

THE WORKING OF THE ETHIOPIAN FEDERAL JUDICIARY

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A DISSERTATION

Submitted in partial fulfillment to the requirements
for the degree of Doctor of Philosophy
in the Department of Interdisciplinary Studies
in the Graduate School of
The University of Alabama

TUSCALOOSA, ALABAMA

2019

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ABSTRACT

It is more than two decades since Ethiopia has introduced a federal system. This heralded a shift from the long aged unitary, centralized judiciary to a federal system. The demand for a strong judiciary was a long standing question of the people and the nation that has not been addressed by the previous unitary regimes in Ethiopia. The demand for strong judiciary was a serious gap in the previous unitary system of Ethiopia where the people and the nation fought for decades. The study analyses how the current Ethiopian federal judicial system addresses the long standing demand of the people and the nation.

To critically analyze the working of the federal Judiciary of Ethiopia, mainly qualitative and for triangulation purpose questionnaires (quantitative) methods that are relevant to the purpose are deployed. What is more, since the Ethiopian judicial federalism is in its infant stage, in order to cultivate experience, the research explores the federal and judicial experience of other federal countries such as—USA, Canada, India and other African Countries when appropriate.

In this research, an intensive, in-depth and thorough analysis of the working of the federal judiciary is conducted so as to come up with findings related to constitutional, legal and policy challenges including challenges of budget, human resources, infrastructure and the major principles and challenges of coordination, cooperation as well as the problem of corruption and rent seeking including the challenge of competent leadership and good governance.

The research concludes that even if there is undeniable change in the current federal judicial system when compared to the long aged unitary judicial system, still there is high demand from the people for strong judiciary. The current federal judicial system as it stands faces multitude of challenges the country needs to address. Finally, the research recommends solutions that can address the long-aged demand of the people for strong independent judiciary.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples
ACHR	American Convention on Human Right
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Right of the Child
ECPHF	European Convention on the Protection of Human rights and Fundamental Freedoms
EBC	Ethiopian Broadcasting Corporation
EC	Ethiopian Calendar
FDRE	Federal Democratic Republic of Ethiopia
FDREC	Federal Democratic Republic Of Ethiopia Constitution
FSCCB	Federal Supreme Court Cassation Bench
G.C	Gregorian calendar
FC	Federal Courts
HEMH	His Imperial Majesty Haile Selassie
HC	High Court
HOPR	House of Peoples Representative
HOF	House of Federation
ICCPR	International Covenants on Civil and Political Rights

ICESCR	International Covenants on Economic Social and Cultural Rights
ICERD	International Convention on the Elimination of All forms of Racial Discrimination
I.T	Information Technology
JAC	Judicial Administrative Council
SOT	State of Tigray
SOA	State of Amhara
SOA	State of Afar
SSNNPE	State of Southern Nations and Nationalities and Peoples of Ethiopia
SC	Supreme Court
SSCCB	State Supreme Court Cassation Bench
SC	State Courts
TDR	Traditional Dispute Resolution
TC	Transitional Charter
UNDP	United Nations for Development Program
UDHR	Universal Declaration of Human Rights
WC	Wereda Court (the lower court of each State)

ACKNOWLEDGEMENTS

I am deeply indebted to my advisors Professor Norman Singer and Pro. Alfred, Dr. Mahummud Abdulahi for their genuine valuable guidance. I am grateful for their assistance in completion of this research. My deep gratitude also goes to Pastor Daniel Gebresselasie the president and Ato Daniel Gezahgn the vice president of Justice for All Prison Fellowship Ethiopia for their priceless assistance and moral support in the whole course of my study. My many thanks also go to my Family and the University Of Graduate School Of Alabama for arranging this program and especially for its cooperation in this hectic time because of the passing away of Prof Singer. Finally I extend my thanks to all those who assisted me in one way or another in the undertaking of this study.

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CHAPTER 1: INTRODUCTION

1.1 BACKGROUND

Modern democratic governments in any system enshrine different rights to their people in their constitutions. Unless these rights are otherwise safeguarded, rule of law cannot prevail, democratic government is at stake, and socio economic development is not possible.¹ It is hard to imagine that democracy and good governance can flourish without the existence of an institutionalized, modern, fair, and efficient justice system.² For a modern and efficient justice system that promotes rule of law and good governance, a predictable legal environment with an objective, reliable and strong judicial structure is an essential factor.³ Without a strong judiciary (accessible, speedy, efficient, effective, and independent) with a strong working judicial structure to protect human rights and enforce the rule of law, neither internal peace and good governance nor development can be sustainable.⁴ A strong independent judiciary plays a key role in the process of enhancing stable economic growth, in attracting investment and in promoting sustainable, democracy, and rule of law.⁵ A strong judiciary was the demand of the people of Ethiopia and the nation, which was not addressed in the unitary system and which resulted in the change from the unitary system to that of the federal system.

¹See the Opening statement of His Excellence Mr. John Scharm, the Ambassador of Canada to Ethiopia at the Proceedings of the workshop 7on Ethiopia's Justice system Reform 7-8 May2002 P24 See Opening Statement of Mr, Samuel Nyambi, the then UNDP Resident Representative and UN Resident Coordinator at the Proceedings of the Workshop on Ethiopia's Justice system Reform Africa Hall 7-8 May 2002 P26 see also the road to dignity by 2030: ending poverty, transforming all lives and protecting the Planet” Synthesis report of the Secretary-General on the post -2015 Sustainable development agenda (4 December 2014) UN DOC /69/ 700/ especially at paras 77- 78 “77 , Effective governance for sustainable development demands that public institutions in all countries at all levels be inclusive participatory and accountable to the people . Laws and institutions must protect human rights and fundamental freedoms all must be free from fear and violence without discrimination. See also the well come address of His Excellence Werede Woldie, the then Minister of Ethiopian Capacity Building at the Proceedings of The workshop on Ethiopia's Justice System Reform 7-8 May 2002 p14 Africa Hall,Addis Ababa

²Ibid

³ UNDP Management Development and Governance Division, UNDP and Governance Experience and Lessons Learned(1998) (Lessons Learned SeriesNo1) at 23

⁴ Supra note 1

⁵Ibid See also S.A.Palekar: Comparative Politics and Government PHI Learning Private Limited New Delhi- 110001 (2009) p 134ff

The driving force of this research is also to assess and analyze the changes and the challenges of the Ethiopian federal system in the process of building strong judiciary that was not addressed by the unitary regimes.

Since one of the basic principles of federalism is the division of power between the center and the states, and the division of government power among the legislative, executive, judiciary in the center and the states, to be properly exercised the federal government must address the interests of the people and gain trust from the society it governs. The workings of all organs of the government have to be institutionally strong and competent to discharge their mission and strategic objectives.⁶

Especially in a federal government that is constitutionally highly devolved and decentralized and delicate in its nature, a strong judiciary is very vital to timely dispose the diverse kinds of disputes that emanate from the broad based transactions that are the result of federalism.⁷ Otherwise, an inefficient judiciary will be prone to rent seeking and corrupt activities and would make access to justice very cumbersome, especially to the poor in a country like Ethiopia, where out of 100 million Ethiopian population 85% of the population lives in scattered rural areas and 20% of the population lives below the poverty line in the center and the unions of the federation.⁸ If the judiciary is not strong enough to address quality judgment to the poor, they will lose trust in the whole judiciary and the federal system itself. Hence, without the existence of a strong working judiciary, the poor are unable to claim their human rights

⁶Ronald L. Watts Comparing Federal Systems (2008) Institute of Intergovernmental Relations third edition p.73 See Stephen Haggard, Andrew MacIntyre and Lydio Tied, “*The Rule of law and Economic Development*” (2008) Tom Bingham, The Rule of law (Allen Lane, Penguin Press, 2010) < <http://www.Cpl.law.com.ac.uk/past-activities/the-rt-hon-lord-bingham-the-rule-of-law-php>> (accessed 16 May 2016)

⁷Thomas I. Hueglin AND Acan Fenna A *Comparative Federation* 2005 broad view press P.31

⁸ Ethiopian Demographics Profile: Population 102, 374,044, Age structure: 0-14 Years : 43.75% (male 22,430,798/ Female 22,316,910, 15 -24 years: 20.04% (male 10,182,973/ Female 10,332,626, 25-54 years :29.45% (male 14,970,645/ Female 15,178,999, 55-64 Years 3.89% (male 1,939,645/female 2,047,041, 65 years and over;2.91% male 1,338,985/ female 1,635,432/ Source CIA World fact Book updated on October 8,2016 See also Federal Democratic Republic Of Ethiopia, Population Census Commission, Summary and Statistical Report of the 2007 Population and Housing census ; Population size by age and sex(2008)

stipulated in the Constitution, and those abuses or violations committed against them.⁹ It is not difficult to assume how highly cumbersome it will be for people at the grass roots level in the context of Ethiopia where 85% or more than out of 100 million people live in rural areas and are not able to come to the capital cities of the center and the states where most High Courts and Supreme Courts are situated. Additionally, the laws and the rigorous procedure that the courts apply are alien to the Ethiopian culture, norm and tradition because they are imported from foreign countries. This again aggravates and serves as another impediment to the enforcement of the rights of those who live in rural areas where most are illiterate. This aggravates the inefficiency of the judiciary that will again be a barrier causing Ethiopians to choose not to use courts.¹⁰ For a diversified society like Ethiopia with a federal system, a strong judiciary that is established down to the grass root level is highly commendable, especially with the paradigm shift from that of the unitary judicial system to that of federal judicial system which serves to protect and enforce citizens' rights¹¹ that are found in the center and the states. How this is implemented in the Ethiopian federal judiciary is discussed in detail in this research. The failure of a strong judicial structure, which enables the judiciary to render speedy, accessible, independent and impartial justice, has several devastating consequences to the Ethiopian society¹² found in the center and states. With regard to this, the democratic system building policy of Ethiopia¹³ stipulates:

