.1 %, 2.4 % of them chose 'D' and 'B' respectively. 2.4 % chose more than one. As has been discussed in chapter two 'A', which is preferred by the majority of the judges and the lawyers, would have been preferred by Aristotle.

Those who chose 'A' have given various reasons for their choice. Some of the reasons include that 'A' could:

- Improve the instrument, be more beneficiary, develop himself professionally
- Serve him, his father, his country and history well
- Get meaning from the instrument
- Help him in his quest to be a musician

- Benefit from the adage the right thing to the right person

On top of these reasons the judges added that 'A' could make proper and correct use of the instrument to benefit himself and beyond himself, could efficiently generate income and satisfaction, could develop his profession further and becomes creative, could help others from the income generated, is the better choice than the other choices, the instrument is intrinsically more important than economically.

Those lawyers and lecturers who chose 'D' mentioned that identity lies in history which should be preserved and that 'D' cannot sell or transfer the instrument in whatever way. Judges who chose 'D' also agreed on this point. They also added that the most important thing in living is keeping history, identity, culture and legacy. Humans by their very nature would demand respect for dignity, which would have been the selection by the late father.

Lawyers who chose 'C' have mentioned that as all the heirs have equal rights distributing the share of the sell, as the right to an equal share of proceeds, would be fairer and correct than other choices. Judges who chose 'B' stated that helping the poor would be a source of happiness.

My informants (and judges working in the same bench) also had radically different bases and conclusions. Judge E would prefer A as A would more effectively make use of the flute despite the fact that he thinks distributing the share of the sell would be fair. Judge B³⁵⁰ also preferred A to others as this choice makes A more creative. It is this kind of thinking which could lead society to strive for excellence. Academic B, conceiving of justice as (practical) fairness, preferred A which would be fairer than any other decision.

Judge I argued that justice has to be measured from the result it bears and prefers A.³⁵¹ Academic A on the other hand prefers D so that the legacy of the father may

350 Interview with Judge 'B' *Supra* note 10.

351 Interview with Judge A, *Supra* note 8.

continue.³⁵² Judge D argues that the law allows A to benefit but had he been not a judge he would have preferred D.³⁵³ Judge J prefers D and if he should act based on the civil code prefers C.³⁵⁴ Judge K also prefers A and he has same reason as other judges. The choice of the majority of judges can be construed to the benefit of A's capability of being a musician. This may contradict other choices and other principles.

Despite that most justifications given are utilitarian as the endeavor in choosing A is the utility that A gets out of the fluting. Even though that may be the choice, some elements of history, economics, hedonism, fairness in equal distribution of benefits, correctness are seen enmeshing choice of other judges. Some of the judges were egalitarians (equality is the correct distributive principle-as Terzi (2010: 125) defined it), some are resouricsts (claiming equality of primary goods), some were welfarist (focusing on the overall success, happiness and achievements of the heirs). In handling this single case the principles of equality (treating equal people equally), principles of just desert (people ought to get what they deserve), of reciprocity (focusing on character of relationship) and need (meeting class of needs) (as are explained by Schmidtz (2006: 14)) are mentioned as justifications. This indicates that justification and justice (legal, social) may not necessarily match.

Whichever personal choice they may have, the majority of them (46.6 % and 43.3 % respectively) believed that both the formal courts and the non-formal systems could effectively serve their preferences. They explained that the courts can do so if they interpret inheritance laws (for example Article 1087(2) of the 1952 Civil Code)³⁵⁵ in line with the values in the society. Of course judges, under the present Civil Code, judges have no option but to sell the flute via auction and share the proceeds: and that is what they do (Academic B).

352 Interview with Academic 'A', *Supra* note 18.

353 Interview with Judge D, *Supra* note 14.

354 Interview with Judge J, *Supra* note 26.

355 Article 1087 (2) of the civil code reads as "The utmost care shall be taken to give to each of the heirs the things which are most useful to him".

On the other hand 48.7 % of the judges agreed that non-formal systems could serve their choice of justice effectively as it investigates each case on its own merit and give preference to the societal values to the laws. 2.4 % said they could not while 2.4 % claimed that the non-formal system can serve but to a limited extent.

By the same token 23.3 % and 20 % of the lawyers and academic lawyers said that the courts and the non-formal systems respectively can't serve. Those who stated that courts can't do mentioned that the law did not allow them, they cannot serve social justice short of written laws and courts have to adhere to the principles of transparency and accountability. Those who stated that the non-formal systems can't do mentioned that non-formal systems are not developed in the country and doesn't take account of the overall political, economic and social condition of the country unless trained.

The difference in the application of the law in this case is due to the lack of a principle leading towards common good.³⁵⁶ Though it is possible that different principles could apply to different cases (family, environment), the application of different principles to the same case does not establish a coherent system. The principles too may not necessarily be developmental in the sense Ethiopia expects of the justice system.

6.4.9. Perception of quality and fairness

Judges and other professionals were asked whether the courts were serving quality justice fairly. It is only 6.6% of the lawyers and academicians who claimed that the justice being served by the formal system in their respective locality has the required quality. 13.3 % of them claimed lack of quality while the 23.3 % claimed a very limited quality. A significant number of them (13.3 %) stated that it is difficult to say if the justice has quality or not. Furthermore 30 % of the lawyers and

³⁵⁶ Be it egalitarian, utilitarian, the libertarian Sen accepts the possibility of plurality of competing principles and the importance of "possibility of plurality of sustainable reasons" and use of "plural grounding" not to rule any argument out as irrelevant or unimportant. There is no need to reduce multiple and potentially conflicting principles to one solitary survivor, guillotining all the other (Sen 2009: 12, 183).

academic lawyers stated that the non-formal system has quality; a total of 6.6 % of them stated that it has no quality and 6.6 % stated that they lack the information to respond while 20% stated that it has quality to a limited extent.

Judges' opinions were not significantly different. Most of them (36.5 %) claimed that the decisions that courts give are only fair to a limited extent. 14.6 % of them stated that court decisions are fair while 4.8 % stated that the decisions are very fair. In terms of quality 29.2 % stated that the decisions lack the quality, 14.6% stated that the quality is compromised, 4.6 % stated that it has the required quality. 31.7 % stated that it is limited but is being improved while 4.6 % stated that it is difficult to judge. Regarding the non-formal system 26.8 % of the judges claimed that the settlement by the non-formal systems has the necessary quality, 12.1 % stated the quality is compromised, 12.1 % stated that it has no quality. 7.3 % have no information to judge, 7.3 % claimed that their quality is significantly better than the quality served by the judges. 2.4 % said that it is difficult to judge. Given the paradoxes, mismatches and the dominance of chance explained above it would not be surprising to see the majority claiming lack of quality and unfairness in the decisions of courts.

6.4.10. The legal system conception of justice

However litigants perceive of justice, decision making bodies should adhere to their basic principles (particularly in hard cases) in resolving disputes. Basic principles attach responsibility for the consequences of actions. As can be seen from the above illustrations, judges might choose A and arrive at the same conclusion with widely differing or contradictory underlining bases. A quick conclusion from this, to use Schmidtz (2011: 11) would be "embracing a principle which resolves a certain conflict is not enough to show that the principle is a principle of justice".

The primary task would be searching for how the entire legal system conceives of justice. In this respect informants stated that it is difficult to express what justice is

for the justice system of the country.³⁵⁷ Academics A and B also have the same conviction.³⁵⁸ The effect of lack of clear direction can be seen in the mismatch between the laws, social justice and the practice in the administration of justice. This effect can be seen in criminal administration and search for justice and a brief explanation of it follows.

Criminal trials, in addition to searching for truth, serve to express society's deepest shared notions of institutional justice and fair play. They remind of the procedural and substantive values that the people hold dear. Criminal trials represent public, highly visible, morality plays, through which order and balance are restored to a community that has suffered an often grievous loss. True restoration can occur only through criminal trials that are perceived to be just and fair (Hoffmann et al 1996: 1272) by the people.³⁵⁹

Be that as it may, the current practice in the courts did not exactly show the judges' reflections of societal values in their day to day activities. Judge stated that if one asks three judges about the policy behind our criminal justice system, one could get three answers (due process, crime control or rights based)³⁶⁰ In the routine exercises one could be inquisitorial, another adversarial with a controversial fact, another in between. According to Academic B, since what justifies justice is not giving decision but giving the right decisions, neither the interest of litigants nor the country, nor is social justice taken account of in rendering decisions.³⁶¹

357 Interview with Judge 'D', *Supra* note 14 and Judge J (*Supra* note 26).

358 Interview with Academic "B" and "A", *Supra* notes 10 and 18 respectively. After serving for a long time as judges of the ANRS High and Supreme Courts, both have been serving as university law lecturers for the last 6 and 14 Years respectively.

359 See Hoffmann, et al 1996: 1272. As Barbara is quoted in Hoffmann criminal trials affirms, simultaneously, the need of both our collective and separate selves. The trials allow us to define who we are as a people, help to educate all of us about that definition and provide us with an opportunity to foster our self-confidence in the fundamental morality of our society (Hoffmann et al 1996: 1272).

360 Interview with Judge J, *Supra* note 26.

361 Interview with Academic "B", *Supra* note 10. Interview with Academic "B", *Supra* note 10. Judge J added on this point and held that though Ethiopia did not follow inquisitorial system, it is better if the courts search for the truth of the case. According to Judge J the law making process, the law schools, and the litigation process do not bear their influence in narrowing this difference: the problem lies not only in understanding what justice is but also in the how to serve of justice

6.4.11. Truth, procedural guarantee and Orality

In the search for truth, process matters. Talking and acting in terms of truth finding, the public at large gives importance to the process of litigation as equally as its ends.³⁶² As far as capability enhancement is concerned the end does not necessarily justify the means. The most important values in this respect are the right to express oneself in court and the right to be heard in the same court. These rights have been given due regard among the public.³⁶³ In line with this Judge B conceives of justice as getting equal opportunity in being meaningfully heard which is not always so in practice. This can be seen both in the process and the end of litigation. As Judge B noted, judges should clutch the objectives of procedural laws buried under the dead letters of the laws. They have to apply procedural laws as simply and flexibly as possible so that the litigants could fully and meaningfully participate in the litigation process. These procedural guarantees (which the people give more weight to than the final decision) would result in an equal outcome. Justice is a matter of creating a fair and accountable world based on such outcome equality.³⁶⁴ The respect of this right is important not only to the parties but also to decision making bodies as parties could show facts which a judge may not have investigated especially in land cases where both parties come up with documentary evidence of equal weight.³⁶⁵ Despite this procedural importance some of the judges breach procedural laws at the expense of substantive laws. Judge D stated that most applications at the cassation bench are about infringement of the right to be heard. In countries like Ethiopia, judicial process is largely determined by the legislature. This does not preclude judges from tailoring justice so that the outcome may fit the litigants. Judge D agrees on this and points that women and men may not give equal importance to damage to teeth. Theft and mudslinging may not convey the

³⁶²Interview with Academic B, *Supra* note 10.

³⁶³*Ibid.*

³⁶⁴Interview with Judge 'B', *Supra* note 10.

³⁶⁵Interview with Judge D, *Supra* note 14.

same meaning to people living in different areas. It is only when people are meaningfully heard that procedural guarantees tailor justice to the extent of gender or ethnic diversification.³⁶⁶ When exchanges of written submissions dominate orality in litigation, the probability of tailoring justice to local contexts will narrow.

6.4.12. Some of the most common cases

As explained in Table 6 land and family cases are most common type Ethiopian court case. The challenges in handling land cases affect the agricultural-led economy of the country while the challenges on the family cases affect the social fabric of the society. Both affect the relationship with the environment and social justice. The cases illustrate the importance the people gave to social justice as a basic need and how realising legal and social justice became problematic.³⁶⁷ Thus the following sections discuss the general challenges courts face in handling their most common cases. More specific cases will be dealt with at the end of the chapter.

6.4.12.1. Land cases

Beginning from the era of *Derg* (Proclamation No. 47/1975) land in Ethiopia was owned by the State. So land litigations in court involved rights other than ownership rights. This may have included the right to use and till the land, boundary disputes, disputes relating to possession and use of land, displacement, ownership rights over houses and other buildings. In a country where the majority of the people depend on subsistence farming, security in land holding has a direct bearing on capability realisation. Access to land, land use and land tenure have important linkages to food security and hence social justice. Thus, coordinating government efforts on

³⁶⁶Interview with Judge 'D', *Supra* note 14. Judge D mentioned people living in Dire Dawa and Gojjam giving different meanings to different mudslinging.

³⁶⁷ as the long lived saying goes-A chicken lost without justice is more cause for concern than a mule gone fairly judged_ is a common adage today (Judge B, *Supra* note 10). He added that the cases in the courts not only show the level of poverty in the people but also the commitment (dignity and social status in the society) of the people towards justice as a father litigating at the Supreme Court for a verdict against him worth Birr 70 replied "how come my son win a case against me". Judge A (*Supra* note 8) also stated that disputes mirror society.

land reforms and court endeavors in the anti-poverty initiatives are important not to impoverish the most vulnerable. Decision making has to take account of fair access to information and analysis of relevant information through multi-track communications and information exchange. Shared responsibility has to be enhanced. As inequitable land holding system exacerbates poverty policies and actions that are susceptible to tenure insecurity and fragmentation would lower the living standards and the well-being of smallholder farmers (Costantinos 2013: 47). As the economics of scale tell us the advantages of land possession was obtained due to the size of their land and the cost per unit of land generally decreased with the increasing scale of the land and this needed be tackled.

The increase in land disputes exacerbates the increase in court workloads, which in turn exacerbated the problem of relating to land disputes. The growth in population unparalleled by equal growth in land access is further worsening the problems. The ANRS Government was trying to ameliorate the problem in various ways. Efforts have been exerted since 1997 to redistribute land in the region and do away with the long overdue problems. The ANRS government has used mechanisms of *dilidil*, *yemere-tkotera* and *ticheta* so as to redistribute land and give certificates of land holding. *Dilidil* was basically employed after the downfall of the *Derg* regime in 1997. It involved the redistribution of land and awarding certificates of land holding to land users. As the execution of *Dilidil* was not uniform, it was followed by *Yemeret-Kotera* in 2006.³⁶⁸ *Yemeret-kotera* involved measuring the lands at the disposal of farmers and registering in rural land registration book by ANRS Environmental Protection, Land Administration and Use Authority. The person

³⁶⁸See The ANRS Manual for Registration and Updating Information pertaining to Rural land, 2012 for the details of the process, P.v11. Recognizing the economics of scale the proclamation No. 133/1998 of the Region under article 7(1) and 9(4) indicate the minimum amount of land to be possessed by land users while the regulation to this effect (Regulation No.51/1999) declares that it shall not be less than 0.25 hectares where it is a plot of land cultivated by rain and 0.11 hectares where it is cultivated by irrigation (article 5(1) of the regulation.

granted rural land would be given land holding certificate.³⁶⁹ This again couldn't resolve the problems so that it was succeeded by *Tichita* (literally translated as public comment or opinion) in 2012. This later effort also carried on the same goal but involved a wider public participation. The land measured by the Authority would be registered when the Kebele people gathered and certify the correctness of the measurement-hence the name *tichita*.³⁷⁰ All these have been done to give certificate of holding to the land users and guarantee their right to hold and use rural land.

However, the more such efforts are exerted, the more cases are coming to courts. The efforts have created irreversible chaos in the courts³⁷¹ without solving the problems.³⁷² The focus group discussion and interview³⁷³ revealed many challenges³⁷⁴ to social justice in the courts' administration of land disputes. The challenges identified in the interviews and focus group discussions with judges included:

1. These land reform efforts were backed by legislative reform.³⁷⁵ Some of the judges considered the law as setting aside prior court decisions while others

369See articles 1(2), 22-24 of ANRS Proclamation No.133/2006, The Revised ANRS Rural Land Administration and Use Proclamation. When land is measured neighboring land holders and users shall be called to attend therein and decide upon their boundary in agreement.

370See the Manual, *Supra* note 59, P.v11.

371Interview with judges A and B, *Supra* notes 8 and 10 respectively.

372Interview with Judge N, senior judge at Bahir Dar Woreda Court,21/10/2015.

373Woreda Courts have trial jurisdiction regarding disputes over possession of land and Cassation jurisdictions from social courts regarding matters of jurisdiction and fundamental rights (article 22 of Proclamation No 151/2007, *ZikreHig*).

374The challenge has far reaching implication than remaining on land issues alone. Land disputes are among the five top cases in the ANRS courts. Some other cases (for example most crime, family, inheritance) have issues of land as their ultimate causes. For example, in one criminal case the defendant killed his younger brother to be the sole heir of the land. In another case children are evicted by their uncle and are found in an orphanage (Interview with Judge L, Presiding judge of a Woreda court, 21/10/2015). In another case Judge "N" (*Supra* note 65) stated that person who lost a case owing to fabricated evidence from the administration killed (using axe) his younger brother and family who made use of the forged evidence. Judge A (*Supra* note 8) also stated that most litigation (including criminal ones) are either litigations over a resource or enforcement of contracts. It, homicide cases in regions center land disputes and every case has one of these reasons.

375SeeANRS legislations No. 89/198 and 133/1998 and regulation No. 51/2007 and the Manual *Supra* note 62.

maintained that prior court decisions prevail over the legislations. These have created unpredictability in the courts.

2. The lack of documentation in the administration forced the use of *Tichita*. In some localities this mechanism is used as a weapon to evacuate the one which the residents do not want to live with. In this respect the poor, the destitute and women were victims of the process and the outcome.
3. Furthermore, the weak, women and the very young were forced to take less fertile or hydroponics while the strong and the corrupt took the fertile. The process would be completed by granting certificate of holding that courts consider as conclusive evidence in land litigations leaving little to no possibility of other remedies. The weak and the women particularly face further problems in the whole process. They face problems pertaining to evidence in the litigation process. Administrative solutions wait for court decisions. Courts give decisions based on written evidence from the administration. Despite the Federal Cassation interpretation of the laws that oral evidence is admissible, courts give less weight to oral evidence. Women face various difficulties in getting the evidence from the administration. Even a farmer who tills the woman's land on a contractual bases would use the *Tichita* process to hold certificates of use in case disputes arise and could simply evict the woman unlawfully. The women are afraid to serve summons to the men thus reducing the opportunity for litigation. There is no *de facto* equality between them. A farmer holding land for more than 15 years (Civil Code Article 1168)³⁷⁶ could simply be evicted by a farmer holding the certificate in this way. While some judges uphold the former as per Article 1186 of the civil code, this raises further issues of unpredictability.

³⁷⁶Article 1168 (1) of the civil code declares that a possessor who has paid for fifteen consecutive years the taxes relating to the ownership of an immovable shall become the owner of such an immovable.

4. Besides other requirements to inherit a land, courts check the minimum or maximum amount of land that a farmer should possess, rather than seeing who could make more efficient and effective use of the land.³⁷⁷ A woman who won a case and gets land is heard to complain of losing the land owing to the damage to the land by a nearby river.³⁷⁸ Another informant questioned if women really won in this situation at the end of the day.³⁷⁹ Since the judges do not appreciate the enhancement of capability of litigants, women who were winners in a land case were losers in the real sense. In addition to these trees are being cut in the litigation and environment is being degraded and antagonism between parties is widening.³⁸⁰

Hence, the court inability to shape the behavior of the executive branch of the government not only escalates land litigation but also created unpredictability and lack of coherence in the judicial system. This does not only make courts untrustworthy but also impoverishes the disadvantaged and is unable to prevent land degrading. The party's capability wouldn't be enhanced as basic needs and living standards not fulfilled and improved. The distance between legal and social justice can vividly be seen increasing.

6.4.12.2. Family cases

In Chapter Five it was indicated that family (including inheritance) cases are one of the top litigated cases of the Federal and ANRS courts.³⁸¹ Family cases have issues

³⁷⁷Proclamation No. 133/1998 allows land inheritance. Amending the 1997 A child could simply inherit by mere fact of being the child of the deceased. The limit is only the amount of land he is permitted to hold as per the law. This would split the land unnecessarily and creates economy of scale. The 1989 has got its hierarchy different from the civil code. The documentation problems made some to get compensation twice or thrice.

³⁷⁸ Interview with Academic "A", *Supra* note 18.

³⁷⁹ Interview with retired judge "A", *Supra* note 8.

³⁸⁰ Interview with Academic "A", *Supra* note 18.

³⁸¹ Focus Group Discussion with Bahir Dar Woreda Court Judges, 21/10/2015. In the focus group discussion the judges agreed that most cases they entertain pertain to family cases. In fact they are engulfed with them.

of divorce, property and child maintenance. During the focus group discussions³⁸² judges who tried family cases revealed that the rate of divorce cases has increased overtime.³⁸³ The increase in the divorce rate of couples has one or more of the following causes: age difference between the couples, health problems, poverty, interference by relatives of the couples, criminal conviction and imprisonment of one of the couples, mismatches (especially in behavior), betrayal in property, inability to consummate and the absence of legal requirement to demand divorce.

Despite that some of these cases the cases do not represent the couple's genuine interest. Judge L and others guess that 70% of the family cases in the court they preside are fabricated divorce cases. This figure may be exaggerated but has an important message to convey. Focus group discussion revealed that some litigants come to the court only to get a certificate of divorce so that they can get land (or be members in two separate house associations) from the respective municipalities on individual bases. That is why many couples, whom the judges know personally, continue living together after securing divorce decree by the courts.³⁸⁴ This indicates how the courts' inability to address the root causes of cases, at times known by the judges, incentive rent-seeking behaviors contrary to the dictates of Ethiopian developmental state.³⁸⁵

Furthermore, family cases have chain effects on the capability of women, on environment and companies. Most plaintiffs in family cases are women.³⁸⁶ It is because the men control the resources that women in most cases happen to be

382Focus Group discussion, ANRS Woreda Court Judges, 21/102015.

383The 1995 Ethiopian Constitution under article 34 provides that: Marriage shall be entered into only with the free and full consent of the intending spouses and that family is the natural and fundamental unit of society and is entitled to protection by society and the state. Customary ways of dispute resolution and courts (as organs of state) are entitled to protect marriage and family.

384Focus group discussion,*Supra* note 74.

385As to how the Ethiopian system defines rent-seeking as a mechanism whereby profits the use of government power and creating connections with the affluent so as to get profits which cannot be secured with the free market (FDRE 2007 Building Democratic System and Revolutionary Democracy, p.2).

386Focus Group Discussion, *Supra* note 74.

plaintiffs in family cases.³⁸⁷ For example out of the files consulted in Chapter Five accounts for 76% of the total files. The pecuniary value of the litigation indicates how poor the litigants were. All the cases lodged in the courts ended in granting divorce despite the involvement of family council as per the family code.³⁸⁸ As is true for land cases women in family cases also face similar complicated problems both in the process and enforcement of decisions. For example, following a divorce decision, contrary to the law and justice all properties would be liquidated equally between the husband and the woman despite the fact that the woman is the sole owner of the property.³⁸⁹ Judges L and others also stated that when the most important property for both, land, is divided between the two spouses women get the part of the land which is relatively less fertile than the share of the husband. Accordingly judge A asks if the woman wins at the end of the day in the real sense. Women lose so much property in this respect, and hence, justice should be more than keeping hierarchy and order.³⁹⁰ Thus, both the process and the outcome of family litigation are not only decapitating the women but also escalating injustice and impoverishing women.

In all other cases judges decide to divide the property in litigation between the two spouses. The land they hold and the forest or trees thereon will be divided equally. This fragments landholdings and impacts the economics of scale. Academic D also added that most company cases in the federal courts are preceded by the split in the family.³⁹¹ As shareholders are members of the family, a split in the family

387Interview with retired judge "A", *Supra* note 8.

388This is required of the family code.

389Interview with Judge "D", *Supra* note 14. Under article 63 of the Federal Family Law of Ethiopia (Proclamation No.1/2000), all property is presumed to be common property of husband and wife unless one of them prove that he/she is the sole owner. Proving this for a woman is difficult. Under the law, common property is a property that belongs both to a husband and a wife.

390Interview with judge J, *Supra* note 26.

391Interview with Academic "D", University Law Lecturer and practicing lawyer, former Federal Courts Judge, , 23/11/2015.

breakup companies. This again splits the business environment, splits capital, increases unit costs and arises economics of scale.³⁹²

6.4.13. Choice of forum

As is discussed in chapter two the presence of different forums expands the real freedoms people have towards social justice. As members of the people this too expands the real freedom of judges and the lawyers. In a response to the questionnaires that asked what forum would the professionals prefer in case they come across with a case demanding third party intervention for resolution, the majority of judges in the formal courts, and other respondents prefer non-formal ways of doing justice. In this regard 60.9% of the judges and 53.3% of other professionals prefer non-formal ways of doing justice. Only 18% of the judges and 23.3% of the lawyers preferred the formal courts. 19% of judges and 10% of other professionals would make their choice depending on the type of the case they came across. 19.5 % of the professionals did not answer the question. A host of pros and cons lay behind the choices.

In their response judges have mentioned the pros of non-formal systems which have been the bases of their choice that includes:

1. Non-formal systems are less expensive and non-time consuming, and are confidential, result being win-win leaving the parties with good relationship, lasting peace and love among them
2. The non-formal system gives freedom to choose arbitrators
3. There is corruption in the formal system

³⁹²Ibid. The researcher, as ex-president of the ANRS and FHC also observed the split in family splitting business and labor forces in many cases. Economics of scale is explained in section 6.4.12.1 and see *Supra* note 62 to this effect (The idea of economics of scale is taken from www.economicshelp.org/costseconomics, last accessed 2 Aug. 2016).

4. Formal systems are not considerate; they lack the necessary capacity, the required accountability, predictability, trustworthiness and impartiality

5. Could be resorted to any time, could arrive at the truth of the case

While these have been mentioned on the questionnaires as benefits of the non-formal system, the cons of the formal system are also mentioned. The first pertains to the power of the parties to bargain, to control the process and the outcome of their case. Once in the court parties could not control (may not understand) the process and the outcome of the case which in turn means that parties could not control the cost, time, the importance of the outcome and the volume of the outcome. The reputation of the decision making bodies, their friendliness, accessibility (like geography, cost or psychological), and quality level of their decision as understood by the parties, the relationship that the courts have with the parties, are also mentioned as the disadvantages of the courts. These factors erode courts' competitiveness.

Those who preferred courts, on the other hand, underlined the presence of a more or less educated and skilled manpower in the courts. The existence of pre-set procedural law known to the parties before the start of the litigation, the prevalence of clearly set mechanisms of decision enforcement which enforce their decisions however long time the enforcement may take are mentioned as reasons for the choice. In this respect courts surpass non-formal systems. Other reasons to prefer formal courts include:

1. Non-formal systems are not strong enough as courts are, are different from place to place, are not under an institution monitoring them, have no system of accountability
2. Low cost in the enforcement of decisions
3. Ability to get correct decision based on the law, evidence, and the ability to appeal in the case of grievances.

6.5. The non-formal ways of doing justice

6.5.1. A Representative Institution.

The Ethiopian legal system is known for accommodating plural systems of dispute resolution mechanisms. Keeping the formal/non-formal dichotomy intact, the non-formal system of dispute settlement has its own internal plurality. There are many kinds, forms and structures of non-formal system. They range from the nearby neighbor to the larger community. The focus of this research however is on those that have established systems as long, repeated traditions of the people. These are many.³⁹³ What is common of all is that they employ the mechanisms of *Shimigilina*. The most notable and widely used system is *yeshimigilina erq ser'eat* (system of elders' council). Some of the research areas are well known for deploying these mechanisms for all kinds of disputes. The expression *menz giligilu ena beligu* (*Menz* for its traditional justice and its harvest³⁹⁴ indicates how the system is dominant in some areas. Thus, *Shimigilina* is widespread, common and representative of the non-formal systems in the ANRS.³⁹⁵

The following discussions are about *Shimigilina* including its values, its jurisdiction, selection of the elders (*Shimagilie*), its workload and purpose. Finally, the section discusses a case that went through both the formal and the non-formal system.

6.5.2. *Shimigilina* (literally translated as the Elders Council or council of wise men)

In principle *Shimigilina* is an amicable *ad hoc* dispute resolution mechanism where elders in a community arbitrate and settle disputes. The local people under study

393In FekadeAzeze et al (2011) Annotated Bibliography of Studies on Customary Dispute Resolution Mechanisms in Ethiopia at least 125 kinds of customary dispute resolution mechanisms found throw-out Ethiopia are summarized. And it can clearly be seen that the use of elders in resolving disputes is common in Ethiopia. The same effect can be observed in the works of Getachew and Alula.ed. (2008) *Grassroot justice in Ethiopia-the Contribution of customary Dispute Resolution Mechanism*, Addis Ababa Ethiopia, United printers.

394A locality including Gera Keya Woreda in North Shewa Administrative Zone.