⁹ Speech of Lord Philips president of the UK Supreme Court who retired in 2012 presented on rule of law symposium 2014 www.sol.org.sg. Accessed on May 2016 p.20 See also UN General Assembly Report of the Special Rapporteur on Extreme Poverty and Human Rights, UN Doc. A/67/278. 9 August 2012, 7-8

¹⁰ Speech of the Ethiopian Prime Minister on EBC on May 2016 to the HoPR the Ethiopian Census conducted on 2010 Especially Italian (1930) Swiss (1937) Greek (1950) Yugoslav (1951) are some of the Source of Penal code of Ethiopia, The civil code of 1960 is imported from French civil code The Revised Constitution drew its source from the Constitution of 51 countries The Constitution of the USA Being the Principal one. See Graven, "The penal Code of the Empire of Ethiopia" Journal of Ethiopian law, Volume. 1, No2,(1964),p.273 See Rene David , "Sources of the Ethiopian civil code" Journal of Ethiopian Law, Volume.IV,No.2 (1967),P 346 see also P.Brietzke, "Private Law in Ethiopia" , Journal of African law, Vol.18, No.2 (1974) PP.149-167.

¹¹ Supra note 1, Supra note 3 see also John HATCHAD, MUNA NDUKO, And PETER SCINN *Comparative Constitution and Good governance in the Common Wealth* 2006 Cambridge University Press page 183

¹² Ibid

¹³ See the Document entitled Democratic System building policy of Ethiopia 2012 G.C

Establishing efficient and effective judiciary with strong judicial structure enables citizens to exercise their rights equally based on rule of law and to live peaceful life with smooth relation and by doing this it strengthens democracy.

To implement judicial independence in correlation with transparency and accountability assures democratic judicial system to exist in a country. The existence of speedy, cost effective, efficient, effective, impartial and independent judicial structure plays a pivotal role in promoting free market economy, and enhances speedy and continuous economic growth.

From the policy statement, we can understand that a failure to establish a strong judiciary would mean to Ethiopia that no guarantee would exist for the enforcement of human rights enshrined in the federal and state constitutions¹⁴; no entrepreneur, business man or even ordinary citizen could rely on the judiciary to enforce their civil or criminal cases, and contracts and agreements would have a devastating effect on investment, production and economic growth, which would have its own impact on weakening the federal government¹⁵. Thus, the Ethiopian federal and state judiciary should be capable of rendering accessible, speedy, efficient, effective and independent judgment to the public at large, based on equality before the law and equal protection of law, including its accountability.¹⁶ Without a strong judicial system with a strong working judicial structure to protect human rights and enforce the rule of law, neither internal

¹⁴ Ibid

¹⁵ Factors that affect the interest of investors

- Denial of justice in criminal ,civil or administrative proceedings
- Fundamental breach of due process including a fundamental beach of transparency, in judicial administrative proceedings
- Manifest arbitrariness
- Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief
- Abusive treatment of investors, such as coercion, duress and harassment.

See also (European Commission , Fact Sheet on Investment Protection and Investor- State Dispute settlement in EU Agreements (November 2013) See The North American Free Trade Agreement (NAFTA) in Arizona et al V. United Mexican States See the Document On The Ethiopian building Democracy 2012 G.C

¹⁶ Supra note at 11

peace nor development can be sustained.¹⁷ How this principle of strong judiciary is implemented is discussed in relation to the Ethiopian federal judiciary.

Grand Brennan expresses the indispensability of a strong judiciary. He emphasized the indispensability of having a strong judiciary by stating that:

The courts are an organ of government separate from and independent of the political organs. The courts are an important element in the system of checks and balances that preserve our societies from a concentration of official power that might otherwise oppress the people and restrict their freedom under the law. The courts are an organ of government but they are not part of the executive government of that country, political issues must be debated, political fortunes must wax and wane, political figures come and go according to the popular will. That is the nature of democracy, but the political organ of the government, the courts are there continually to extend the protection of the law equally to all who are subject to their jurisdiction to the minority as well as the majority, the disadvantaged as well as the powerful to the sinners as well as the saints to the politically incorrect as well as those who proclaimed in order to benefit the judges. It is proclaimed in order to guarantee a fair and impartial hearing and unswerving obedience to the rule of law. That is the way in which our people secure their freedom under the law.¹⁸

According to Brennan, one can obviously understand that a strong judiciary is indispensable in a democratic government. However, since the federal system accommodates diversity within unity this can become the source of conflicts and disputes. Of course, this is

¹⁷ Ibid

¹⁸ G.Brennan, "*Declaration of principles on judicial independence*" Australian Bar review 15 (1969-97):175

inevitable but it is made more complex due to the division of power that exists between the center and States; as well as by the division of power between the legislative, executive and judiciary of the center and states. Not only this, the diversity of culture, language and economy of the states by itself is a challenge that makes disputes more complex. Therefore, the existence of strong independent judiciary in a federal government like Ethiopia is very vital to resolve the disputes in a fair, impartial and independent manner. Otherwise, short of this, the federal government cannot remain strong and sustainable.¹⁹This is what countries with a federal system call judicial federalism. The concept of judicial federalism presupposes a strong judicial structure in a federal government both at the center and states. The principle of judicial federalism also works for the Ethiopian federal judiciary and how judicial federalism is discussed in connection with the workings of the current Ethiopian federal judiciary.

With regard to the indispensability of strong judiciary in a federal government to K.C. Wheare also stated that “Principles of federalism to be applied one would look for a dual court system to be established in a federal system, one level of courts to apply and interpreted the law of the national government, and another to enforce and to interpret the law of each State.”²⁰ K.C. Wheare²¹ further argues that “State courts be left quite independent in all federated State matters and decide the interpretation of the regional State constitution, and all State legislation nor does any appeal lodged from them to the federal courts.” How this principle of organization of courts and their jurisdiction works in relation to Ethiopian federalism is dealt in this research.

The organization and jurisdiction of courts in a federal system varies from country to country because of historical, economic, social and other factors. For a smooth flow of justice in the Center and States, the existence of a strong (accessible, speedy, efficient, effective,

¹⁹ Elazar Daniel, J. *Constitutional Design and Power Sharing in the Post Modern Epoch* Lanham MD. University Press of America, pp xii see also *Exploring Federalism* (Tuscaloosa, AL: University of Alabama Press, 1987).

²⁰ K.C. Wheare., *Federal Government* (1963), 4thed (London: Oxford University Press, 1963)

²¹ Ibid

independent) federal judiciary in both the Center and the States is indispensable. Establishing a strong judiciary was a serious problem for the Ethiopian people during the previous unitary system with which they struggled for decades demanding a strong judiciary. Although the formal judiciary existed for more than fifty years in the unitary system, the country was not able to respond to the demands of the people for a strong judiciary capable of safeguarding their rights. This necessitated different struggles to be conducted in the country at different times in different names raising different slogans. One of the slogans was the demand for justice that included the need for a strong judiciary with strong judicial structure. After 17 years of protracted war that began in 1994 with the coming of the Constitution of Federal Democratic Republic of Ethiopia (*hereinafter* called FDRE) the country overthrew the unitary system of government and shifted to a federal system of government. The federal system was established with both a federal and state judiciary. Therefore, this research analyzes whether the current federal judiciary addresses the age old need of the people and the nation to have a strong judiciary. In so doing it examines the independence, Jurisdiction, organizational framework, human resources, budget, infrastructure, the administration of courts, laws, proclamation, practices, reforms, and policies, the overall cooperation and coordination of courts, including the place of cassation, cassation over cassation and umpiring the constitution in the federal judiciary. It also analyzes the power of State courts to interpret the State Constitutions. All other current barriers of the federal judiciary are discussed to analyze the issue of the strong federal judiciary since Ethiopia has introduced a federal system²². In order to examine the law and practice of the workings of the federal judiciary and identify the strengths and weaknesses of the current federal judiciary, the workings of other relevant federal judiciaries with federal arrangements such as the USA, India, and Nigeria are examined where ever it is found relevant.

²² See FDRE Constitution 1995 Article 1

The assessment and analysis of the workings of the federal judiciary in Ethiopia takes account of other points to test its workings. First and foremost when a country has federal features of government, it must be understood that the federal principle is present in all the three organs of the government²³. Therefore, the research analyzed whether this works in the Ethiopian federal judicial structure or not with all its challenges and prospects. If the component units themselves do not follow the mandates of the constitution, the entire federal structure will lose its significance or will not actually qualify as federal in nature.