395See for example Getahew and Alula, *Supra* note 379.

call the whole process of *Shimigilina* and the outcome *erq* (literally translated as reconciliation).³⁹⁶ The system operates outside the formal government structure and is common among the people.³⁹⁷ According to Elder A *Shimigilina* has a long history dating back the time of Muse. Even Jesus Christ, sitting with the clergy men, used the mechanism to settle disputes.³⁹⁸

The institution of *shimaglina* is run solely by *shimaglewoch* (literally translated as elders of the community). According to Elder B³⁹⁹ any person, whether he is young or old, male or female, domiciled in the community could potentially serve as a *shimaglie*, although the elderly and the male are preferred in the normal course of its operation. In hard cases priests and *god father* could constitute the *Shimigilina*.⁴⁰⁰

The criterion for serving as a *shimagle* include reputation for making people come to agreement through his speech, wisdom, familiarity and faithfulness to the community norms and service, ability to convince litigants, good faith, God fearing, impartiality and life experience. *Shimaglewoch* are persons respected in the community (and by the parties) owing to these qualities.⁴⁰¹ The people call them *Chewa* which literally means well-behaved.⁴⁰² In all his qualities a *Shimaglie* is a person better than the litigants before him.⁴⁰³ Some believe that the responsibility of *shimeglewoch* in settling disputes is heavier than the damage inflicted on the parties. For this effect the popular saying reminds the elders of the heavy

396Elder C, served as a *shimaglie* and religious leader as of the *Derg*Regim, Gera Keya Woreda, interviewed using research assistance, on

397Interview with Elder A, served as *shimaglie* and religious leader for more than 30 years, 25/10/2015.

398Elder A, *Supra* note 90, cited Old Testament the hu chap. 11 No. 16-24 as an authority to his assertions.

399 Interview with elder 'B', Served as *Shimaglie* for more than 20 years, 6/8/2015 DebreBirhan. He told me that he served as a *shimagle* with a female *shimagle* in which they settled disputes effectively. The women, he added, is effective as she put herself in the shoe of those in pain, shares their pains and burdens. He expressed that he prefers to serve with this woman in more, important or higher cases.

400Ibid.

401Interview with Judge E, *Supra* note 17, Elder A (*Supra* note 90) and Elder C, (*Supra* note 89).

402Interview with "D" (served as *Shimaglie* for more than 10 years), Elder "C" (*Supra* note 86).

403Ibid.

responsibility they shoulder. The saw running *Bereh gedel geba bilut yeshimaglie eda ale* which literally means a person whose ox fell off a cliff said what an adversity to elders⁴⁰⁴ implies that the responsibility of the elders is more demanding than the lost ox.

The system operates based on unwritten laws. They try to reach at equitable decisions that awards *kassa* (compensation) in addition to encouraging forgiveness and giving directions as to future relationships between the parties. They are chosen by the full consent of the parties. If a party alleges to have a *zenig* literally meaning axis with an elder, the elder would not participate in the process. Usually the number of *shimaglewoch* is three and the forum could exceptionally constitute more to nine elders. The more serious the case is (for example homicide cases) the higher the number. The importance of the three men panel is as important as three trivets to cook food or the three priests to proceed prayers.

Hence the proverb:

Behulet gulicha aytadim

Behulet dagna ayferedim

*Behulet qe'is aykedesim*⁴⁰⁵

literarily translated as;

No baking with two trivets

No sanctify with two priests

No judgment with two judges (elders).

⁴⁰⁴Interview with Elder I, Supra note 21.

⁴⁰⁵Interview with Elder F, a *Shimaglie*, served as *Shimaglie* for more than 20 years but not occasionally, 18/10/2015. The translation is mine.

conveys two important messages. First it implies that it is impossible to hold *Shimigilina* without this minimum number. And secondly it implies that *Shimigilina* would bear fruits when conducted in three.

The efficiency and effectiveness in their service depends on the social dynamics. They settle cases based on compromise, reconciliation and adjudication and enforce the settlement based on the consent and approval of the people. Since a party does not want to be outcaste from the community, he will tell the truth before the *shimaglewoch* but uses whatever mechanism possible to hide it before the courts.⁴⁰⁶ Parties give more of their ears to *shimaglewoch* than they give to judges.⁴⁰⁷ Parties express their secrets to the *shimaglewoch* rather than to the judges as a result of which the courts could have done nothing had *shimaglewoch* not existed.⁴⁰⁸

Shimaglewoch, and the communal people for that matter, consider *Shimigilina* as civic duty demanded of serving both their community and the Creator. Elder E has been working as elder as of the *Derg* regime. He settled all the cases he had peacefully. He is aged 81 and thinks that his task as *Shimagle* gave him a long life. He told me that no case at the hands of *shimaglie* would remain unsettled as the saying-*yemenekusie lolie yekiremit amolie yelem* (literally translated as there is no unmelted bar of salt during winter (ironically meant cases before elders) as there is no servant of monk).⁴⁰⁹

6.5.3. Values in *Shimigilina*

According to Abera (1998:introduction) even though the Ethiopian conception of justice maintained its particularity, the philosophical bases was more or less similar

406Interview with Academic B, *Supra* note 10.

407Interview with judge L, *Supra* note 79.

408Interview with Judge N, *Supra* note 65.

409Interview with Judge P, *Supra* note 27. Judge P also has been working as *astarakidagna* (this was introduced by the BPR where an assigned judge to this effect tries to mediate a case before trial). He also worked as *astarakidagna* who settled 8 out of 10 cases and stated that he lived long due to this good performance. According to him the cases that remained unsettled are demon possessed.

to those of the Romano-Germanic system. Some of the similarities between the Ethiopian and the West philosophy of justice indicated that most important values of justice have their roots inside too. This research has identified similarities in some values, but also identified distinct advantages of the non-formal system in emphasizing forms of resolution which produce community harmony towards social justice.

As has been discussed in Chapter One Ethiopians' sense of justice is expressed through *quene* and idiomatic expressions. *Quene* and idiomatic expressions have various functional roles in everyday life of the ANRS. They exhibit important justice principles that still prevail in the non-formal system. My informants⁴¹⁰ stated that the non-formal system of dispute settlement maintained long lived expressions in the long legal history of the country. Some of these expressions being deployed in the non-formal system, uttered in the working language of Ethiopia (Amharic), are the following.

Derash Wuha Enquan Behig Siteyeq Yirgal (yiqomal)

(Dashing water ceases to flow when so demanded in the name of the law).

This adage indicates the degree of conviction that every human beings relation needs to be ruled by law. This is similar to the international conception of ROL. But the law here has the purpose of maintaining the *status quo* in communal life as ironically indicated in the dashing water ceasing flowing when demanded in the name of the law towards establishing harmony.

Befird kehedech bekloyie, yelefird yehedech doroyie tikohegnalechi

(A chicken lost without justice is more cause for concern than a mule gone fairly judged)

This adage indicates that law is ultimately related to justice which gives priority to non-economic values of living. This demands justice embodied with reason to

410Interview with Elders 'A' 'C', and 'F' (*Supra* note 90, 89 and 98. Elders E and G (Elder and social court judge in Bahir Dar, served for more than 15 and 30 years as *Shimagliewoch*, Focus group discussion, on 20/11/2015.

justify grounds for ceasing higher economic interests towards sustainable peace and hence communal harmony. This is different from the conception of justice in economic terms discussed in Chapter 2.

Hig Yedihanina Yehabitaminn Cheriq Yaqoragnal

(The law ties together the shabby garment of the poor with the finest outfit of the rich).

This adage indicates how justice horizontally equalises the rich and the poor. This is important as far as sharing the burdens of litigation equally among the litigants, however their economic status, is concerned and helps to fight corruption and rent-seeking in the realization of social justice. These idiomatic expressions show the important role the people assign to the law and the institutions enforcing the law.⁴¹¹As the people did not measure justice in pure economic terms, the expressions signify important non-economic values of justice, law and rule of law as are understood in the non-formal system.

The following expressions too indicate how truth finding is important in handling a case. They indicate the importance of written evidence and the fate of a liar as a loser and as ardent criminal.

Ha Sayilu tifet, wul sayizu mugit

(No writing without Knowing the letter 'u'⁴¹², no litigation without contract)

This conception is important as far as consistency and predictability in the system is concerned. If this understanding is properly utilized, it can encourage market and investment that require predictability.

Hametegna yafiral, hasetegna Yiretal

(Ashamed is the Gossiper, loser is the liar)

Hasetegna birtu wenijelegna

(A liar is a notorious criminal)

⁴¹¹The law here is to mean traditional law.

⁴¹²This is the first letter of Amharic, the equivalent of the English letter 'A'.

When these expressions are seen together with the above ones they convey the message that justice and rule of law are ultimately related to searching for the truth of a case.

On the other hand the following expressions underscore the importance and qualities of *dagna* (Literally translated as a judge.)⁴¹³ These expressions point out the need to thoroughly investigate a case from hair to nail, the importance of a higher judge to rectify mistakes of a partial judge, importance of speaking in when a judge (who listens) is present, importance of truth finding, the need to secure tailor-made justice, accountability of judges and the impact wealth has on the balance of litigation. The expressions include:

Dagna simeremir keras yizo eske-egir

(A judge tries from head to to nail)

Dagna siadela bedagna, ahiya siadela bemechagna

(A higher judge for a biased judge, as a thong to correct a donkey who misses its balance)

Dagna sigegn tenager, wuha sitera teshagaer

(Speak your mind in front of a judge, pass over the river when you find clear water)

Dagnoch kemeremeru, yigegnal negeru

(If a judge canvases, the right will be revealed)

Fird leliji, terabit ledeji

(Judgment is to a child, a Masson is to a door-this is to indicate a person who prepares wood to make a door)

Fird gemiday, ewinet aguday

(A judge that slice off judgment will bury the truth)

⁴¹³It is to mean traditional judge, a *shimaglie*.

Fird ena fitfit, beyefit

(Let judgment and scrambled Injera (bread) be exclusive/private).

Fird ayawik dagna, tegen ayawik eregna

(A judge that does not know judgment, a shepherd that does not have a shelter)

Dihana habitam temuagito, dingayina kil tematito

(An argument between the poor and the rich is like a collision between the stone and the gourd)⁴¹⁴

These expressions reveal that the operation of non-formal dispute resolution mechanisms is endowed with important values including justice, honesty, role of authority and power in shaping relationships, evidence, truth, impartiality, availability of alternative (or hierarchical forums) forums, and process guarantee in dispute resolution mechanisms. They indicate that truth and justice are connected and are to be revealed from individual cases. The conceptions are considered as the common good of the people and are consistently applied by decision makers. The expression like *Fird ena fitfit, beyefit* (Let judgment and scrambled Injera (bread) be privatized indicates that justice has to be contextualised according to the needs of individual litigants. It is a basic need as bread is to litigants. According to the expressions it is the judge who should canvass so as to realize this right. Litigation is judge led and the role of a judge is significant in realising social justice or else it is difficult to pass over the river without facing fatal risk. This has been defined as the concept of social justice under Chapter Two. This conception of Ethiopian social justice could have been utilized to benefit the judicial reform program discussed in Chapter Four. They serve from the very beginning of disputing to its commencement. If properly utilised, it could make people capable of realising their potential.

⁴¹⁴ This adage does not draw parallels between the poor and stone, the rich and the gourd but only implies that power imbalance can affect the outcome of litigation.

Furthermore, the expressions have important messages to convey. They cover every aspects of the non-formal system of dispute settlement and essentially glorify the importance of both process and outcome in dispute resolution. I learnt from the informants that all the expressions arose from established facts in disputing. They are articulated for defined objectives as for example warning judges to be accountable to their duties and to remind judges of their indispensable duty to search for truth. The wisdom of elders is expressed through them and the people get satisfaction and gratitude in holding them as a sign that their decision making process guarantees the search for truth or that there always is a judge against a biased local judge. Law is defined in the broadest sense making no strident distinction among positive laws, morals, culture, religious edicts the adherence to which is left to individual consciences with the approval of the people. ANRS values are against coercion and violence (mostly used to norm respecting if need arose with spiritual sanction). Values are believed to be inherited from the ancestors and constantly and continuously checked by God. According to my informants this has been the law in Ethiopia since the time of Moses.⁴¹⁵

Besides the values, *Shimigilina* in Ethiopia is usually utilised (along the formal one) when things got though as a result of an escalation of disputes into large scale conflicts.⁴¹⁶ Apart from demands of this pragmatism the political system of the present Government cannot disregard the values. A bottom up approach to development takes account of the very bases of development (Including security, peace in a community) which could be effectively harnessed via non-formal ways. The Ethiopian Government, being developmental and democratic, cannot ignore to enhance full, meaningful and true respect (defend and promote) for this system.

⁴¹⁵Interview with Elders A, *Supra* note 90.

⁴¹⁶For example the Ethiopian government is trying to settle the widely spread conflicts in ANRS (in Wolkite and Kimant areas and throughout Oromia regional State) using the Shimigilina system. The recent report by the Ethiopian Human right Commission presented to the HOPR (not yet released) indicated that the ANRS police force used excessive power to silence the conflict. One reason being the use of force before the conclusion of the Shimigilina system.

Commitment to a democratic developmental state gives enough room for such systems.⁴¹⁷

6.5.4. Jurisdictions (areas of operation)

Potentially the institution of *Shimigilina* entertains every dispute in their respective locality. Judge E holds that all cases could potentially be settled by the non-formal sectors.⁴¹⁸ In this respect Elders H and E entertained cases ranging from battery and cases of bodily injury to homicide cases.⁴¹⁹ A saying *Semay tekedede bilu beshimaglie yisefal alu* (literally translated as If the sky is torn apart, *shimaglie* would sew it⁴²⁰) connotes that *Shimigilina* not only gives solutions to all societal problems but also restores community harmony which is identified in Section 6.4.2 as a basic need of the community. Accordingly, the burdens⁴²¹ that courts currently carry can be relieved if cases with significant implication on social ties including, petty offence, family, land, boundary, cases arising from minor misunderstandings be referred to the non-formal system for an effective resolution.⁴²² But this needs tying into a legal framework.⁴²³

417As has been discussed the mainstream thinking during the former systems was against non-formal systems and a talk of justice in this respect was not possible. As life and business cannot avoid considering these systems, for good or bad, we need to see how they are operating in the system. Especially it is important to see what, if any, opportunity they may create to a market and how far they may create opportunity to social cohesion and hence to social justice. The formal laws should give rooms to respect the cultural ways in which mutual trust could be developed. Contrary to this some laws do not give rooms for the application of traditional ways of doing business. For example, article 2142 of the civil code makes it mandatory that a loan worth birr 500 and above shall only be proved with the production of written evidence. The interpretation of article 1723 of the civil code by the cassation division of the Federal Supreme Court (as requiring mandatory registration of contracts dealing with immovable properties) only created a mess as it mismatched with the way the people understand and deal with business (Interview With Academic B, *Supra* note 10). Recent works indicated that this decision is being changed many times by the same bench and a proclamation is promulgated to control the effect of this decision.