The other test is that although variation in the structure of governments in a federal system is expected but it has to predominantly presuppose that there has to be a dual form of government²⁴. To prove that there is federalism in the judiciary, first and foremost it has to be established that there is federalism in the entire government.²⁵ The other test is that in a federal constitution there exists a division of power between the center and states,²⁶ one at the center and another at the states, therefore, this has to be manifested in the judiciary if not the same then similar demarcation of power in the judicial arena too This can be assessed by looking at the federal structure of the judiciary in relation to its organization and total arrangement.

Another test that can be mentioned here is since in a federal system there are independent courts at the center and States, the goal of the independent courts is to render fair and impartial judgment within their own jurisdictions, but not to make one superior and another subordinate. If these different units are superseded by others, this will be a severe strike to the spirit of federalism, which presupposes the existence of independent courts with their sphere in the

²³ John W. Winkle "Dimensions of judicial federalism" (1974)

²⁴ Watts Ronald I., *Comparing Federal System* 3rd edition (2008) p83 ff see also Forum of Federations and Internal association of Centers for Federal Studies, *A Global Dialogue on Federalism*, volume 2 (Montreal and King: McGill-Queen's University Press, 2006)

²⁵ Geoffery Sawyer, *Modern Federalism* (1969) P 65

²⁶ K. C. Wheare., *Federal Government* (1950)

Center and States.²⁷ This all is tested, including the relationships of these courts between and within themselves, as well as the conflict resolution mechanisms of the federal judicial structure in Ethiopia and the impact on the workings of the judiciary in the Center and States.

Other tests include how far the fundamental rights are protected in the Federal and State courts in the Ethiopian federal judiciary, a question that can be answered by looking at the facts on the ground. Another test focuses on the existence of proper coordination and cooperation, in order to materialize the idea of the federation, and to ensure accessible, speedy, efficient and effective flow of justice in the whole nation.²⁸ The other test analyzes the power of federal courts to umpire the Federal Constitution and state courts to interpret state constitutions²⁹. This research is to consider the above tests to examine whether the current federal judiciary is strong enough to address the long-standing desire of the people and the nation for a strong judiciary.

1.2 LITERATURE REVIEW

Separate jurisdictions of courts originated from the principle of federalism, which outlines the Constitutional division of power between the national government and federal states.³⁰ The devolution of power between the federal courts and state courts is based on the essential principle of federalism: shared rule and self-rule.³¹ This principle implies that the Federal Courts should handle issues of national interest, while issues of state interest should be addressed by state courts³². This enables the regional states to preserve and promote their language and culture, and to effectively dispose of local disputes while remaining accessible³³.

²⁷ Ibid

²⁸ Watts Ronald L., *New Federations experience in the common wealth* (1966) P10

²⁹ See Assefa Fisha: *Federalism and the Accommodation of diversity in Ethiopia*, revised edition 2006, 2007p.397ff see Burges , Micheal , *Comparative federalism and : Theory and Practice* (London: Rooyledge,2006) see also Supra note at 21 See also Montesque.,De' L' esprit de lois (Sprit of the law) 1748

³⁰ Ibid

³¹ Ibid

³² Ibid

³³ Ibid

Federal government courts, therefore, should focus on issues of national concern to achieve and preserve peace and security in the nation. Meanwhile, state courts should provide local solutions to local problems and conflicts to enhance local pluralism, securing their local sovereignty³⁴. Separate jurisdiction of courts in the Center and States enables issues to be classified into either federal or state matters in their respective jurisdictions and dispose of without interference of federal government.³⁵ Based on the above theory, this dissertation will endeavor to discuss the computability of the Ethiopian federal judicial structure with the above principles.

The division of power in a Federal government is not based only on the Center and States. The center and the constituent states must establish their own legislative, executive and judicial powers independent of each other³⁶. In this regard, K.C Wheare³⁷ stated, “Dual system of courts must be established in a federation one set of courts to apply and interpret the law of the general government and the other sets of courts to apply and interpret the laws of their respective state.”

From Wheare’s above statement, since the basic principle of federalism is the formation of a dual government for administrative and other conveniences, the power should also be based on the principle that there has to be legislative, executive and judicial powers in both the Center and the States. Not only should such a division exist, but power should be divided so that federal matters are decided by the federal courts and state matters are decided by state courts. This ensures the existence and the maintenance of the dual court system, although there are variations on the organizations of courts in different federal systems. The main issue is how the federal system addresses the demand of the people for a strong federal judiciary. Without a properly functioning judiciary, a strong federal system is impossible. Using the theory of K.C Wheare,

³⁴ Ibid

³⁵ Ibid

³⁶ Ibid

³⁷ Ibid

this research w analyzes in detail how to classify the federal judicial structure of Ethiopian federalism, and the rationale of this classification, as well as the overall challenges and impact on the workings of the current judiciary in addressing the age old demand of the people.

When power is divided between the Center and State, it is usually into three branches: the legislative, executive and judiciary. Each is found in the center and the states, and has its own separate legal existence and its own powers, functions, duties and rights. Since none of them are absolutely independent of the others, interdependence and cooperation between the various organs is inevitable. The classic view of federation as expressed by K.C. Wheare and which is manifested in the United States, Switzerland, Canada and Australia, the ideal distribution of powers between the government in a federation to be one in which each government is able to act independently within its own sphere of responsibility. However, in practice, federations have found it impossible to avoid overlaps in the responsibilities of governments, and a measure of interdependence is typical of all federations.³⁸ Besides interdependence, there has to be cooperation. Cooperative federalism contributes to the reduction of conflict and promotes coordination. Since conflict is inevitable, there has to be conflict resolution mechanisms that can resolve conflicts that may arise between state courts and federal courts.³⁹ Since the judiciary is not isolated, although it has an independent sphere, there has to be cooperation with other organs of the government, as well as vertically and horizontally in relation to the rest of the judiciary without compromising judicial independence, which is delicate and sensitive. Today a forum of

³⁸ See K. C. Whare, *Federal Government*, 4th edn (London: Oxford University Press, (1963),p.14. as quoted by Ronald Watts., *Comparing Federations* p.86 See also p.29-30 R,Agranoff, "Autonomy, Devolution and Intergovernmental Relations," *Regional and Federal , Studies* 14:1 (2005):25-65 Forum of Federations, *Intergovernmental Relations in Federal Countries* (Ottawa; Forum of Federations,2001) K. Le Roy and C.Saunders ,edition, *Legislative, executive and judicial Governance in Federal Countries* Forum of Federations and International Associations of Centers for Federal Studies, *A Global Dialogue on Federalism*, vol.3 (Monetreal and Kingstone: McGill- Queen's University Press,2006),pp,375-8

³⁹ Ralf Thomas Basu, Raoul Blindenbacker, and Ulrich Karpen,edn.,*Competition versus Cooperation; German Federalism in Need of Reform- A Comparative Perspective* (Baden-Bade: Namos Verlagsgesellschaft,2007).

cooperation that we observe in the Ethiopian experience is a forum called Joined up Justice⁴⁰, where all justice organs meet twice a year and submit their reports for discussion. There seems to be a strong argument by those who say this arrangement erodes the independence of the judiciary, even though it is not strong in its organization and administration. This is discussed in detail in relation to the Ethiopian federal judicial structure, which is one issue of this paper.

Since the federal system differs from country to country, the structure and the jurisdiction of courts within a federal system also varies from country to country. In some federal countries like India, there is a vertical relationship between the Federal Supreme Court and state high courts. According to Ramswamy⁴¹, The Supreme Court of India under terms of the constitution, exercise a very wide jurisdiction. It will not only deal with purely constitutional matters but will also function as a court of appeal in civil cases from State high courts in ordinary litigation.

Therefore, in India, there is no dual court system with parallel structure. There are some writers like K.C Wheare who say this structure clashes with dual nature of the federal judicial structure⁴². However, there are also some scholars who argue that all federal systems must not fit or be carbon copies of American federalism. As far as it serves the mission of that country, there is no reason why Indian judicial structure cannot be classified as federal judicial structure⁴³. In Switzerland there is the idea that a cantonal decision contrary to the federal law is deemed null and void.⁴⁴ Besides, if a court contravenes the federal constitution, the appeal is not to the court of cassation in nullity, but to an appellate court with ordinary jurisdiction.

Some federal countries have separate jurisdiction between the federal government and federated states. The experiences of the United States and German Supreme Courts show that

⁴⁰ This forum was started with the aim to discuss problems and challenges that encounter to the justice system and to alleviate the problems and challenges by implementing justice reform in all justice sectors. This forum was started in 2004 it meets twice in a year and up to now it has met 10 times.

⁴¹ Rams, Wamy M :*The Constitution Of India a brief expository survey Indian Constitution* Art.227-223

⁴² Supra note 38

⁴³ K.Santhasam, *Union State Relations India* (1960)

⁴⁴ Huges, Christopher; *The Federal Constitution of Switzerland and Commentary*,(1954) p 144

revision by appeal for state matter is not vested in the Supreme Courts of the federal government. It is stated that the “American Supreme Court may not take a case if the courts judgment can be sustained on an independent ground of state law.”⁴⁵

According to Wright,⁴⁶ the Constitution of the USA does not in clear terms empower the Supreme Court to review judgment of state courts. Hence, the Supreme Court can review state courts decision provided if, and only if, a federal question is involved. American federal courts are courts of limited jurisdiction, while state courts have general jurisdiction. American courts are structured as a dual system, and the courts have parallel systems. Again, this dissertation makes its own effort to indicate where we can classify the Ethiopian federal judicial structure and its impact. Therefore, an analysis is done in detail on the Ethiopian federal court structure and whether it resembles to the American federal judiciary which is dual-court structure or if it has its own unique character, and why it took that option. If it opts its own unique structure, does it contradict with the theory of the federal judicial structure and, as a whole, with the theory and principle of federalism, based on shared rule and self-rule and with the principle of division of power?

The other issue in those countries with a federal system is that the federal judicial court structure is designed for courts to have the power to arbitrate constitutional disputes.⁴⁷ If we take, for example, the Federal Supreme courts of the USA⁴⁸, India,⁴⁹ and Canada,⁵⁰ we observe courts vested with the power of constitutional interpretation. In Switzerland,⁵¹ the Supreme Court of the federal government checks whether cantonal laws are in line with the federal constitution. In

⁴⁵ The Constitution of USA Article three

⁴⁶ Wright, Alan: *Law of Federal Courts* (1994) p 778, 790

⁴⁷ Supra note at 23

⁴⁸ The Constitution of USA ART iii

⁴⁹ K.Santhasam, *Union State Relations India* (1960)

⁵⁰ St. Louis University Law school legal system of Canada, *St. Louis University Law Journal* (1966)

⁵¹ Huges, Christopher; *The Federal Constitution of Switzerland and commentary*, (1954) p 144

Germany,⁵² constitutional courts settle constitutional disputes. In Ethiopia, the supreme court of the federal government has no power to entertain cases that invite constitutional interpretation.⁵³ This power is vested on the House of Federation, which is the upper chamber of the house.⁵⁴ Why this happens and its implications are discussed in brief in this paper in relation to the federal judicial structure, in comparison with that of other federal courts in different federal systems.

To conclude, although countries may adopt federalism to address various societal questions based upon their own political, economic, social and cultural situation, as well as their global relationships, federal system will not meet its intended result unless it is backed by well-organized institutions with strong and committed leadership. One of the government institutions that have to exist in the federal system is an institution in the center and the states are the strong independent judiciary. Ethiopia has introduced a federal government with a federal judicial structure. How this structure is organized to be strong? What kind of leadership does it have? What are the changes register from that of the judiciary that was present in the unitary system? What challenges is it encountering in the process of building strong judiciary that is the demand of the people for decades in which they fought for. What should be done to resolve the challenges that are encountering the federal judiciary are these issues of discussion in this dissertation?

⁵² Basic Law of Federal Republic of Germany Art.92-104

⁵³ See FDRE Constitution 1995 Art 62, 84

⁵⁴ see FDRE Constitution 1995 Art 62, 83

1.2.1 JUDICIAL ORGANIZATION OF FDRE IN BRIEF

The FDRE Constitution of 1994 established two sets of courts with different jurisdictions.⁵⁵ The Constitution provides for a federal court system, with the Federal Supreme Court vested with the highest and final judicial power over federal matters.⁵⁶ Unlike the Federal Supreme Court, which is established by the Constitution, the Federal High Courts and the federal First Instance Courts may be established, country wide or partially, by a two-thirds decision of the Council of People's Representatives, if and when deemed necessary⁵⁷. In their absence, federal High and First Instance judicial powers are delegated to and exercised by State courts⁵⁸.

The Constitution at the same time establishes a three-tiered court system: State Supreme, High and First Instance Courts.⁵⁹ Unlike the federal High and First Instance Courts, all three tiers of State courts are recognized to be established independently.⁶⁰ The State High Courts additionally assume federal first instance judicial powers in the absence of those courts. This research has address whether state Supreme Court in addition to its state jurisdiction can assume federal high court powers in the absence of federal high court in the states?⁶¹

With respect to the court structure, the Constitution clearly restricts the existence of ad hoc or special courts.⁶² However, religious or customary courts have got official recognition by the Constitution which has a long history in the tradition of Ethiopia as one means of dispute resolution mechanism⁶³. The jurisdiction of religious or customary courts is, however, limited to adjudication of personal or family matters.⁶⁴ The Constitution clearly expresses that judicial

⁵⁵FDRE Constitution 1995 Art 1,45

⁵⁶Ibid Art 78, 80

⁵⁷Ibid

⁵⁸Ibid art 78

⁵⁹Ibid

⁶⁰Ibid

⁶¹Ibid Art 80

⁶²Ibid Art 78/4/

⁶³Ibid Art 34/5 Art 78/5

⁶⁴Ibid see also Federal Courts of Sheri'a Consolidation Proclamation, 6th Year No.10, Proc.No.188/1999, Reaples Proc.No.62/1944

powers are vested solely in the courts at both federal and state level.⁶⁵ It further states that courts of any level shall independent and solely governed by law. This constitutional guarantee accords to the principles enshrined in different international instruments that are ratified by the Ethiopian government.⁶⁶

From the above discussion, we can see that the Constitution of Ethiopia seems to establish two sets of courts which are coordinate, yet are independent and do not interfere in the spheres of each other.⁶⁷The Federal Supreme Court is vested with the highest and final judicial power over federal matters, while the State supreme courts are vested with the highest and final judicial power over state matters. The only power reserved to the Federal Supreme Court is the power of cassation over any final court decision containing basic error of law,⁶⁸ whereas the State Supreme Court has power of cassation over any final court decision on state matters that contain a basic error of law.⁶⁹ Although the Constitution vests the power of cassation over cassation to the Federal supreme courts, cassation decisions are still a subject of controversy. Currently, there is also a proclamation making all courts of the nation to abide by the cassation decision of the Federal Supreme Court.⁷⁰This is dealt in brief in the coming chapter in relation to its role in addressing strong judiciary to exist in the country.

From the above brief discussion, it seems clear to infer that the overall organization of the federal judicial structure resembles the overall principles of federalism that exists in the division of dual government power between the center and the states. However, there are a lot of issues that are subject to debate and that need to be answered by researchers with regard to the working

⁶⁵Ibid Art 79/1/

⁶⁶Ibid Art.79/2/3/ See UDHR ICCP

⁶⁷Ibid Art 50/8/ Art.80

⁶⁸Ibid Art 80/3/

⁶⁹Ibid

⁷⁰ Murado Abdo „Some issues related to the cassation powers of the federal democratic republic of Ethiopia Supreme Court Law Faculty AAU,1998 unpublished

See also Federal Courts Establishment Proclamation,2nd Year, No.13, Proc.No.25/1996.Repeals Proc.No.40/1993, Amended by 11th Year.No.42,Proc.454/2005,9th Year, No.41, Proc.No.321/2003; 7th Year, No. 44,Proc. No. 254/2001 and 5th Year,No.15 Proc.No.138/1998.

of the current Ethiopian federal judiciary, its challenges and impacts in addressing the question for strong and independent judiciary which was the demand and the need of the people to be addressed by the federal system. Since the driving force of the researcher is to address the above debatable issues, this dissertation discusses these basic issues and other related questions that need to be addressed.

1.3 STATEMENT OF THE PROBLEM

The Ethiopian judiciary does not have a long history like those in other developed countries. Its history goes back to the 1931 establishment of the first constitution. The history of the courts is associated with the judicial structure that existed in the unitary system. The 1995 FDRE Constitution shifted the courts from a unitary to a federal structure, where Federal and State courts became recognized by the Constitution. This federal judicial structure is organized based on the division of power between the Center and the States, but since its inception issues have been raised by scholars, lawyers, judges and court users that doubt whether the current federal judiciary of Ethiopia enables the country with the strong judiciary that was the need of the people.

One of the issues which rose is the classification of the Ethiopian federal judicial structure compared with other federal countries with federal judicial structure. Some say it is a dual court structure, while others say it is a centralized court structure, like that of India. Still others say it is unique, unlike any other federal system. Whatever the classification is, does it address the question of the people in the unitary system for a strong judiciary? How are the issues of coordination and cooperation within the State courts, as well as with the center treated in the judicial structure? What kind of conflict resolution mechanism is created in the judicial structure to resolve conflicts that arise between the jurisdiction of the State courts and Federal

Courts? The power of State courts to enforce the decisions of Federal Courts and the power of Federal Courts to enforce the decision of State courts is one of these lingering issues. Is the structure of cassation over cassation in line with the constitutional mandate of State courts, and with the overall principle of the Ethiopian multicultural federalism? This is most crucial issue among lawyers, judges, scholars, and court users, and it is still not answered despite piecemeal efforts on the issue. Whether the power of umpiring the constitution that is given to the House of Federation contradicts or violates the independence of the judiciary is the most striking issue, and is still debated even though some research has been conducted both for and against. Is there any legal basis for the current Joined up Justice Forum that is conducted twice a year, where the federal and state judiciaries are members? Is it not against the principle of the independent judiciary, even if it is not well organized and administered? The Constitution allows budget to be allocated to State courts for federal cases they dispose by the delegation. Whether this is properly implemented in line with the Constitution, or if it gives discrepancy beyond the spirit of the Constitution also needs an answer. Beyond the above structural problems, there are many issues raised about the current federal judiciary, with multifarious internal problems that hinder the nation's ability to have a well-organized and strong federal judiciary. This will also be addressed in the research in detail. All of these main issues and the overall workings of the federal judiciary are discussed in detail in the dissertation in order to address the above stated issues, and to come up with findings and recommendations.