418unless the settlement is illegal and immoral

419Elders E and G, *Supra* note 103.

420Elder F, *Supra* note 98.

421 Interview with Academic B, *Supra* note 10.

422. Interview with Academic B *Supra* note 10, and Interview with Judge E, *Supra* note 17.

423 Interview with Judge E, *Supra* note 17 and Academic B, *Supra* note 10..

According to Elder C the service of *Shimigilina* is open to all people from any corner that volunteer to get the service. Women and some Government officers have also made use of the forum. He told me that people outside from his locality (*Zanamba*)⁴²⁴ and people from areas as far as Debre Birhan and Addis Ababa⁴²⁵ have settled their cases in *Zanamba*.

Shimigilina has also settled a case pending or entertained by the formal courts. Practically the courts (even at the regional cassation level) would push parties to reconcile when the outcome of the case is difficult to predict and when small claims are litigated.⁴²⁶ Most cases settled via *erq* would get rarely reversed by the courts and I found none in the cases consulted. Elder D⁴²⁷ told me that they have settled a case that is disposed of by the Federal Cassation Bench.

In this respect Judge B informed me that in a marital property dispute a case at the cassation level, technically or legally, had to be sent back to the lower courts for a retrial. This would benefit the wife but the judges over the case thought that this process would further impoverish the woman. The husband expected another outcome. When the judges informed the parties the possible outcomes of the case they demanded time so that *erq* may be arranged. They were given time to see *Shimagilie*. The *Shimagilina* settled the case to the benefit of both parties. The judge remarked that judges should decide in the formal courts also in such a fair way (which the procedural codes allow) than being technical.⁴²⁸

Relationships between the courts and the non-formal system is not always as smooth as these cases indicate. For example the *Shimigilina* in *Zanamba* entertains

424A locality in ANRS, Noth Shewa administrative zone, gerakeyaworedakebele

425This is more than 180kms and 300 kms away from ZanaAmba.

426Interview with Judge B, *Supra* note 10.

427Interview with Elder D, *Supra* note 14.

428In another case parties', on their own initiatives, come up with *erq* on the day judgments was to be given. Judge 'B' demanded the case to be closed bases on their *erq*. Other judges presiding over the case in the cassation bench did not agree on this move as decision was ready to be read. He told me that the result of the forward looking *erq* would have been much more preferable for the parties than the judgment. He added that judges should be more than the "dead letters" of the laws.

only cases of betrayal as the nearby court prohibited them from entertaining family, land and other cases.⁴²⁹

6.5.5. Workload

All the proceedings being oral and the forum *ad hoc*, it is difficult to get reliable data that show the workload of the *Shimigilina*. But evidence here and there indicated that the system is busy and the case rate is increasing overtime.⁴³⁰ Elder C said that they used to entertain 20 or more cases in a day but this number is reduced these days due to a similar service established recently by churches in a neighboring Woreda including *Chara-Yohanis*, *Gey-Sillasie*, *Cherer-Mewicha-Sillasie*. Elder G told me that 1,500-2000 cases would be entertained in a year by a single *Shimigilina* forum in a Woreda which, if so, would entertain more cases than a Woreda court entertains.⁴³¹ Another source indicated that when the Bahir Dar Woreda court entertained 14,205 cases in 2015, more than 30,000 cases were settled through the *erq* process for the same year.⁴³²

The Ethiopian Arbitration And Reconciliation Center (hereinafter EACC) Bahir Dar Branch had 14 cases referred to it from the Bahir Dar Woreda court in June and July 2012, of which 12 were settled effectively. The only cost incurred for all the cases was Ethiopian Birr 1,660. It reported that within 9 months of 2012 it had effectively settled 5,211 civil cases referred to it from Bahir Dar Woreda Court.⁴³³ The Branch effectively settled 1,642 civil cases in five months (from 2012-2013).⁴³⁴ Of these

429Interview with Elder C, *Supra* note 89.

430 A study *Supra* note 2 indicated that a single forum with a combination of various ADRMs entertain more cases than the nearby Woreda Court.

431The average number of cases a Woreda receives for the last five years does not exceed this number.

432Judge I, on the focus group discussion and all group participants shared his argument.

433The Branch used *Shimigilina* to effect the settlement. The cases were constituted of 1083 family, 783 paternity, 817 neighboring dispute, 70 cooperatives, 305 commercial, 522 commercial organizations, 1005 other family issues and 153 other cases.

434which include 446 husband-wife and family cases, 157 paternity cases, 304 neighboring disputes, 35 boundary disputes, 47 cooperatives cases, 178 commercial organizations cases, 183 other family cases and 344 other cases. The WG High Court also sent cases to the Branch which settled 121 (family 13 of 24, labor 28 of 52, other civil cases 20 of 27, land disputes 1 out

cases 14,022 were settled effectively and file closed.⁴³⁵ These figures make it clear that huge (and diversified) number of cases is being entertained by the *Shimigilina* system. Bearing the work load of the system in his locality Elder G concluded that had these bodies been strengthened, the people would have no desire for the police.⁴³⁶

6.5.6. Purpose of *Shimigilina*

Shimigilina has the purpose of maintaining peace and communal harmony in the present and for the future.⁴³⁷ This is reflected in every step of the procedure and the outcome of *Shimigilina*. For this purpose *Shimigilina* looks backward in searching for the truth but always looks forward for solutions. Judge B stated that while the formal system focuses solely on the past relationships between the parties, the non-formal system mainly looks forward to establishing harmony and restoring the lost balance.⁴³⁸

Shimigilina also has the purpose of reducing damages from being inflicted on those near and around the perpetrator of the alleged wrong. Elder B stated that the purpose of the non-formal system is halting further damage not only to the parties but also to their cattle, children and women as a result of circles of revenge. Judge E stated that if a case in the formal system is between A and B for the non-formal system this involves people beyond A and B (is between groups in a community). This is very important as the most common litigation in the ANRS are litigations between relatives and close neighbors as a result of which social cohesion between relatives (and between man and environment) is being eroded.⁴³⁹

of 1, civil and 9 of 13 crimes upon complaint, 1 of 2 crimes on property) peacefully. A total of 72 files of the 121 were settled peacefully.

⁴³⁵The NS High Court yearly performance report, 2015.

⁴³⁶Interview with Elder G, *Supra* note 103.

⁴³⁷Interview with Elders E, C, D and F, *Supra* notes 100, 86, 120 and 98.

⁴³⁸Interview with Judge B, *Supra* note 10.

⁴³⁹Interview with Academic A, *Supra* note 18. Thus reducing cycle of disputes necessitates settling misunderstandings and tightening social ties to be the very conception of justice in the no-formal system

In addition to serving the communal peace at a minimal cost *Shimigilina* also serve to complement litigants in the formal system that have the truth but no evidence to prove it. According to informants the outcome of *erq* will be reduced to writing so that the litigants could make use of the document in formal courts in case the opponent defects.⁴⁴⁰ Moreover, the system is also used to rectify injustices in the formal courts. Informants mentioned cases where litigants in the formal court lost their cases due to forged evidence. In their respective localities informants⁴⁴¹ came across with cases where, based on the consent of the parties, they went through it gain and rectified the miscarriage of justice in courts.

The system also serves to prevent further litigations or escalation of vendetta. In serious cases (like cases of homicide⁴⁴²) *Shimagilewoch* would intervene on their own initiative at the earliest possible time to stop the circle of revenge.⁴⁴³ In other cases where the elders deem that the rate of disputing in the community escalates so that God will chastise the community they would initiative the process and convene a forum to reconcile or create the opportunity to reconcile possible litigants. For example Elder I⁴⁴⁴ told me that:

...when the Kebele had no rain (and was to face drought), elders and priests gathered the local people and told them that the widespread undisclosed dispute in the community was the cause to this fact. They taught the people that feuds would upset God who punishes the vindictive in this way. If they make peace, then God pardons and all would live in an ungrudging atmosphere. They did this for three consecutive days and made around 400 people of the community reconcile. The people then resorted to work and when so engaged the community would face no more hardship.

440Interview with Elders DandC, *Supra* notes 120 and 89.

441Interview with Elders D, C and E, *Supra* notes 120, 89 and 103.

442Interview with judge E, *Supra* note 17.

443Interview with Elder D, *Supra* note 120.

444Interview with Elder I, *Supra* note 21.

He further told me that that the rain came after such settlement and he believes that there is no further ungrudging in his locality.⁴⁴⁵ Thus the system is making people resort to work and enhancing their capability of doing.

6.5.7. Procedure

Though the search for truth determines the procedure, *Shimigilina* uses unwritten laws and flexible procedure applied across civil, criminal or other claims. The flexibility helps the elders to get more powerful information about the case so that litigants can come to a settlement. In most cases the aggrieved party triggers the motion of *Shimigilina*. Receiving oral allegations, the *Shimaglewoch* gather and deliberate on the issue and call on the alleged perpetrator of the damage. Some *Shimigilina* serve written subpoena.⁴⁴⁶ A person who did not appear or who abused the system is believed to suffer and cost his life.⁴⁴⁷

The entire proceeding is oral. When both parties appear and consent to the *Shimigilina* the first person to speak about the *bedel* (ill-treatment) is the plaintiff. The situation of the case determines the next procedures.⁴⁴⁸ To assure consent and appearance the defendant swears in the life of one of his relatives (*zemed yimut* and others). And then he will guarantee (*wa'as metirat*) his appearance and give (in bodily injury case for example) a sheep or goat to the plaintiff. This in particular will be done when the case is also being investigated by the police. The guarantee (*wa'as masterat*) makes appearance mandatory, but far more than that serves to

445Interview with Elder A (*Supra* note 91). He also shared this view and stated that if reconciliation is not effected the sin will pass over to descendants in a way people inherited the sin of Adam. However the connection the system is working to effectively implement civil code and civil procedure codes declarations regarding arbitration.

446Interview with Elder C, *Supra* note 90. He added that the system he is working in RasAmbaKebele serve subpoena to defendants

446Interview with Elder C ,*Supra* note 90. He remarked how a very well living and reputed man in the city of Gera Keya Woreda appeared as a defendant to the forum and abused the elders and religious leaders but only suffered too much thereafter and passed away.

447 Ibid

448Interview with Elder J, Elder served as *Shimaglie* for more than 18 years lives in Gera Keya but interviewed in Addis Ababa, 12/11/2015 and Judge E, *Supra* note 17.

keep the social relationship unaffected so that the alleged perpetrator of the harm (civil or criminal) will not be evacuated from the area he has been living and the market he has been transacting.⁴⁴⁹ In more serious cases (like Demisew Temitime's⁴⁵⁰ case) the alleged perpetrator may be ordered not to move out of a certain area.

The *Shimaglewoch* may talk to the parties on individual bases before talking to them in common. In searching for the truth elders may receive evidence from any one any time they deem relevant. This could be done outside the forum and on the motion of any of the elder's personal capacity, even wandering in the locality and asking anyone in the locality in his own way.⁴⁵¹

Every *Shimigilin's* move symbolises what they are there for (values of the system). For example, in the process of settlement most of them do not chose an elevated place but rather place themselves in between the parties. This symbolises impartiality and respect for the right to be heard of both parties to the maximum possible.⁴⁵² They chose Sundays or other holidays so that they could get additional power to convince litigants to forgive for the sake of the Creator.⁴⁵³ Mostly they settle the case in one session.⁴⁵⁴ Most cases would be settled in a day, the maximum could take two or four adjournments.⁴⁵⁵

The venue for the *Shimigilina* could be the church, residence of one of them, or could be under a tree.⁴⁵⁶ Elder D stated that the venue will be arranged depending

449Interview with Elder B, *Supra* note 93.

450Interview with Elder H, Demisew was suspected of committing homicide. Having being informed about the crime, the elders convene a forum of their own initiatives. Upon appearance Demisew was ordered not to move out of his work and market place until the process of *Shimigilina* was concluded. Demisew was a rich farmer who did according to this order and his status has not been reduced during the *Shimigilina*.

451Interview with Elder E, *Supra* note 104, and Elder C, *Supra* note 90.

452Interview with Elder F, *Supra* note 95 and Judge E, *Supra* note 17.

453like St. Michael, St. Gebril, St. Mary date or other non-working days depending on the party's interest, Interview with Elders C, D and E *Supra* notes 90, 121 and 104 respectively.

454Interview With Elder B, F and Judge E, *Supra* note 93, 95 and 104 respectively.

455Interview with Elders E and D, *Supra* notes 104 and 121 respectively.

456Interview with Elder D, Judge E, *Supra* notes 121 and 17 respectively.

on the convenience of the litigants.⁴⁵⁷ Or they may convene the forum at a place that village people gather where it is more convenient either to call witness or participate in a market or reckon advice from another elder if the need arose. They may change the venue when the case did not come to settlement at one shot or when the parties feel insecure. Changing the venue in these situations is believed to energize elders to the benefit of the mediation.⁴⁵⁸ Changing venue may also help to secure position free argument.

Ritual ceremonies would remark the conclusion of the process of *Shimigilina* and the dispute.

6.5.8. Remedies and Rituals

As has been explained above the justice of the system emerges when the truth of the case is revealed. This will be concluded by *erq* which is believed to halt feuds between the litigants and beyond.

Before the emergence of the result of the settlement by one of the elders the elder wrap up a summary of the case and the necessity of resolving a dispute. The situations of the parties (like being brothers, poor) will be explained. The parties will be asked to accept the recommendation. This will be followed by the awards which is called *kassa* (compensation). This mostly takes monetary form. The amount, named *yeshimagile*, is first proposed by the *shimaglewoch* and can be agreed by the litigants. This would take account of the damage suffered by the plaintiff, the possible damage if the defendant would be sent to prison, and the desire not to damage the defendant beyond the unbearable. If the plaintiff might incur expenses in the future, the *Shimaglewoch* would also make the defendant agree to make the damage good until full recovery. This is believed to heal every injury. The adage *Hatiyat beniseha, bedel bekasa* (sin in repentance trespass in repatriation) indicates the remedial effect of compensation for any kind of injury. Depending on the case a

⁴⁵⁷Public participation is wide in the application of the norm it adopted in the real meaningful way.