1.4 ORIGINALITY

Although the above problems are unfolding in the workings of the current Ethiopian federal judiciary, to my knowledge and as far as my ten years' experience as a vice and president of Tigray Regional State Supreme Court reveals, no adequate research has been conducted, with

the exception of piecemeal efforts. This is what inspired me to conduct this dissertation. This research is original work for the judiciary and the nation as a whole. Therefore, the research exerts maximum effort in addressing the above problems of the current federal judiciary analyzing the impact of those problems and addressing the demand for a well-organized, strong federal judiciary with a strong judicial structure, in order to come up with viable recommendations.

1.5 RESEARCH QUESTION

The research question is based on the above stated problems. The core research question is:

- Does the current working of the Ethiopian federal judiciary address the people's long standing demand for a strong (accessible, speedy, efficient, effective, and independent) judiciary?

1.5.1 SPECIFIC QUESTIONS

The specific research questions are:

- How can the evolution of the Ethiopian judiciary and its role in addressing the peoples' demand for a strong judiciary be described in the Ethiopian legal and political history?
- How is judicial structure organized in a federal system?
- What principles, practices, and legal mechanisms regulate the coordination and cooperation among the judicial organs and with other governmental bodies in the Ethiopian federal system?
- How is the independence of the judiciary regulated, and how is cassation and cassation over cassation structured in the current judicial structure? Does the current federal judicial structure vest courts with the power of umpiring the constitution? If not, why?
- What are the existing challenges and impacts of the current workings of the Ethiopian Judiciary?
- What should be done to address the long standing demand of the people for strong independent judiciary?

1.6 GENERAL OBJECTIVE

The objective of this dissertation is to analyze the workings of the current judiciary and, as a whole, its structure, to come up with findings that are related to the structure and its internal problems, and to come up with viable recommendations that assist in alleviating these problems, as well as strengthen the structure in order to address the demands of the society for a strong judiciary.

1.6.1 SPECIFIC OBJECTIVES

- To analyze the kind of dispute resolution mechanism that existed before the establishment of formal courts, its impact on resolving disputes, and its role to date.
- To analyze the historical development of formal courts and its impact in achieving a strong judiciary with a strong judicial structure
- Discuss, in brief, the federal idea and judicial federalism, and what necessitates Ethiopia's adoption of federalism and judicial federalism.
- To analyze the working of the current federal judiciary in line with federal principles adopted by Ethiopia, and to come up with a conclusion and recommendation that can strengthen the current system and that can assist in alleviating the weaknesses and drawbacks.
- To analyze the coordination and cooperation between the center and state courts and the mechanism of resolving conflicts that arise between the center and the states and among the states themselves, in order to come up with recommendations that can enable the federal and state courts to keep their own independence and jurisdiction in their own sphere.

- To assess whether there is an overlap of jurisdiction that can affect the independence of the two court structures, which contradicts the principles of the separation of powers and the division of power between the federal and state courts, to find a solution in order there to be a smooth flow of justice.
- To examine the role of courts in interpreting the constitution, as well as its impact on the independence of the judiciary compared to the jurisdictions of courts in different countries with a federal system, and then to suggest a better solution.
- To investigate the overall success, challenges and impacts of the current federal judiciary in building a strong federal judiciary with a strong judicial structure that addresses the question of the public by upholding the federal principles of the country, so that policy makers, legislatures and other interested groups and organizations can cultivate benefits out of the research.

1.7 RESEARCH METHODOLOGIES

The dissertation employs mainly a qualitative approach but for triangulation purpose it also distributes questionnaires. Accordingly, it reviews the FDRE and the regional Constitutions and other relevant codes, proclamations and regulations, public records, reform documents, available statistical data, media reports and other necessary journals and court decisions.

This dissertation also reviews literature written on the judicial systems of different countries that can enable Ethiopia to gain experience, such as the USA with classical federalism and a strong federal judicial structure, India with multicultural and multilingual federalism with a centralized federal judicial structure, Nigeria with multicultural federalism, and Canada with multiple official languages. Some other African countries that are related to the topic are also discussed. Selected cases decided by all levels of courts that go to the objective of the research are analyzed. An interview with a lawyer, prosecutors, judges, university lecturers, court users, government officials, and prominent members of the House of Representative and of the State Legislature connected to the issues are conducted. The relevant minutes of the House of People's Representatives and the Constitutional Assembly are reviewed. International instruments related to the judiciary are consulted.

1.8 SCOPE OF THE STUDY

The research is limited to analyze the workings of the federal judiciary under the Ethiopian federal system, and to come up with findings of its success and impediments, as well as to recommend viable solutions to the identified barriers. It will not cover the state judicial structure or the overall administration of the judiciary in the nation, unless those issues are related to the working of the federal judicial structure. Some concepts like cassation, cassation over cassation, constitutional review and the independence of the judiciary are discussed in brief,

with relation to their place in the judicial structure, but without detailing their concepts and philosophies.

1.9 LIMITATION OF THE STUDY

A serious problem during the process of research is the shortage of references written on the federal judiciary of Ethiopia, because most of the materials are very general and the main focus is mainly on the legislative and the executive branches. Also, it is difficult to find research conducted in this area, although fragments exist.

Other problems include the shortage of cases, because of the recent adoption of federalism and federal judicial structure in the country, and the shortage of experience because the history of the judiciary was based on the unitary court structure, which has a long history in the country.

Getting statistical data, because of poor record management of Ethiopian courts (except the Federal Supreme Court, where the recording system is backed by IT) is another barrier. Of course, finding prominent lawyers, judges and members of parliament for interviews and group discussions was a problem, either because of time constraints, unwillingness, or a lack of knowledge and information.

Another factor of constraint was budget problems in conducting interviews and collecting other data from the states and government institutions.

The researcher has ultimately committed to the dissertation, doing his best with all the challenges and constraints, employing different solutions and alternatives.

1.10 OUTLINE OF THE RESEARCH

The research is composed of six chapters: the first chapter deals with background, literature review, a statement of the problem, the research question, the objective of the study and an overall outline of the paper that will enable the reader to have a clear picture about what the research is addressing.

The second chapter addresses the dispute resolution mechanism, pre-Constitution and post-Constitutions to create a familiarity with the dispute resolution mechanism in the administration of justice in Ethiopia and the impact of this in creating a strong judiciary

The third chapter is devoted to the theory of federalism, its essential features, judicial federalism and its ingredients as a background for why Ethiopia opted for federalism. This chapter also addresses the experience of the judicial structure in different federal countries and the establishment of the federal judicial structure in Ethiopia from the unitary judicial structure, to give a clear picture of federalism, judicial federalism and the application of each in the Ethiopian situation.

The fourth chapter analyzes the challenges and impacts of the current federal judiciary and its structure. The overall organizational and internal challenges of the federal judicial structure and their impact on the judicial system are discussed in this chapter.

Chapter five assesses the roles of cassation over cassation, constitutional review and judicial independence in the Ethiopian Federal Judicial Structure and their challenges and impacts to understand whether their existence in the Ethiopian Judicial system is beneficial or if it has become a challenge for a strong judiciary with a strong judicial structure.

Chapter six of the dissertation's deals with findings, conclusions and recommendations

CHAPTER 2

2. DISPUTE RESOLUTION MECHANISM IN ETHIOPIA

2.1 INTRODUCTION

In Ethiopian history before the establishment of a formal judiciary, the dominant way of resolving disputes was the traditional dispute resolution mechanism that was exercised in every locality. This was practiced in different forms and manners because of the diversity of cultures and traditions of the society. For Ethiopians, this kind of dispute resolution mechanism has an age-old history, unlike the courts, and Ethiopian citizens are familiar with it. Therefore, in this chapter the dispute resolution mechanism prior to the historical development of the formal judiciary in different localities of Ethiopia and its impact is discussed.

Then the historical development of formal courts and their role in addressing the demand of the Ethiopian people for a strong judiciary is dealt with in detail.

2.2 DISPUTE RESOLUTION MECHANISMS IN ETHIOPIA

Before the 1931 constitution, there was not a formal structure of judiciary in the Ethiopian judicial history. The traditional dispute resolution mechanism of each locality was common in all parts of Ethiopia for communities to resolve their disputes. The Ethiopian communities believe that the traditional justice mechanism is less costly, and they are already familiar with its less complex procedures. They also have a strong conviction that the principles of traditional dispute resolution of their locality are built into their values and norms and the expression of their identity, as well as the belief in the healing power for the acrimony of the disputants, their

families and the community at large. Alongside the traditional dispute resolution mechanism, the kings and nobles of each locality were settling disputes that came before them.

During the reign of an emperor, once duly enthroned and anointed by the Church, he is known as king of kings, defender of the faith, symbol and guarantor of unity and defender of the security of Ethiopian polity. He acts as a legislator, chief executive, and chief justice, as a leader of all armies in time of war as well as in time of peace; the land and the people are all his subjects.⁷¹ There is no such formal court, except that of informal dispute resolution mechanism applied by the society. There are many reasons why the emperor acts in so many roles: The first and most crucial reason might be the doctrine of the Church, which preaches that the king is elected of God. James C.N. Paul notes that;⁷²

Religion is almost inseparable from an established monarchy, and it is usual for any Christian king to receive the formal blessing of the church at his coronation and to be anointed with holy oil. This again is supported by the following readings: Kings are justly called gods, for they exercise a manner of resemblance of Divine power upon earth. As it is atheism and blasphemy to dispute what God can do, so it is presumption and high contempt in a subject to dispute what a king can do.

⁷¹ James C.N. Paul and Cristopher Clapham: Ethiopian Constitutional Development, published by the Faculty of law Haile Selassie I university, Addis ababa, 1967 page 287-292 see also Aberra Jembere., An Introduction to the Legal History of Ethiopia From 1434- 1974 E.C. A publication of African Studies Center (leiden, The Netherlands) p41ff see also Customary Dispute Resolution Mechanism in Ethiopia; The Ethiopian Arbitration and Conciliation Center Addis Ababa 2011 p10ff see also Andargatchew Tesfaye., The Crime Problem and Its Correction volume 11 Published by The Addis Ababa University Press (2004) p10ff See Also Aberra Jembere, An introduction to the legal History of Ethiopia 1434-1974 p41ff See also Garedeew Assefa and Haile Abraha (the research of this dissertation the place of traditional justice in the Ethiopian formal justice system in the case of Afar and Amhara r.egions 2013) See also Fassil Nahom, Constitution For A Nation of Nations P.17 see also Alula Pankhurst. And Getachew Asefa Grass roots justice in Ethiopia 2008.

⁷² Ibid

The Kebra Negast⁷³ also states that, “It is not a good thing for any of those who are under the domain of a king to revile him, for retribution belongs to God. The people consider the Emperor as the representative of God on earth and obey his orders happily.”

Bruce also states that, “The powers of the kings of Abyssinia are above all laws. They are supreme in all causes, ecclesiastical and civil, the land and persons are equally their property and every inhabitant of the kingdom is born their slave.”⁷⁴

All those statements indicate that the kings were viewed as a fountain of justice and everything was under their administration. However, this has played a role in strengthening the power of the King. During the emperors’ time, we cannot think of secularism; rather, it was the existence of one dominant religion through the Orthodox Church⁷⁵ that was very powerful during that time. Even today, while Secularism is enshrined in the Constitution of the Federal Democratic Republic of Ethiopia (herein after called FDRE) the Orthodox Church is expressing its dominance.⁷⁶ Since the main issue of the paper is not secularism, it is not proper to go further than this.

Another reason might be the rules, regulations and the doctrine of Monarchy, forcing subjects to see the king as above everything and below God. Here, it is wise to quote Hobbes’⁷⁷ explanation of monarchical government:

The powers of the government must ultimately and essentially be unlimited and undivided. There must exist a sovereign either one person or a body of men, who is not subject to the law can take any action which he (or it) thinks necessary for

⁷³ Budge Translation (1922) page 64 The Kebra Negast colorfully wove the legend of a Solomonic dynasty and there by served certain politico-religious needs of the times in the constitutional process. Mahteme Selassie Wolde Kiros, Zekre Neger, pp, 347ff

⁷⁴ Ibid

⁷⁵ Wondem. Agegnehu and J. Motovu, The Ethiopian Orthodox Church (Addis Ababa, (1970)

⁷⁶ See the report of Ombudsman 2012 Established by the Institution of the Ombudsman Establishment Proclamation, 6th Year, and No. 41, Proc. No. 211/2000.

⁷⁷ Thomas Hobbes, Leviathan 1959 pp 64-65

the welfare of the state, and is not checked by any other branch or unit of government.

This theory not only works in Ethiopia, but has also worked in different countries like England, Japan and France.⁷⁸

The other reason might be the feudal orientation of the kings to their subjects, which imbued in their minds respect and loyalty to the king a blessing, favored by God. Later on, legal instruments such as the 1931 G.C and the 1955G.C constitutions⁷⁹ gave legal reinforcement to the above doctrines, and played a great role in creating a strong Monarchical government in Ethiopia, including the formal judicial structure that works throughout the country. Especially after the promulgation of the constitutions, Emperor Haileselassie was able to form a strong government structure with a well-organized judicial structure that enabled him to rule the country for more than forty years. His government was unitary with a highly centralized administration, including the judicial structure. Of course, history reveals that there were many movements in the country with different slogans and ideologies and of course one of their slogans was strong and independent judiciary to exist in the country that contributed to the revolution of 1974G.C, which toppled the Emperor.⁸⁰ The history of the courts is also associated with the historical development of the feudal system of the Emperor.

⁷⁸Ibid

⁷⁹ The 1931 Constitution of Ethiopia Art.1 states that “The territory of Ethiopia, in its entirety, is, from one end to the other, subject to the government His majesty the Emperor. All the natives of Ethiopia, subjects of the Empire, form together the Ethiopian Empire.

“By virtue of his imperial blood, as well as by the anointing which he has received, the person of the Emperor is sacred, his dignity is inviolable and his powers indisputable. The same statement is retreated under Art 4 and 5 of the 1955 revised Constitution. See also Abera Jemberre supra note 68 P167ff

⁸⁰ The Bale Farmers Revolution

The Gojam Farmers Revolution

The Students Movement in every corner of Ethiopia including the Addis Ababa University

Teachers movement

The Eritrean Liberation Movement

The Oromo Liberation Movement

The Tigray Liberation movements

The Ethiopian Peoples’ Revolutionary Party

From this discussion, we can infer that before the 1931 Constitution, the traditional justice system was the dominant prevailing system in the country, where the kings were considered to be fountains of justice and other nobles played great roles with no uniform legislation and procedure. The system was based on the whim and caprice of the kings, nobles, elders and clan leaders. It also had different forms and applications according to the culture and tradition of the different localities, making it impossible to see a centralized court structure or well-organized judiciary. Here, it seems relevant to quote Thomas Gerath:⁸¹

Before the establishment of formal courts there was no uniform formal judicial system with the court of fixed jurisdiction requiring courthouses, or personnel concerned solely with the administration of justice.

According to this statement, there was no building for court proceedings, meaning litigation could happen in open places, such as under trees to protect the judges and the litigant from sun or even sometimes in fields depending on the weather condition. This practice is still happening in the rural areas of Ethiopia, while clan leaders or elders of the community settle disputes through customary laws.

Dame Margery describes the nature of the pre-1931 traditional litigation system of Ethiopian government as follows:⁸² “No other institution in Ethiopia seemed to have the capacity to effect much change in traditional life the governing system was the traditional system of litigation.”

Eric Virgin also describes how outsiders viewed the process of traditional litigation in Ethiopia in the old days as follows:⁸³

⁸¹ Thomas Grathy, People's practice, Attitude and problems in the lower Courts of Ethiopia. Journal of Ethiopia volume four no2 (1969) p.435

⁸² Shebeshi Lemma Yettenti sat Ageba Muget, (Amharic Edition) Addis Abeba: Kuraz publishing agency, 1985 E.C.

⁸³ Abera Jembere, “Yatayyaq Muget: The traditional Ethiopian mode of litigation,” journal of Ethiopian law, vol. Xv, February 1992, pp. 82-92.

⁸³

The Ethiopian is a born speaker and neglects no opportunity of exercising talent. A law suit is a heaven sent opening and entails as a rule a large and appreciative audience now threatening and gesticulating, now hoarsely, whispering with shrugged shoulders, now tearfully, he tells of his vanished farthing, and points a menacing finger towards the accused. The judge in the midst of a circle of speakers, having listened to the eloquence with a grave and thoughtful men, then invites the accused to reply like a released spring he leads up, and with raised hands calls heaven to witness his innocence, then falls on his knees, rises, stands on tiptoe, drops back on his heels, shakes his fist under the nose of his adversary and approaches the judge with clasped hands, while all the time an unceasing stream of words pours from his lips.

Several explorers of the 16th and 17th centuries have also mentioned the Ethiopian traditional legal system and the traditional court systems of the day in their writings, especially James Bruce⁸⁴ from England and Francisce Alvarez⁸⁵ of Portugal. They mentioned in their writings the “throne of the judges” at Axum and the “judgment tree” under which justice was exercised during the reign of Fusillades, one of the ancient kings of Ethiopia (1632-67). Norman J. Singer also states:⁸⁶

84 Andargachew Tesfaye: The crime problem and its correction vol 11 published by the Addis Ababa University press 20011 page 97 – 71/James Bruce Travels to Discover the source of the Nile,volums,1 and 2 (London,1790)

85 Ibid

86 Norman J. Singer. A traditional legal institution in a modern legal setting The ATBIA DAGNIA of Ethiopia UCLA LAW review vol. 18: 308 he states the reason that perhaps primary among them was the fact that the Amharas were faced with contrasts in social structure that proved to be over whelming. Traditional Amhara structure was hierarchical notions of stratification were fundamental, a person’s status was determined by his place on the social scale.