⁴⁵⁸Interview with Elder I, *Supra* note 21.

Wekesa (reprimand or blame), that has the ability to constrain behavior in the future, may supplement or complement the award.⁴⁵⁹ This restraint may at time have more power than the effect of formal sanctions to the benefit of litigant's capability.

As indicated above the system has strong links with spirituality. This is reflected by the litigant faithfulness and reliance on oath, elders' curses and blessings, sacrifices of animals and reference to religious principles and morals. Though some of these are reflected in the process, the ritual ceremony at the end of *Shimigilina* makes this connection more vivid. *Erq* will always be followed by rituals and other traditional ceremonies. After the case is settled the *Shimaglewoch* give thanks, make parties salute and kiss each other, forgive each other in the name of God and arrange a feast, (depending on the capacity of the parties and in both houses). When *Shimigilina* is done in churches, prayers will be arranged.⁴⁶⁰

In minor cases only compensation may not be necessary and *Digis* (literally translated as feast), with money contributed from both parties, could conclude the process. *Digis* at any rate is a must as *Erq* without *Digis* is believed not to settle the dispute.⁴⁶¹ In more serious cases, (for example, homicide cases) a religious father (a priest) of the litigants would praise and pray. In such cases parties slaughter a sheep or an ox bought in common and eats the meat using a knife in common. In homicide cases all male relatives of both sides attend the ceremony and the elders would make them pass over a rifle or a rod. This is believed to dry the blood.⁴⁶² The purpose of passing over a rifle or a rod is to symbolise the desire to be killed by the rifle in case one of them defects the *shimigilina*. Sometimes marriage may be arranged between the relatives of the parties.⁴⁶³

459Unlike the non-formal system, the formal system does have such bases (Interview with Judge B, *Supra* note 10).

460Elders B and I, *Supra* note 89 and 21respectively.

461Interview with Elder E, *Supra* note 104.

462Interview with Elders A, D, E, *Supra* note 91, 121 and 104 respectively.

463Interview with Elder 'A', *Supra*note 91.

6.5.9. Common cases

Elders B and E told me that most cases in the cities they serve as *Shimaglie* involve family cases. They entertain these cases in either of two ways: either as council of elders or as family council.⁴⁶⁴ In convening a family council the family codes apply and each litigant provides the court with a list of two elders and one would be chosen in common. In such cases elders are usually relatives of the couples or persons who testified the marriage. On receiving the case from the court, the council may call relatives of the parties to go in to the real cause of the dispute. If the real cause is the push of relatives, they will, in most cases, reconstruct the dispute and make the parties agree. If they fail to settle the case amicably, they will send it back to the court from which it came.

This is different from the way they do justice convening the council of elders (*Shimigilina*) explained above. A single case may pass through both formal and non-formal forums. The Sirgut vs. Liake case at Debrebirhan has passed through courts, family councils and elders' council (*shimaglewoch*). The court and the family councils could not save the marriage. However, the *shimaglewoch* (elders' council) managed to settle the dispute and served social justice. This case is representative of other similar cases as it indicates how legal and social justice lost in the formal courts end up being secured by the non-formal system. The case also illustrates the process and the outcome of the *Shimigilina* system.

⁴⁶⁴The former is the traditional *Shimigilina*, the latter is a council to be constituted as per article...of the ANRS and article...of the Federal Family law.

6.5.9.1. The case of Sirgut VS. Liake

Plaintiff Mrs. Sirgute (wife)

Defendant Mr. Liake

File opened on 29/02/2009

Appealed on 27/7/2010 and 30/7/2010

Finally closed on 14/10/2010.

This is a family case No. 02430 brought before Bebre Birhan Woreda Court. The couples were married in 1988 and have got 4 children. The wife w/ro Sirgute brought the case to the court on 29/2/2009 G.C. She demanded divorce because of repeated violence. She listed more than 32 items and a house built on 640 sq.m of land to be divided equally. Laike replied to the court that the allegations were false and the court should dismiss the motion. In case the court did not accept his motion he on his side listed more than 21 items of property to be divided after the dissolution of the marriage. The court sent the matter to family elders, as is expected of the family codes, but the family councils established as per the dictates of the family law couldn't reconstruct the marriage. Accordingly, the council sent the case back to the court and the marriage was dissolved on 22/10/2009. The court also decided to divide all their properties equally.

The file was reopened at the Woreda court a year after (on 30/2/2010) to effect the enforcement of the court decision. The court decided (after three adjournments- 14/3/2010, 16/3/2010, 20/3/2010) to divide equally the proceeds of the sale of all the properties via auction. Both appealed⁴⁶⁵ against the decision regarding the property (not on the divorce issue which they cannot) and two files were opened in the North Shewa High Court.⁴⁶⁶ Shimagliwoch (not family council) interfered in the

⁴⁶⁵It has been explained earlier how enforcement of decision is problematic in courts.

⁴⁶⁶File No 02430 and File No 02409 of the North Shewa High Court.

middle of the proceeding.⁴⁶⁷ As a result, Sirgut's appeal (after six adjournments) and Liake's appeal (after five adjournments) were closed. The *shimaglewochi* (two of them were women)⁴⁶⁸ investigated the root cause of the problem (also talked to two brothers of Sirgut) at this level and made the parties agree on the following points:

1. Legalise their marriage again
2. make their property common to both and their children
3. if a party abandons this agreement he shall forfeit his property to the other partner and the children
4. The wife shall receive the house rent and administer the rent.

The agreement was signed by the *Shimaglewoch* and both parties.

The *Shimaglewoch* who tried to settle the matter at the High Court level were not the family council but were council of elders. Two religious leaders⁴⁶⁹ from *Sarian* area were also involved in the process. They were having a meeting with the *Shimaglewoch* every Sunday for five times at a local kebel. This council of elders found the root cause of the dispute.

After a year from the conclusion of the *Shimigilina* I had the chance to talk to Liake and later Sirgut.⁴⁷⁰ He confessed to me that his violence against Sirgute was wrong and was the very reason for the divorce. He proudly informed me that he had now corrected his behaviour, it is important to see here the danger of returning wowam to a misbehaving husband, and they are now happy together and life has changed remarkably after. He stated that his family dream in life was educating their children to the highest level and becoming wealthy via trade. This dream was devastated when the formal courts and the family council failed to reconstruct their marriage. In the process of the litigation he paid 10,000 ETB to his lawyer; Sirgut

467This is not required of the formal laws. The *Shimaglewoch* involvement was in accordance with the expectation of the traditional system.

468As is discussed earlier though the system exclude women from being a *Shimaglie*, their involvement is not common.

469 469Aba (lit.Father)wihib and *qes* (lit.priest) Fithaweq. Sarian is about 5 kms south of DebreBirha.

470I was not able to get the wife but confirmed via phone that she shares all what Liake stated.

also did the same. For more than a year he was unable to carry on the business at which he used to earn 30,000 ETB every month. As he alleged he stopped doing the business because one cannot do things like that when there is *neger* (a case.)⁴⁷¹ This indicates how a prolonged litigation could damage the parties' capability of "doing" (finding justice). It can also be seen how the family had been impoverished despite the dream. The negative and positive outcomes of the case have to be seen vis-à-vis the litigants' capability of 'being' and 'doing' (having justice) in their life. It is only when these elements are served that social justice would be realised. As far as the law is concerned the courts and the family council can be said to have served legal justice expected of in a case where one of the parties decided to end their marriage via divorce. The Liake case is a good example to show how legal justice of this sort might not necessarily end up with social justice.

Moreover after the case is settled via the *Shimigilina* way Liakes' capability of 'being' and 'doing' is realised in the following way.⁴⁷²

1. They are civilly married again (the conclusion of the agreement amounted to a new marriage)
2. They re-built the house (that was auctioned for 70,000 ETB) which is now worth 1.2 million ETB and is being improved further
3. Have their eldest daughter graduated from Jima University with a degree in law and
4. Multiplied their trades in two areas.⁴⁷³

⁴⁷¹Senior judges (Judges "B" and "C, *Supra* notes 10 and 30) at the ANRS Supreme Court also agreed on how having a case in courts would be counter-productive. Judge "E" also noted that non-formal systems would leave the trader to trade, the farmer to till his land with the necessary time and cost and business would not be closed by attending the non-formal system.

⁴⁷²Liake added that he has got another case worth Birr 5,500 (less than 220 USD) pending at the Cassation division of the Federal Supreme court in Addis Ababa. He admits the 1,200 birr but denies the remaining amount as being fabricated. He complains that he lost the case at the lower courts despite clear evidence. He paid 10% of 5,500 birr to his lawyer. Additionally he incurs costs in going and coming back from DebreBirhan to Addis Ababa (150 km away). He hopes to get good decision in his favor at the cassation level. He boldly told me that (with a sense of advice) he makes use of non-formal dispute resolution mechanism if he came across with any case in the future.

⁴⁷³Interview with Liake, client to the courts and the non-formal system, Debrebirhan, 10/8/2015.

Elder B informed me that he has come across with many similar cases where the *Shimigilina* system repaired the failure in the formal system. Elder E stated that searching for the very cause of the dispute is what makes them effective.⁴⁷⁴ What has come to be interesting is how the *Shimagilewoch* help both parties be part of both the problem and the solution. He stated that whenever there is a dispute one of the parties always looks backward while the other looks forward. A *Shimaglies* would help both parties look backward and forward. This particularly is important in family cases where women look backward (of all the pains in the past) while the men look forward.⁴⁷⁵

6.5.9.2. Monetary cases

The following case has come from a narration from one of my informants.⁴⁷⁶ It indicates how the non-formal system could help to complement the gaps in the formal system.

In a case which Elder B entertained a woman was denied by a man of Birr 2,100 which she gave as loan. She had no evidence at all. The *Shimagliwoch* called both and talked to them as usual. They found that the man was living with HIV virus for long period of time. They praised God for giving the man a long life with the virus and showed him their confidence on him that he will never betray such a God. He told the elders that he will not betray both God and the woman. He agreed that he owed the money to the women. He not only accepted the debt but also effected its

⁴⁷⁴In one case which ended in divorce the *shimaglewoch* made the husband and the wife settle and remarry. In a very private conversation they found that the real trouble lies in the husband committing immoral act (which I agreed not to mention here). The elders made the wife convinced of all men doing this to make their marriage lively and lovely. Now they are living in Bahir Dar being one of the richest in the city. In another case couples having 7 children were divorced for the husband changed a milk giving cow with a horse without the consent of the wife. They divided their property equally. After a year consuming all of her shares and looking convalescent she appeared before the court. The man was called and appeared before the court looking good but in the details told the court that he lost his peace and spent very night with full of night mare. The judge sent them again to reconciliation. They remarried again and now living peacefully and prosperously. Judges in focus group discussion agreed that there are many other similar cases.

⁴⁷⁵Interview with Elder F, *Supra* note 95.

⁴⁷⁶Interview with Elder B, *Supra* note 89.

repayment on monthly bases. The woman did not take the case to the court, as she had been told by professionals that she would lose the case.⁴⁷⁷

Had the woman taken the case to courts before taking to the *Shimigilina*, she would have lost it and been further impoverished. This clearly is not only against realising social justice but is also doing injustice. If the courts establish effective links to the non-formal system, gaps in litigation (including evidence) would be reduced, fulfill basic needs and hence social justice. The mere application of such laws would create income insecurity among the poor and the formal-non-formal connections helps the poor to ameliorate the insecurity and increase the effectiveness of courts.

6.5.9.3. Criminal cases

Shimigilina has helped to halt further impoverishment. The following case indicates how perjury is damaging the formal system while the non-formal system rectifies this to prevent further impoverishment.

A married man and a father of two, hardworking farmer kicked a woman with *dula* (a stick) during a boundary dispute. The woman fabricated a story and complained to the police that this man attempted to rape her. The man heard this and evacuated from the place for four months where his whereabouts was unknown. His brother asked for *Shimigilina*. The *shimagilewoch* talked to the woman and her father in search for the truth. After a repeated attempt the woman confessed that the man only had beaten her. The man was called and agreed to pay 1,500 ETB which he did soon. The woman told the police the truth and lifted her case.⁴⁷⁸

Elder I added that if the woman proceeded with the case the man would have never returned to his locality or if he did so he would have been sent to jail serving rigorous imprisonment of 15 years.⁴⁷⁹ This couldn't make the man capable of his

⁴⁷⁷The Ethiopian civil code under article 2472(1) declares that "where the sum lent exceeds five hundred Ethiopian dollars, the contract of loan may only be proved in writing or by a confession made or oath taken in court".

⁴⁷⁸Interview with Judge I, *Supra* note 341.

⁴⁷⁹This is based on his alleged knowledge of a similar story in Addis Ababa that ended in sending the man to a 15 years rigorous imprisonment.

“being”-rehabilitated or couldn’t yield lessons to others “being” law abiding citizens. Thus, he concluded, the world would have been much better had all the office holders in the formal system done this *Shimigilina* way.

There are other important cases which explain how social harmony is established to halt further impoverishment⁴⁸⁰ how parties are made capable of being and doing, how harmony is maintained in the community, how social justice in this respect is realized and enforcement is effective.⁴⁸¹

Conclusion

This chapter demonstrated that the problems in the legal history of the courts are not resolved despite the various attempts to reform the system. The case study demonstrated the root causes of the challenges that made Ethiopians’ desire to improvements in fulfilling basic needs and living standards not being fulfilled by decision making bodies. The mismatch between law and practice simply continued. The reform programmes did not solve the problems of the conceptualisation of justice. These problems were the legacy of the past.

The main reasons behind the problems include:

1. Problems in identifying issues of the people, in realising these issues of the people and in attaining outcomes the people expect

480Interview with Elder A, *Supra* note 91. Elder A settled 12 homicide cases. He settled the case of Aleminew who paid 12,000 as *kassa* and who lives peacefully after completing his sentence for homicide. On the other hand a person who served 20 years for another homicide case was killed by the son of the deceased just after being released from prison-just a day before the interview with Elder ‘A’. He told me that this was so, and common, when the parties did not go through the *erq* process however long the perpetrator served a sentence. Now the killer evacuated from the city leaving everything he has unattended- family protection scheme like the non-formal one. In another case (FentaChekol vs. EngidawGebiru-sons of same grandfather) 8 and 9 persons respectively were killed before the *erq* from both sides (Elder ‘A’). Judge J remembers a case where 6 and 7 persons are killed owing to the same reason and stated that “the formal system could not halt this”. So the two systems should work hand in hand and integration policy, procedural laws should be adapted to this effect (Interview with judge J, *Supra* note 26).