Other reasons for the failure of the Amhara system included the absence of systems of communication; the lack of an educational system to infuse Amhara ideas; and insurmountable religious difference. Muslims and pagans of the south and the conquering Christians looked at each other with disdain.

87 Ibid

88 Fethanegest was basically a codex of law providing for secular and religious legal provisions rather than a constitution

Ethiopia is usually cited as the one instance in which the colonial power had very little influence on the construction of the present system. The empire had been independent but fragmented from time immemorial and the Italian occupation, though felt in many spheres, did not contribute to the legal tradition. Ethiopia, however like all other African nations, does have colonial heritage built into its legal system, albeit a colonialism that has somewhat removed from the usual concepts implied by that term.

Norman argues that even though Ethiopia was not colonized, Amhara Colonial rule was direct. All administrators were directly responsible to Addis Ababa though this system, with the intention of creating a united society.⁸⁷

He further states that as part of the attempted administrative framework, a national legal system was developed. Needless to say, its structural base was the traditional Amhara system. Formal courts and written substantive laws were virtually nonexistent. There was, however, an ancient Nomocanon known as the Fetha Negest that was drafted in Egypt during the first half of the thirteenth century and translated into Geez, the ecclesiastical language of the Empire.⁸⁸ However, the Amhara judges spread throughout the empire were authorized to apply Amhara law. Singer states that this was done was because virtually all judges were Amhara and there was no law, other than the inaccessible Fetha Negast,⁸⁹ upon which to base judgments. The application of Amhara law reinforced the non-Amhara population's aversion of the official tribunals, as it was clear that they would apply foreign law. Singer concludes that although the Amhara domination was there, each tribal system throughout the Empire had its own system of

⁸⁹Ibid. As there was relatively few manuscripts, in existence, it is assumed that the Fetha Nagast simply became a theoretical frame work for the Christian customary law. For additional comment, see origins of the fetha Nagest (1968 unpublished) singer: law and modernization in Ethiopia: A study in process and personal values Intl law journal 73 (1970) as quoted by Singer.

customary law. Most of the non-Amhara legal activity was carried on within these separate systems. Since ancient times, the people of Ethiopia have looked to the emperor as the ultimate source of justice. The earliest evidence shows that adjudicating disputes was the duty of the emperor.⁹⁰

Alvarez describes the role of the Emperor in the sixteenth century.⁹¹ Each Negus (king) or other ruler of territory would have an Alicaxi, (judge) who would hear cases. According to Alvarez, if the case was important, the Negus himself would give judgment; otherwise, or if the parties consented, the Alicaxi would do so. But present at all proceedings was the Malkanya, the representative of the Emperor. A party seeking to appeal to the Emperor had to furnish the Malkanya with an “affidavit of the case”. As the Emperor travelled throughout the country, he would encamp and hear cases. Near the main tent would be the Sagala, (a big tree) the tent of justice. No one could enter the Sagala, and all had to dismount while passing it. The case was heard before the Wambers, (judges) who accompanied the Emperor. Each judge in turn gave his opinion. Finally the Ligaba Wamber (chief judge) would give his opinion and announce the judgment. The judges would then present the case to the Emperor, who would render the final decision. The above discussion explains how the legal tradition of Ethiopia established the Emperor as the ultimate source of justice before the establishment of formal courts.

When courts were formally established, he continued to exercise the power that he had before the establishment of formal courts. This traditional system is a unique characteristic of Ethiopia, and it exists till today. This has contributed to the coexistence of the society, as well as to the current tradition of settling disputes through Elders, Clan leaders or those known in the Amharic language as shemagle. Currently, the Ethiopian society still believes that justice can

⁹⁰ Perham, Margery *The government of Ethiopia*, (1947), 143 - 144

⁹¹ Ibid see also Alvarz., The Presier John of Indies (1962) p128As quoted by Andargachew Tesfaye., *The crime problem and its correction* 2004

come from leaders even with the existence of formal courts. This is evident through the current practice of the people where they rush to their nearest leaders after their case is disposed by courts. In some situations, you see them going from Keble leaders, all the way up to the Prime Minister, searching for justice and thinking that these leaders will give an order to the courts to revise or dismiss their judgment.⁹²

From the above discussion, we can infer that the traditional dispute resolution mechanism through customary law was the prevailing system in the Empire, and there were no formal courts until 1930. It seems that because of this, some lawyers do not agree about the traditional dispute resolution mechanism of Ethiopia being an alternative dispute resolution. They would rather say the Ethiopian situation of traditional dispute resolution mechanism is not an alternative, but it the basic system of dispute resolution of the country before the establishment of formal Courts. However, in the context of Ethiopia, formal courts are an alternative to customary laws. Even today, a significant number of cases are disposed through the customary dispute resolution mechanism instead of by the formal dispute resolution. The following saying of the society shows this belief: “Hand cut by shemagle is deemed as if it is not cut. Justice from elder’s rain from God.”⁹³

Since the main goal of this paper is to discuss the historical development of formal courts, it does not seem wise to go further than this in discussing the traditional dispute resolution system of Ethiopia. One thing to mention here is that even today, after a long existence of formal courts and the existence of different constitutions at different times, the traditional dispute resolution practice is prevailing among almost all Ethiopian people, especially in Afar, Somalia, Oromia, Tigray. The system is highly accepted and favored, at least as much as

⁹² See the report of the Ethiopian Ombudsman and regional Administrative bureaus 2012, 2013 G.C

⁹³ Hand cut by Shemagle is deemed as if it is not Cut, Justice from elders rain from God, Denying to Shemagles is sin in front of God.

the formal justice system. Although the importance of the traditional justice system is undeniable, the decision of the Shemagles, elders, community leaders or clan leaders is not fully enforced by formal courts. Especially in criminal cases, whatever the degree of the case may be, it is mandatory for the case to be heard by the formal judicial system, even if the disputant parities settle their case through community leaders or Shemagles. However, the Afar and Somali State court practices go against this. In Afar and Somali courts, there are situations where even if the criminal is punished by imprisonment, especially for homicide cases, if the two clans settle the case through clan leaders, the criminal will be released. The decision of the court of conviction and punishment will be set aside and the final agreement of the clan will be enforced.⁹⁴ For Afar society, the traditional dispute resolution mechanism is viewed as a gift from Allah/God. Failing to enforce the decision of the clan leaders may lead the two clans to violence, conflicts, or even to full-fledged war.⁹⁵ With all of its advantages, the traditional dispute resolution system has deteriorated over time, because of its lack of legal backing and the lack of focus on it by the government and the justice sectors. Most scholars blame Rene David⁹⁶ for his contribution in weakening the traditional dispute resolution mechanism of Ethiopia. Particularly in his drafting of the civil code, he intentionally inserted a provision to weaken the application of the traditional dispute mechanism under Article 3347, because he thought that Ethiopia should shift to the modern way of dispute resolution mechanism: the formal judicial system. Singer argues that although Ethiopia is not colonized, it is similar to a legal colony, because all of its laws are imported from foreign countries.

⁹⁴Garedew Assefa and Haile Abraha the Place of Traditional justice in the Ethiopian Formal Justice System The case of Afar and Amhara Regions June 2013 Addis Ababa. See also sample interviews conducted In State of Amhara and Afar P51ff and the annex

⁹⁵Ibid

See Art 3347(1) of the Civil code which states “ Unless otherwise expressly provided all rules whether written or customary previously in force concerning matters provided for in this Code shall be repealed by this Code and are hereby repealed

⁹⁶ See Seddler civil procedure code 1960

⁹⁷ See Criminal Policy of FDRE 2014

⁹⁸See the paper presented for federal judges by Prof Brhanu Mengistu on the topic Court Annexed Mediation Service in Ethiopia Prepared by Supreme Court of Ethiopia and Justice For All April 20-21,2015 G.C

Recently, there has been an effort for traditional dispute resolution mechanisms to be introduced and enforced by formal courts, especially in the 2014 E.C criminal policy.⁹⁷ Since the drafted criminal procedure code did not come into effect, the principle of the criminal policy cannot be applied. Ethiopia cannot take advantage of the fruit of its age-old traditional justice practice. Even today, the formal courts cannot take advantage of those informal traditional justice practices where 80% of issues were disposed of outside of the formal courts.⁹⁸ The impact of this has flooded the Ethiopian courts with cases ranging from minor to complex.

Hoping there will be a solution to this in the near future and being optimistic, it is good to conclude from the above discussion that in the history of the evolution of formal courts and in the whole administrative justice system of Ethiopia, the traditional justice system was dominant. Before the 1931 constitution came into force, the people of Ethiopia were settling their conflicts through different mechanisms of customary dispute resolution. This trend, though it lacks legal backing, is highly practiced even today in different rural areas of the country and to a lesser degree in urban cities. Having said this, for better clarity one of the topics of this dissertation it is wise to discuss in brief about the historical development of formal courts in Ethiopia.