2. Gaps in clearly stipulating what contribution is expected of the courts in building a democratic developmental state
3. Lack of clarity in understanding what development is, how the legal system defines the mission of the courts and how justice is defined
4. Insufficient role for the non-formal system and the inability to make use of its rich justice heritage principles.

The case study also demonstrated that significant number of litigants present their cases to the non-formal systems for better process and outcome. While it is not given enough space by the formal system the non-formal system combines objectively and subjectively peoples' secular and spiritual life and serves as a cause to realising peoples's capability of 'being' and 'doing'. The Chapter demonstrated that the application of non-formal system of dispute resolution mechanism not only continued but is being expnded today with important and coherent justice principles that could be used as the bases of Ethiopian reform program. The Ethiopian variant of non-formal system has important lessons regarding values in judicial business, the process in decision making and impacting lives as an outcome. The chapter questioned the assumptions that extensive use of imported change instruments (including reform programs) would solve all problems in the justice system. Case studies proved that reform programs would only be effective when targeted local problems using local solutions. Moreover reform programmes have to arrange non-hierarchal decision making powers, so that formal systems have to share some of the powers they monopolised and should recognize non-formal systems as equally responsible bodies in realizing social justice.

Conclusion

This study has been conducted in response to the quest for effective decisions by dispute settlement institutions in order to realise social justice. The study has therefore examined:

1. The gap between legal and social justice in the legal history of Ethiopia.
2. Dispute settlement institutions, constitutional imperatives and their role in realising legal and social justice.
3. How legal and social justice and the role of judicial reform programmes in Ethiopia improved the gap between legal and social justice, and the relationship between formal and non-formal dispute settlement institutions; in this respect the study in particular examined the non-formal system of dispute resolution to develop principles so as to find ways to improve the formal systems.
4. People's reaction to an ineffective dispute resolution mechanism and harmonisation between the formal and non-formal ways of dispute resolution mechanisms towards social justice.
5. The connection between different factors of legal justice (including legal history of Ethiopia, litigation rates and the mentality of litigation in the country, prevalence of legal pluralism in the country, ability of decision making bodies) and the fulfillment of basic needs, improvements of living standards and reduction of poverty.
6. The root causes of the challenges faced by judicial reform programmes and lessons to be learnt from the non-formal systems.

Chapters One-Four covered general issues, whereas Chapters Five and Six discussed and analysed case studies with respect to each of these issues. The study argued that the realisation of social justice has been problematic for a number of reasons.

Chapter One explored Ethiopian legal history and suggested that Ethiopia has a long and uninterrupted history of modernizing its laws and judicial systems. This globalized the laws while the courts remained very local. While the laws were made amorphous, less influential and devoid of jural postulates, the courts became dependent on either the rulers or the public. The institutions were not effective in shaping the behavior of litigants despite the modernization efforts. This intensified resistance on the part of the formal system while giving momentum to the non-formal system of dispute resolution that necessitated the need to redefine institutions, justice and their role.

Chapter Two defined institutions in a wider perspective and argued that neo-liberal economic emphasis on institutions of contract and property rights is problematic so far as realizing social justice was concerned. It argued that constitutions are fundamental institutions and held that other institutions' role should be making real the dictates of this basic institution. This role basically incorporates shaping behaviours towards enhancing the capability of the people and fulfilling social justice. It indicated that justice is about human right which in turn has to be about human capability enhancement.

Chapters Three and Four are about legal and judicial reforms undertaken globally and in the Ethiopian context. These reforms are preceded by the old law and development movements and were to rectify mistakes in the old movement. The chapters demonstrated that though the new movement is dynamic the practice remained static. With the variation in context, the old and new law and development movements demonstrated that justice has been monopolized by the formal systems towards a thin conception of development in terms of economic growth. The Ethiopian variant in particular indicated that identification of problems and recommendations were technically done by CILC that shares the ethos of global financial institutions. Thus the reform talks in global languages of good governance, ROL and accountability. The perspectives from non-formal systems were not taken account of and non-formal systems are not given enough space.

Chapters Five and Six explained the achievements and challenges of the ongoing reform programmes in Ethiopia. The chapters are based on case studies and indicated that the successes of the judicial reform programme were important but were distanced from the realisation of social justice. Chapter Six in particular explained the contradictions and challenges in the reform and the reasons behind the challenges.

This chapter draws these points and contains the conclusions of the study. The conclusions mainly focus on the way social justice could be realised by the formal courts. The first part of this chapter contains a summary of conclusions of the study while the second part deals with analysis of the conclusions and future work.

7.1 Summary of conclusions

Ethiopian constitutional and legal development has largely been outward looking. Currently this has been the case in the Constitution of 1995 in which Chapter Three on Human and Democratic Rights was influenced by international conventions. The contents of the right to development (which vaguely puts persons center of development, gives priority to respect for all human rights, recognizes realizing social justice, and allows wider participation) are in congruence with the contents in the RTD. Specifically, the right to development under Article 43 of the Constitution is influenced by the Declaration on the Right to Development of 1986 which in its part is influenced by the development conception of Amartya Sen. This Constitution belongs to the 21st Century but for the most part the enforcement of the Constitution lags behind the century.

The imported laws assumed formalisation as agents of engineering change. While the formal systems passively endorsed the laws and marginalized the non-formal system, the non-formal system is actively engaged in the lives of the people. All efforts could not substitute the deep rooted non-formalization on the part of the people. On the other hand the possibility of being oppressive on the part of the

non-formal system and the competitive advantages of the formal system indicated that indigenously too didn't guarantee the full realization of social justice.

Contemporary reform attempts also suffered from two major problems: firstly, the reforms are externally derived and do not take local needs into account and tend to be technicist. In particular, they do not take into account the constitutional need to consider social justice. Secondly, they have until now tended to ignore the vital relationship between the formal and non-formal systems.

More specifically, the thesis established that the formal system has many problems. The judicial reform programme and other change instruments have developed many initiatives as discussed in the previous chapter, but have not really succeeded in delivering an effective and socially just system for the following reasons.

1. The role of Ethiopian courts was not clearly stipulated. The chapters proved that in real terms Ethiopian courts bear their impacts on lives of persons and groups. Constitutionally speaking Ethiopian courts were duty bound to give life to the right to development, which in turn means courts are duty bound to enhance the capability of litigants and the people. In every one of their moves and outcomes courts as organs of the government are expected not to impair the realisations of basic needs and living standards of the litigants and the people. Various law and reform programmes were designed and implemented but there remain significant challenges due to the gap between constitutional prescriptions, policies and expectations of poor litigants, the entire people and the courts. As the courts are found to be important actors on the social, political, economic and environmental life, there is a need to redefine judicial role from these perspectives: alleviating poverty and sustaining development. If so capability enhancement would not be hallucinogenic to the institutions enforcing the Constitutional imperatives.
2. Lack of correlation between disputing and consequence sensitiveness: Rapid increases in disputing in Ethiopia is making the courts busy. As Chapter Five demonstrated, a busy court is not necessarily effective enough. The fast

disposition rate of courts is not necessarily among the decisive factors that increased disputing. Often these size of the files maybe the reason for as well as the result of its weakness. The increase in litigation was significantly driven by artificial factors and other weaknesses in the executive branch of the Government. Chapter Six explained that rent seeking attitudes and behaviours on the part of the litigants (and the executive), or failures on the part of the Government (example land cases, cases against Government corporations), unpredictability and inconsistency on the part of courts (example land cases, repeated cases at the federal cassation bench), ethical problems on the part of judges precluding adherence to the laws and binding cassation decisions account for the inflation in court files.

This would deteriorate the economic status of the parties or third parties, loosen the social ties of the people or fragment resources particularly land so that the productivity of land decreases while arising in the economics of scale. More artificial litigation is increasing and this will increase the damage to the economy, the social ties of citizens and will cause an irreversible damage to the capability of parties. As explained in Chapter Six, the non-formal decision mechanisms have less of these evils. Thus, there is a need to be consequence sensitive to the implication of each case so that courts extend social, economic and environmental benefits of their outcomes towards sustaining justice under the Constitution.

3. Lack of considering quality justice as basic needs of the people: As Chapters Five and Six indicated disputing is becoming a mass exercise in Ethiopia. This can be seen not only from the increase in litigation but also from the content and the number of people behind the litigation. Disputing happened to be the game between the litigant motives in demanding justice and the courts to supply justice. Despite that courts need to consider the real impact of its process and outcome upon the lives of the people. As illustrated in Chapters Five and Six the judicial reform program didn't take account of these games and propose

fundamental solutions for. It rather focused on measuring justice in economic terms than the real impacts of courts performance on the real lives. Chapters One and Six indicated that this quality of justice as the basic structure of the society was primarily the basic need of the people and all other basic needs constitute this demand of social justice. This need has to be comprehended and reflected on in the supply of judicial bodies. Accordingly future works need to stipulate a threshold of quality performance measurement that gives specific attention to the realisation of social justice on individual cases. Courts need to give specific attention to deterring behaviors that impairs capability realisation.

4. Opportunities have not been properly utilised; challenges have not been duly recognised: The Ethiopian experience provides important opportunities and challenges regarding reform initiatives. The opportunities include the political will to reform and change, the acceptable rate in disposing cases measured in terms of clearance, back log and congestion rate, the willingness to attract meritorious lawyers to the court (and the adoption of law to this effect).

However, these efforts face many challenges. The challenges include the hegemonic approach to reform, counter-productive effect of the ambition to reform, the inability to develop reform principles from the non-formal system, the tradition of ignoring laws in the books, the overburdened reform programmes, the lack of judicial policy or philosophy in the courts and the inability to exploit perspectives and potentials of non-formal systems. More specifically the challenges pertain to securing justice on a one-to-one case basis, enforcing decisions and lack of professionalism among judges, the asymptotic dichotomy between law and justice, the dichotomized conception of justice by the actor in the formal and the non-formal system, the presence of radically diversified and conflicting understanding of justice and lack of clarity on what the justice system appreciates as the meaning of justice. A serious challenge also lies in the failure of the reform programme to take root at home, take lessons from the non-formal system, the failure to define justice and

development in the context of the judiciary. This necessitates the revision of the role of judges in a democratic and developmental system, and the revisiting of the conception of development in the context of the judiciary.

5. Inability to create learning institutions: Good practices and challenges were observed during the field study towards integrating principles from the formal and non-formal systems. The culture of taking the exogenous as exotic didn't allow lessons to be taken from the non-formal system. The inability to look inside made the potential benefits from the non-formal system of processing cases, concluding cases to the benefit of all and the adherence to the common principles a far-fetched exercise. As indicated in Chapter Six the attitudes of some of the judges towards this system also impeded the scaling up of the good practices of harmonizing the formal and the non-formal system in a meaningful way.

Contrary to establishing learning institutions, Chapter Six indicated a recent move to establish special courts to deal with market oriented cases that would erode court competitiveness towards non-formal systems. This move has been influenced by the legal history of Ethiopia that not only marginalised the non-formal system but also ignored the formal one and encouraged special bodies for disputing. This would make parties to prefer courts for non-market oriented cases. This in turn would discourage courts from being "learning institutions" and reduce the global attractiveness of Ethiopian courts which in turn reduces investment.

6. Inability to shape behavior of litigants and beyond: institutional quality results in changing the behavior of litigants and beyond. If there is a change in behavior litigants would be constrained from using courts as weapons to impoverish other litigants. Rather they would use courts to expand their freedoms towards social justice realisation. As explained in Chapters Five and Six, the inability on the part of the courts to shape behaviors beyond litigants exacerbate corruption so that the wealthy and the strong take the upper hands in litigation; the damage to the

poor and women escalates; the inconsistency and unpredictability in courts begets more cases; similar cases will be opened repeatedly and gives a false image of the work load of courts; market failures will increase and enforcement of decisions will be more challenging. The courts can be organs of the government but less of its institutions. These leave parties with more challenges in realizing their basic needs and living standards.

As indicated in Chapter Six courts have too many cases to handle. An effective resolution of these cases could make the courts more important to constraining litigants' behavior that are against the realisation of social justice and encouraging behaviors that realize social justice. When courts can do so they would qualify as institutions in the strict sense defined in Chapter Two. There is thus a need to synchronise the formalisation and non-formalisation efforts so that development defined in terms of fulfilling basic needs and living standards of the people benefit from pragmatic adoption and implementation of laws by the courts.

7.2 Analysis

7.2.1 The need to align decision making and poverty alleviation

The Ethiopian Constitution declares the right to development that includes fulfilling the basic needs and living standards of the people and individuals. Moreover the GTP2 targets alleviating poverty. Though the courts are duty bound to respect, enforce and defend the Constitutional imperative, the laws establishing both the Federal and ANRS courts do not stipulate comparable objectives. Courts are expected to realise these objectives through the cases brought before them for litigation. Their reaction might be individualistic and gradual, but the Ethiopian courts have had a large number of cases through which they can economically, socially and environmentally impact not only litigants' lives but also the lives of the entire community through the influence they bear on the behaviour of the people and the executive branch of the government. Various reform initiatives are believed to positively causally contribute to yield support to this great project. The

experience of Ethiopian endeavors indicates that wishes expressed in the books usually fail unless its judicial role is revisited and articulated explicitly in two ways: first in terms of alleviating poverty and second in terms of sustaining development.

Chapter Five and Six demonstrated that the way courts handle and end family cases is eroding the very fabric of the society. The way they handle land cases is increasing land fragmentation and disuse which is a huge blow to the economy of the country that is largely dependent on agriculture. The way to getting decisions in contract cases and enforcing decisions is damaging the market, as the market cannot work with ineffective contracts. The failure in enforcing contracts leads to market failures, which undercuts sustainable development. The cases are intertwined in such a way that company and land cases have their roots in family cases and vice versa. Unless the objective of the courts is stipulated in clear terms, the negative impacts of courts on this chain effect may continue.

The chapters also indicated a significant number of cases being brought against the Government. Judges appreciate this as a sign of the failures in other branches of the Government. This opportunity could have been exploited so that the way Government functions could practically be geared towards securing good governance and prevent rent seeking behaviour. This creates an opportunity to fulfill the Government's desire of being developmental and democratic. Making effective decisions demands serving justice towards enhancing the capabilities of the parties, including the Government.

Furthermore, Ethiopian courts have got the opportunity to positively impact the economic, social and environmental performance of the polity. As indicated in Chapter Two this is realising sustainable development. Chapter Six illustrated that this opportunity is not utilised. Realising social justice would be a faraway exercise unless dispute resolution mechanisms align their commitment towards alleviating poverty and sustaining development.

7.2.2. The need to list capabilities

Chapter Five demonstrated that of all the cases coming to the attention of the courts land, family and contract (monetary) were three of the top five areas. Given the rate of litigation, the number of cases in this respect is large enough so that the courts could directly impact the entire population within Five years. Had the courts bore their impact, change in behavior would have been visible and repeat cases would not have increased at the same rate they are increasing now.

As it is true that for every action there is an equal and opposite reaction, in the context of Ethiopia an equal and opposite reaction to poverty is not wealth but justice. Serving justice in courts and non-formal institutions should go beyond treating the symptoms of litigation which otherwise multiplies poverty. In this respect courts should expand the possible freedoms that litigants have towards realizing their capability. This may not happen over time but Ethiopians cannot wait too long. Courts may not always be effective in doing so but the principle of fairness restricts them from making people incapable. This necessitates the need to list capabilities and give priorities to some of the capabilities in the list. This is in contrast to suggestions by Rawls but combines the way Nussbaum lists capabilities with Sen's notion of open-endedness.

As far as litigants in courts are concerned it is difficult to have a complete list of capabilities. In Chapter Six various conceptualisations and interests within and among judges and litigants are explored. As explained a judge's preference of health may not fit the truth preference of the litigant or the peace preference of the people. In some cases, where litigants hide their real interest (example artificial divorce indicated in Chapter Six) this will be further complicated. This makes listing capabilities in courts problematic. However, capabilities can be listed broadly and enforced within the context of Ethiopian conception of social justice.

Thus as contradictory principles were observed in the operation of the courts, the first in the list of capabilities is the rule *not to harm and not to allow harm to*

happen.⁴⁸² Avoiding clear injustice is the first subset in this list. Halting further damage to the freedoms of litigants being and doing may include designing a judicial reform programme based on principles that are homegrown, not serving as a forum with illicit motives to harm, devising mechanisms to do away with artificial litigation, using court resources (procedural codes) against harms to the parties, accessing justice to the most disadvantaged (owing to factors including geography, representation and gender), managing time and being time bounded in serving justice, and giving one-to-one attention to cases than focusing on the general picture.

Allowing more opportunities to litigants towards justice is another subset of the list. This can be done, for example, by giving more freedoms to parties to make use of non-formal systems in searching the truth of the case.

7.2.3. Quality or numerical performance measurements?

The right of access to justice and the right to development are enshrined in the Ethiopian Constitution. The right to access includes the right not only to appear before courts but to pass through the courts in a fair and reasonable time so as litigants secure decisions. Short of decisions one cannot talk of accessing justice towards economic, social or environmental ends. Rather, one can talk in terms of de-capacitating litigants and the people who could have been directly and indirectly affected had the decision been given. The current high rate of attrition should be appreciated from this angle. This implies that access to justice feeds the realisation of the right to development.

Despite that the current mindset of access to justice in terms of fast disposal rate clashes with the right to development. The rush in disposing cases with minimal regard to either procedural guarantees or search for truth is significantly caused by the mechanism courts use to measure their performance. This generated reversal and retrial rates against the basic demands of litigants. This further undermines the

⁴⁸² Other list of Capabilities will subsequently be discussed.

fairness of proceedings, increases the rate of reopening and gives false figures of case load which in turn undermines the numeracy of measurement itself. A massive return to a mass exercise of litigation would only increase the mass exercise. So the courts on their part should exert efforts to reduce the attrition rate of the cases. The partnerships with other stake holders should contribute to reducing the attrition rate.

Thus the mechanisms of measurement currently focusing on production of dead cases should include the measurement of productivity of courts. The quality of procedures the courts follow and the quality of the outcomes that follow should be the mechanisms to measure the performance of the courts rather than focusing on numerical measures that are currently deployed, which by themselves are good points to start but not end points to stop. As indicated in Chapter Five the numbers indicate an inflated image of the courts' performance and conceal the real impacts of court performance on the real lives of the people and Government (like curbing corruption or rent seeking). The numbers do not show the economic, social and environmental impacts of court performances which have been seen to be negatively impacted during the field visit.

7.2.4. The need to standardize change

Chapter Two illustrated that a well-founded reform programme will be stable and lasts long while imposed reform programmes grow unnaturally and could not resist outside waves. The Ethiopian experience indicated that courts were implementing many reform initiatives for the last two decades. These efforts are meant to capacitate the knowledge, skill and attitude of the court personnel. The evaluation of the Federal and ANRS courts at the end of 2014/15 imply that this way of capacitating courts overburdened and de-capacitated them. Balloons cannot be expanded indefinitely. Courts burdened with cases cannot be bombarded with reform programmes without the proper evaluation of the success and failures of the ongoing reforms. Ethiopian courts have passed through CARP 1, CARP 2, Judicial

Reform Programme, Civil Service Reform Programme, BPR, BSC not to mention the citizen charter, Quick fixes, Real Time Dispatch techniques. Some change instruments overlap in terms of time. While the outgoing narrates success, the new one triggers action from clean sheets.

Too many reform programme do not even give time to foresee the wider implications of the old ends and the new beginnings. As is indicated in Chapter Five, the Ethiopian judiciary operates under resource constrains. A poor country cannot live with new beginnings and new aspirations alone. Moreover the reform and change instruments are technical but are owned by the leader of the court who presides over cases but has little or no managerial or leadership knowledge and skills. Reforms too have to be owned by those who are directly affected by programing the formal and the non-formal systems. Stakeholders in both systems have to be consulted and informed of the reform from the inception to evaluation. A successful reform demands technical, legitimate and local ownership. The experience of having too much un-staged reform programme is due to lack of ownership, technicality and localisation. Lack of a coherent justice philosophy in Ethiopian courts, as explained in Chapters One and Six, too crucially da-capacitated courts so that they couldn't censor the introduction of reform initiatives. For these lack of reform would not sustain and erode the very emotion aroused at the launching of a reform programme. Taking unplanned, un-staged reform seriously, is taking the suffering of the people seriously.

The judicial reform programme in Ethiopia had success stories as discussed in Chapter Four and Five. However, most informants were not able to clearly identify the success of each of the reform programmes. The consensus seems that the reform is working on as color coded filing system, recording and transcribing system, ICT in courts are being implemented. These could have been done by any one of the change instruments above. The lesson is that a well-founded reform is stable, capitalises on what had gone and foresees the possible sequences of other changes. Reform initiatives should critically evaluate earlier achievements and

failures and investigate its basic assumptions as some may be based on false assumptions. In that case the BPR, for example, can't wipe out all the achievements of the earlier reform programme and start from clean sheets. The question remains what it is for a judicial reform programme in Ethiopian democratic developmental state if a newly introduced reform does not build on the earlier efforts towards:

- Democratising the litigation process, curbing rent-seeking and enabling democracy as potential partner of development in a developmental democratic state
- Stopping the spread of injustice and poverty
- Making the judiciary, the litigants and the communal people capable both in its process and its outcome
- Creating coherence in the justice sector, particularly among the judges
- Establishing judicial policy and jurisprudence of the country
- Creating healthy synchronization in the external relationships that courts need to have with the non-formal system
- Making courts learning institutions both from earlier failures and the benefits of non-formal systems

The frequently introduced change instruments discussed in Chapter Five didn't give clear answers to these issues.

7.2.5. Challenges of enforcement of decisions

It can be assumed that in bringing a case to the courts litigants are intending to win the case. In winning the case the winner can be said to have fulfilled his function of being a winner. The functioning of being a winner is only a means to another function of being (getting the sum) or doing (educating a daughter like the Liake case). A frustrated winner would resort to the aid of the court towards enforcement of the court's decision to these effects. As discussions on capability realization illustrated, enforcement of decisions makes the court and the litigants capable in a variety of ways. It fulfills court functioning of doing and being: being competent and

independent court (enforcing their decision without external aid), fulfills functioning of the people being (being able to litigate in a competent court), and parties doing (getting the fruits of the decisions).

Chapter Five indicated that the challenges in enforcing court decisions makes the capability of these beings and doing problematic and worth considering. The Chapters illustrated how enforcement ended up being one of the most appealed cases at the apex courts. The files examined did not show the enforcement of decisions in the majority of the cases. Thus returns of the outcome of a case are largely eroding the economic benefit of winners. Parties in Chapter Five are seen incurring as high as 352,337 ETB to execute a decision. This amount is not yet reimbursed. Taking 550 USD as per capita income for Ethiopia 352,337 ETB would be an annual income for nearly 30 people in Ethiopia.⁴⁸³ Failure in execution is de-capacitating the winner of the case or more people at the illegitimate benefit of the losing party to that extent. The reduction in economic benefit of litigation presses down the capability of legitimate litigants and third parties and the capability (being trusted) of the very institution enforcing the decisions.

This needs to bring in the concept of responsibility in the operation of courts. Parties should not only be left with more opportunities after litigation but also should take responsibility for an illegitimate claim they bring to courts. The more justice is made accessible to them and the higher the opportunity to freedom of choice of forums, the higher should be the responsibility. Thus another list in the capabilities list is *making litigants accountable for bearing the burden of an illegitimate harm inflicted on another*. This makes each party to have a fair share of courts goods, fair access to the benefits of the goods of what courts yield and paves the way to correct trial errors towards fair results. This could also ease challenges of enforcement of decisions.

⁴⁸³The World Bank: Economic overview, 2015.

Chapter Five indicated the causal and positive relationships between efficient enforcement of decisions (contract enforcement more specifically) and the increase in investments. This would imply that the problems in enforcement or the lack of enforcement degenerates investment. In this respect property frozen at the commencement of the litigation is meant to lowering the risks in enforcement. If enforcement happens to be more challenging than getting decisions, freezing assets would be a double blow to the economy of the country and makes the contribution of courts to the attainment of sustainable economy and development insignificant.

Reform effectiveness too has to be measured from the effectiveness in decision enforcement which has the effect of increasing investment, lowering risks in transactions, reducing the liability of creditors and increase productivity. It needs to give ways to capability problems on the part of courts (including knowledge, skill, commitment, determination, corruption, human resource, budget), and tackling factors that dilute enforcement.

As explained in Chapter Six the effort on the part of the non-formal system to enforce decisions without disconnecting litigants from the market and the social ties could yield commendable lessons to the formal system. Unreasonable resource disconnections (human or financial) from the very social and market fabric would reduce the opportunity that people could generate from the connections. The designs in the non-formal systems might have been developed out of necessity but the effective enforcement of settlements demands inquiry of the very rational of effective enforcement of settlements. This in particular would be interesting when one sees the absence of frozen assets in the whole process of *Shimigilina* and its enforcement. Hearing the lessons from the voices and perspectives, beliefs, values of non-formal settings does pragmatically benefit the courts.

Thus, these facts necessitate a researched and well done minimum threshold of enforcement schemes, amount, timing and kinds of freezing assets, synchronizing principles of the non-formal system of enforcement with the formal one.

7.2.6. Engagement

The study of the *shimigilina* showed that a key attribute of the institution is their engagement with the parties to the dispute and with the implication of the dispute for community harmony. This contrasts with the more technical, mechanical and disengaged approach of the courts. As explained in Chapter Six judges, contrary to being meritorious, are becoming less professional, less expert and more mechanical. This has distanced judges from realising social justice. An important lesson from the *shimigilina* system is that the courts need to be more engaged: both in the process and the end of litigation. Even mere application of laws does not preclude judges from “clutching the objectives of procedural laws buried under the dead letters of the laws” and apply procedural laws as simply and flexibly as possible so that the litigants could fully and meaningfully participate in the litigation process.

As indicated in Chapter Two, human beings are complex creatures. If litigants biological, physical, psychological, intellectual, social, and perhaps spiritual elements are not only unavoidable when they come to litigation but also impact on decision making process and outcomes, Ethiopian judges have to learn from the *shimigilina* system as to how effectively engage in the litigation process and serve social justice.

Hence, judges cannot avoid subjectivity in serving justice that needs being mitigated and converted into objectivity. A meritorious judge in a developmental state converts the fruits of subjective engagement in to objective reasons and considered judgments. A more effective way of engagement, while mediating subjectivity, is to be as caring and compassionate and as human as possible to litigants. This helps judges feel and share the pain of the litigants and make parties participate in the process in a more genuine and humanly way than by conducting mechanical monologues. This may also help judges to temporarily detach themselves from their formal position and understand the pain of the victims. This also decreases the

unintended negative consequences of decisions. In being so engaged, litigants speak meaningfully and judges listen to meaningfully.

Rational engagement has other added advantages. Objective assessment of subjective elements of litigation-interaction would be feasible. Understanding the overall situations of litigants paves the way to sensitive reasoning so that justice players wouldn't misunderstand one another. A litigant who loses a case will understand why he/she lost the case. Prisoners would rather feel rehabilitated than sardined in being sent to jail. Engagement narrows the ever widening antagonism between judges and clients.

In Chapter Six it was indicated that the chance of becoming dominant in the play of justice leads to engagement reducing the role of chance in attaining justice, and empowers people towards owning the process and the outcome of a decision. Unpredictability, inaccessibility, perception gaps, conception differences, fabricated cases and retrials have increased the dominance of chance largely due to lack of meaningful engagement. As this severely constrains people these domains of unpredictability and chance have to give way to domains of legitimate claims.

Engagement allows transparency in the courts. It reveals further opportunities in the case processing and shaping of better outcomes. The presence of corruption is noted in the courts in Chapter Six. The Chapter indicated the measures taken on those found corrupt in the Federal and ANRS Courts. Corruption damages the principle of impartiality and fair equal opportunity between litigants, and benefits the powerful and de-capacitates the powerless. Engagement closes the opportunity to manipulate and abuse disputing. Thus, another element in the list of capabilities is *opening the door wide for firm rational engagement*. This makes judges less mechanical experts and more meritorious professional.

Engagement potentially reveals truth. As the adage in Chapter Six *Befird kehedech bekloyie, yelefird yehedech doroyie tikohegnalechi* (A chicken lost without justice is more cause for concern than a mule gone fairly judged) indicated whatever the

amount in litigation the most important thing for litigation in the non-formal system is the expected justice of the system. This implies that in terms of needs, the justice expected of courts is more basic need than the amount in litigation. This demands capable institutions or else the capability of litigants and the people would deteriorate. The courts are thus expected to respond to the most important need of the people-search for the truth of the case. Thus, *a search for truth* is an item in the court capability list. In this respect courts could take lessons from the non-formal systems standards of action towards the search for truth. This is in thick agreement with the minimal substantive elements of ROL even more in tune with the internal morality of laws.

7.2.7. Need to disconnect and reconnect

The legal history of Ethiopia indicated that laws have been transplanted from outside to modernise and develop the country. Despite that the aspirations couldn't inspire the formal courts. For the most part the courts were not disconnected from the very procedure they were following and the decisions they were giving. Though formal they were disconnected from both the (and later from the non-formal) system. The importation of laws one after the other developed the mentality of an old wine in a new bottle. With an increase in the number and complexity of population and litigation this mentality cannot maximise and realise meaningful lives especially to the poor and the disadvantaged.

Chapters Three and Six demonstrated that development requires a meritorious judiciary that is coherent internally. The current effort by the courts to attract the best graduates is commendable towards establishing a coherent judicial system. Though this might have been so, wide areas in the judicial system need coherence. Building internal consensus could range from building consensus on the very mission of the courts to the reduction in the reversal and amendment rate by higher courts. Despite that the conception of justice by the people, law schools, of lawyers and the courts simply involves mismatches and is unconnected.

The formal system has other disconnections. As Chapter One and Six indicated it largely has been keen towards the traditional ways of dispute resolution but acts contrary to it. It is expected to be developmental but is oriented otherwise. So many principles enmesh judges in handling a single case. A court embodying all principles of justice cannot keep its coherence. There is lack of consensus on the basic expectation of courts. The constitution is too far from the daily applications while the laws establishing them lack clarity. Imported laws have various and at times contradictory principles.

Building internal coherence and establishing healthy external relations demand meritorious professionals the courts may not secure to have unless educational institutions and training centers revisit their curriculum towards re-connecting all these elements.

7.2.8. Synchronizing efforts to integrate forums

As indicated in the introduction to this Chapter the focus of this research has been on the formal systems where the principles of the non-formal systems are used to suggest how the formal system can be improved. In this respect the non-formal system indicated how institutional strength is decisive in rendering effective justice and sustainable development. In handling the same case the experience of non-formal dispute resolution mechanisms in doing better with the economy of litigants, social ties of the litigants and the environment proves, *Ceteris paribus*, that institutional quality causally and positively impacts on sustainable development. The experience in the formal system shows that despite reform achievements, which can't be achieved by the non-formal system, institutional weakness and underdevelopment are causally and negatively connected. As integrating them would not be a realistic recommendation, one key idea which emerges is therefore that there is no need for integration of the two systems, but rather to keep the two systems separate but co-exist by and synchronise important justice principles towards realizing social justice. Synchronization may reduce voluntary importation

of law and programmes. Future research has to dwell on the details of this synchronisation.

The presence of the two separate systems is recommendable from capability enhancement perspectives too. The existence of non-formal systems simply expands litigants' freedom to the choice of forums. That would increase human creativity. Winning a case in the absence of non-formal systems is a victory but in a reduced freedom. As the non-formal forums are forums where people fully consent to participate, their restriction is a restriction to this freedom and the energizing power that the forums have towards justice.

Thus as far as possible both forums should expand the freedom of choice of their litigants. This can be done by the forums in allowing litigants to move from one to another freely and equally. As the principles that the non-formal systems follow enrich the functioning of the formal systems, principles could be screened and freely flow from one forum to another. Chapter Five and Six showed that the formal system uses mediation for example by civil society constituted family council or family elders. Where the efforts of these bodies have failed, the *shimigilina* acting independently have managed to settle the case successfully and restored family and community harmony. This is an important benefit of synchronisation. These have saved costs and time. Thus this could be a basis to thinking in synchronising efforts by the courts, civil society and non-formal systems towards better results. In this respect, one of the courts function would be respecting the autonomy of the non-formal system but coordinating and administering synchronised efforts towards realising social justice.

While it is clear that plural legal systems exist in Ethiopia, current reform and change efforts appear to have little engagement with the traditional systems. The justice formal systems serve would get social legitimacy if it cures this significant colour blindness. Bracketing traditional local institutions, top down impositions would only repeat the mistakes of the law and development movement. Judges in Ethiopia are not totally against the non-formal systems. This is understandable as

the majority of their conception of justice is influenced by the community than the law schools or training centers or the reform programmes. In fact the majority of them prefer the non-formal systems in relation to cases they come across. In the files consulted, and of judges interviewed, there was no indication that the result of mediation was found against law and moral. This is a very fertile ground to synchronize the two systems. Thus:

1. The formal system takes into account the key principles of social justice in the Ethiopian context. In doing so key ideas of justice in the non-formal system should be taken into account by the formal system.
2. Rather than integrating the two systems into one, there should be an attempt to synchronise or harmonise the systems.
3. This would involve greater promotion of the role of the non-formal, because it is often more effective.
4. There should be provision for formal courts to refer matters for mediation to the non-formal where appropriate or taking advantage of current provisions to do so.
5. As indicated in Chapter Six while the non-formal systems benefit from their transparency and being rooted in the community and therefore avoid some of the problems of the formal systems, there is also the possibility of abuses in the non-formal system. As indicated in Chapters One and Six the possibility of oppression of women and the disadvantaged or presumption of guilt is never nil in the non-formal system. Chapter Five also indicated how a frustrated party in ligation by the formal system settled using the non-formal system for fewer amounts than he/she might deserve. The risks involved in risking business in the hands of invisible non-formal systems too may not make them attractive alternatives.

Some of these abuses can be ameliorated by the fact that parties can resort to the formal system if dissatisfied with the non-formal ones and therefore it is necessary

to provide for some form of supervision (short of formal reviews) of the non-formal system. In this kind of synchronisation it may be necessary to develop principles and procedures that allow limited supervision in circumstances where the non-formal system would result in oppression or manifest injustice. What the supervisory system may be would be a matter for further research.

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Appendices

Annex 1: Consent form

This research investigates how effective are the Federal and Amhara courts in decision making. Please read and choose your (level of) consent to participate in this interview by signing and dating this form.

1. I confirm that the purpose of the research and interview, the collection of data, the way they are used (including my name, responsibility, my organization, my replies), have been explained to me. I also have had the opportunity to ask about the research and the researcher and have had satisfactory explanations.
2. I understand that my participation in the research is absolutely voluntary and that I can ask questions any time in the middle of the interview and that I can withdraw from the interview any time without giving any reason. This would not have any implication as to any of my rights. The information I give will only serve this research.
3. My level of consent is (one of the following to be chosen)
 - ✓ Full (my name, responsibly, organization may be referred in the research.
 - ✓ Partial (only the type of my organization may referred to)
 - ✓ Partial (only my specific organization may be referred to) or
 - ✓ I prefer no reference to my involvement in this research.
4. The researcher (please select any one or more of the following):
 - ✓ May use sound recording machines
 - ✓ may use video recording machines
 - ✓ may only take hand notes
 - ✓ may use any means he considers appropriate
5. The information I give will be kept secured and held confidentially. I also volunteer to be part of the follow up research or information.

_____	_____	_____
Informants name	date	signature
_____	_____	_____
Researcher name	date	signature

Annex Two: Interview questions

A. Interview question or areas

Section one-personal data (the researcher will fill in)

Name_____

Age_____

Sex_____

Level of education_____

Section Two-topical question or topical areas for discussion

1. Profession (judge, lawyer...) and experience
2. Reason for choosing the Profession
3. Kinds of judgeship in your locality
4. Attitude towards litigation (positive, neutral, negative) and reasons
5. How do you perceive persons? Attitude towards labor and the means to establishing trust in transactions. .
6. Reasons of litigation in the locality. Why do people litigate?
7. Needs and aspirations of the community
8. The basic needs and aspirations of the community, how the community prioritizes the basic needs and the informants judgment about these.
9. Kinds and amount of cases in the locality, which kind of case is most common?
Why?
10. Any assistance arranged for the disabled or disadvantaged people in the locality by the decision making bodies.
11. Justice
 - ✓ How is justice understood by the judicial authorities?
 - ✓ How is justice conceptualized by the justice system?
 - ✓ How do you understand it?
 - ✓ And what influenced you to have such an attitude (like schooling, society, peer or other)

- ✓ How do you try to achieve justice both in your decision making process and the outcome?
- ✓ Is the justice produced by the existing justice system 1/very just? 2/ just? 3/ can't explain 3/ not just? 4/ very unjust?
- ✓ How do the people measure justice? How do you measure whether the system is just or unjust?
- ✓ Could it have different meanings in different cases (criminal, Civil, labor and family) cases?
- ✓ How do your parties in litigation perceive whether justice is being done?

12. Alternative Decision Resolution Mechanisms (ADRM) in the locality;

- ✓ Kinds of ADRMs, name of the ADR, the continuity with the past ADRMs.
- ✓ The 'judges' there (nomenclature, selection criteria and process of selection, relationship with parties, those excluded from the service, tenure of service).
- ✓ How are they made legitimate? Why are they chosen by the local people?
- ✓ Kinds of cases, most entertained cases, the trend in the back log of cases and the kind of people making use of the mechanisms
- ✓ Their implications for the entire justice systems
- ✓ Perception of justice and the way it is reflected in their decision making process and the outcome.
- ✓ How effective are they?
- ✓ How are the ADRMs important to the improvement in the lives of the litigants and the entire community?
- ✓ What is their philosophy of litigation, and justice? What is their general philosophical approach to disputes or conflicts?
- ✓ What laws are applicable in the mechanism (procedural and substantive, written or unwritten)
- ✓ Can you describe the procedure of these decision making bodies?
Depending on the answer to this question other subsidiary question will

follow. The subsidiary questions include quality of the procedure, transparency, reasonableness, impartiality, speed, defense right, right to be heard, cost of litigation, and production of evidence, human right issues, flexibility, and adjournment). Further inquiries follow regarding ritual ceremonies and their implications as part of the procedure.

- ✓ Venue of the ADRMs.

13. The Judicial bodies and the ADR mechanisms

- ✓ See if there is similarity or differences in the administration of justice (person, society, environment...) and note how similar or different are they.
- ✓ See if there is (could be) interconnections between them.
- ✓ Relationships between them, how cases may be referred from one of the systems to another, when and why?
- ✓ Which mechanism is chosen by the litigants or the people and why is one of the mechanisms chosen over the other?
- ✓ Lessons that one of the systems learn from the other.
- ✓ Enforcement of decisions: mechanism and effectiveness.
- ✓ Their influence on shaping people's behavior (like on cooperation, coordinating activities, on building trust or on building confidence).
- ✓ Select one traditional musical instrument (possibly a flute) and discuss how the formal and non-formal judges decide a case where four descendants of a deceased claim to inherit a flute of the deceased. The claimants have equal right to inherit the flute but represent different interest like-love to play with the musical instrument, attach historical importance to the flute, love with money, being poor or being a senior of claimants. The descendants could not compromise their interest.

14. Select a representative non-formal system of dispute resolution and discuss how the mechanism is effective in resolving disputes.

15. Discussion on the judicial reform programme: issues including

- ✓ Discussions on the judicial reform programme (issues including its bases, characters, directions, difference between the federal and the regional, difference with the global arrangement, consensus among the professionals, its status right now, other change instruments at hand and the reason for the shift from the one to another)
- ✓ Identify cases when court and ADR mechanisms are more effective.
- ✓ Open question: any other relevant opinion or information that the informant may provide with.

Annex 3: Questionnaire

This questionnaire is prepared to see how the Federal and the ANRS courts are making effective decisions. It is hoped that the answers you give to the questions would help the researcher in finding better ways of making effective decision. Bear in mind that your role in this respect is indispensable and take care in giving genuine information. The Researcher would like to extend its unreserved thanks from the bottom of his heart for the time and resource you spent in this regard.

If the space provided is not enough, you may use additional sheet of papers.

Section One-personal data

To be filled on voluntary basis or you may escape to fill one or more of them

Name _____

Level of education _____

Age _____

Sex _____

Economic status, income per month _____

Religion _____

Residential area _____

Any visible disability or support from courts you specially need

Any information you would like to give _____

Section Two-topical questions

1. Which mechanism of dispute resolution would you prefer if you came across with a case? _____

- 1.1 what is the reason for your choice under question number 1 above
?

2. what is the one good thing in your life (example affiliation, health, to participate in public (and in decision making bodies) without shame, etc _____

3. how do you realize your choice
above? _____

4. what do you think is an obstacle for the realization and the possible ways to tackle the
the
obstacles? _____

5. how do you understand by
justice? _____

6. how is your understanding different to or similar with the understandings of courts
and other decision making
bodies? _____

✓ put the following in order of their importance according to your choice to measure
justice:

- ✓ quality of life
- ✓ security and safety
- ✓ rule of law
- ✓ quality of the justice system

7. Put in order of their importance the basis of your understanding of justice

- ✓ equality of wealth
- ✓ societal recognition,
- ✓ be capable of doing, be what one wants,

- ✓ procedural justice
- ✓ reducing poverty and leading a kind of life as one reasonably choose
- ✓ sharing equally benefits and burdens
- ✓ fulfilling owns good
- ✓ fulfilling others good
- ✓ fulfilling the good of the strong
- ✓ equality of (to be added by the informant)
- ✓ sharing opportunities
- ✓ to be entitled to something (to be added by the respondent)
- ✓ avoiding clear injustices
- ✓ raising living standard of the community (communal life)

8. Which one of the following influenced your understanding of justice above?

- ✓ Schooling (you may specifically put the school)
- ✓ the society
- ✓ work place
- ✓ peer in the work place
- ✓ custom
- ✓ globalization
- ✓ instinct and difficult to explain
- ✓ biological

9. In favor of whom would you decide if you are expected to give a traditional musical instrument to one of the inheritants of a deceased?

- ✓ to the one who loves music
- ✓ to the most poor
- ✓ Sale the instrument and share the proceed of the sale equally amongst all.
- ✓ To the one who keeps it best for the deceased's musical legacy

10. Can you explain the reason(s) for your decision above? _____

11. How do you understand the understanding of justice by the communal people? _____

12. Can the courts in your locality effectively administer or realize justice? Why or why not? _____

—

13. Can the customary courts (ADRM) effectively administer or realize the justice you and the community understand? Why or why not? _____

—

14. Can you mention obstacles (personal, societal, global) to an effective administration or realization of justice? _____

15. What are the implication of delay in processing cases, unpredictability or inaccessibility in decision making? _____

16. If there is any other information relevant to the discussions that you want to add _____

17. You may also freely explain if courts are giving quality justice to the people and how

and if customary ways of settling dispute in your locality is giving quality service and how