2.3 HISTORICAL DEVELOPMENT OF FORMAL COURT STRUCTURE IN ETHIOPIA

The history of the Ethiopian formal structure of courts began with the introduction of the 1931 Constitution: the first written Constitution in the history of the country.⁹⁹ From the fifty articles of the Constitution, there are five Articles that stipulate the structure of judiciary.¹⁰⁰ Specifically, Article 50 of the constitution states: “Judges sitting regularly shall administer

⁹⁹ see the 1931 Constitution Art.50-54

¹⁰⁰ Ibid

¹⁰¹ Ibid

justice in accordance with the laws in the name of His Majesty the Emperor. The organization of the Courts shall be regulated by law.”

This Constitution does not suggest anything about the independence of the judiciary or the structure of the courts, because the real intention of the constitution was for the Emperor to be seen as modern to the world and to strengthen his power of administration by creating strong centralism.¹⁰¹ Since the strong centralization could not be expected without creating centralized government institutions which includes formal court sand it was inevitable for courts to get constitutional recognition. The constitution forces them to render judgment in the name of the king, who is deemed to be the fountain of justice, obviously above the Constitution and above any law.¹⁰² Courts are merely created to dispose disputes that emanate from the people not the disputes they have with Emperor No one can sue the Emperor. However, this Constitution did not survive very long because of the Italian war, and Ethiopian courts were not systematically organized, so people were not getting formal judgment as envisaged by the Constitution.

When Italy was defeated and the Emperor again gains control, he instituted an official Gazette,¹⁰³ the Negarit Gazeta that gives legal recognition to all promulgated legislation. Therefore, in 1942 G.C, through the Administration of Justice Proclamation of 1942, a structural hierarchy of courts was created.¹⁰⁴

¹⁰² 1931 Constitution Art 50-54

¹⁰³ The Italian occupation was from 1936 - 1941

¹⁰⁴Administrative Justice Proclamation, No. 2 of 1942, NEGARIT Gazeta 1st year No. 1 (March 30, 1942) At that time Ethiopia was divided into fourteen provinces. Each province is subdivided in to a number of Awradjas; there were ninety two. Each Awradja was divided in to a number of Weredas; there were two hundred and forty three. A governor was appointed as head administrative official of each of these political subdivisions. The court structure also allows this pattern with one court in existence for each of the locations.

At the provincial level, however, one finds the high court as quoted by Singer ibid.

See Aberra Bantiwala. The position of the judiciary in Ethiopia (1966, G.C unpublished, faculty of law, Haile Selassie I University).

¹⁰⁵These include:

1. The Supreme imperial court
2. The High courts
3. The Teklay Gizat (provincial courts) later replaced by high courts.
4. Awraja regional courts
5. Wereda (district) courts
6. Meketel Woreda (sub district) courts

However, the 1942 Proclamation didn't clearly indicate the Awaradja Guezat Court, the Wereda Guezat Court or the Mektl Wereda Court. The proclamation provided that "it shall be lawful for us to establish by warrant under our hand other courts of criminal and civil jurisdiction which shall be subordinate to the provincial courts".¹⁰⁵ This was declared simply by a circular of the Ministry of Justice. However, by looking at the prevailing structure of courts of the time, one can easily conclude that the Awaradja Guezat, the Wereda Guezat and the Meketl Wereda Guezat Courts can be classified as subordinate courts. Their existence is of great value to render accessible judgment, because of the disperse settlements of the people, who have a minimum of three or four-day-long(or in some areas several week-long) journeys from the Mektl Woreda to Wereda and Awraja.¹⁰⁶ Therefore, establishing these courts is indispensable if the courts are there to handle the disputes of the people living in different scattered and very traditional geographic settlements of the nation. However, during arrangement of that time it should be noted that the Governors General, Governors and Mislaniyes were authorized to sit as presidents of the Teklay, Awaradja and Woreda Guezat Courts respectively.¹⁰⁷ Therefore, it's correct to conclude that the court of that time was structured in six tiers. This structure continued until 1962G.C,¹⁰⁸ The first change in court structure was made by the enactment of Criminal Procedure Code of 1961G.C.¹⁰⁹ Pursuant to this code, the Miktle Wereda and Teklay gezat courts were not

¹⁰⁶ Courts proclamation, 1962, Proclamation No. 195 Negarit Gazzeta; year 22 No 7.

¹⁰⁷ Supra note 101

¹⁰⁸ The High Court sits permanently in Harrarghe, Begemder, Gojjam, Kaffa, Sidamo, Eriterea, Wollo, Wollega, and Tigrayie provinces as that time it was called Tigre.

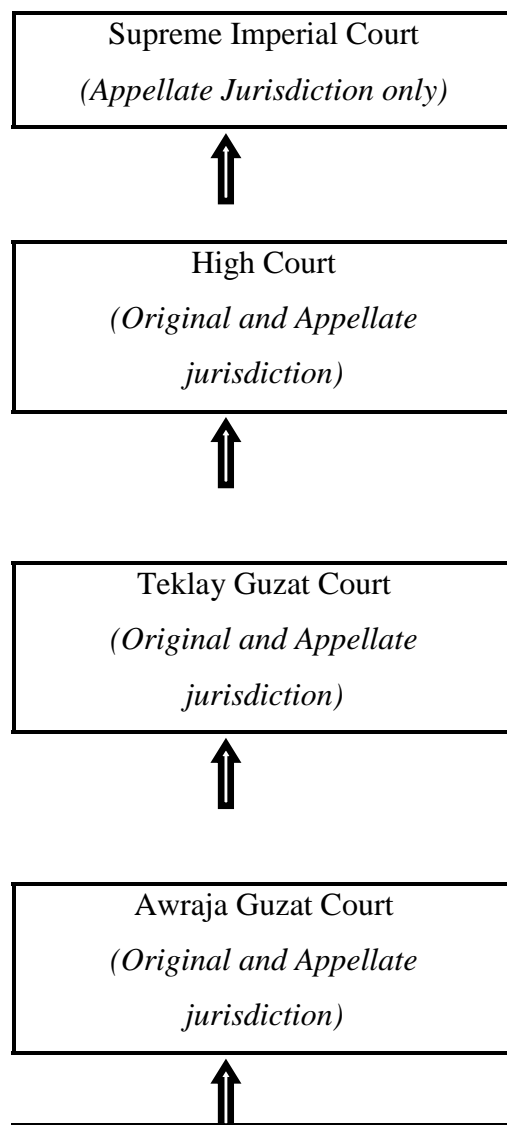
¹⁰⁹ It is provided in Art 9 of the Administration of justice proclamation that "the high court may sit at any place within our empire as may be convenient for the dispatch of business."

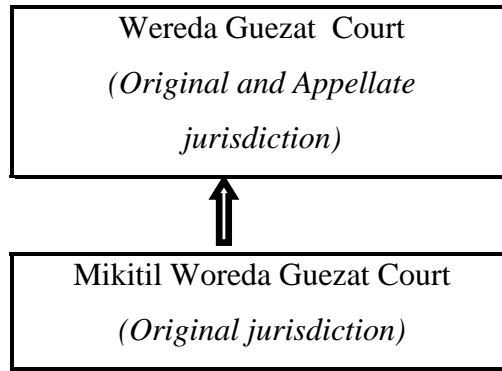
¹¹⁰ Its original jurisdiction is governed by civil procedure code, Art 15 and its appellate jurisdiction by civil procedure code, Art 321.

¹¹¹ Administration of justice proclamation, supra note 104 Art 8

vested with criminal jurisdiction. The court establishment proclamation 195/1962G.C¹¹⁰ also did not stipulate for any jurisdiction of those courts. Therefore, even if it is not possible to trace which legislation dissolved those courts, it can be inferred from the Civil Procedure Code¹¹¹ which clearly enshrines the civil jurisdiction of courts, and from the Criminal Procedure Code, which defines the criminal jurisdiction of courts. For better understanding, look at the chart of the judicial structure of Ethiopia under the Proclamation of 1942.

FIGURE 2.3.1: JUDICIAL STRUCTURE OF ETHIOPIA





Source: Proclamation of 1942

In 1962, parliament enacted the Courts Establishment Proclamation¹¹² that created a revised judicial structure of Ethiopia. This proclamation, established four tiers of courts: the Supreme Imperial court, the High Court, the Awradja Guezat and the Wereda Guezat Courts. The Imperial Supreme Court was situated in the Capital City of Ethiopia, Addis Ababa with its a branch bench for Eretria,¹¹³ which seceded from Ethiopia in 1991 after thirty years of protracted civil war. The Imperial Supreme Court has benches in each sits three judges. The Afenugus was the president of the Supreme Court.¹¹⁴

There was High Court which is situated in all provincial capitals.¹¹⁵The high courts were led by president and a vice president. The High Court had original material jurisdiction for all more complex cases and appellate jurisdiction over those cases appealed from the decision Awradja Guezat courts.¹¹⁶A panel of three judges heard the cases, with a decision by majority vote.¹¹⁷

There was also an Awradja Guezat court, which was established in every Awradja Guezat. This court was vested with original material jurisdiction, and it also entertains those

¹¹² Courts Establishment Proclamation ,1962,Proclamation no 195,neg. gazet year 22 no.7

¹¹³ Empire of Ethiopia, Civil procedure Code of Ethiopia Negarit Gazet'a,24th Year, Extraordinary Issue No.1 of 1965 Artt321

¹¹⁴ Administration of justice proclamation 1942proclamation no 2negarit gazet year 1 art 3 Civil procedure code Art 321

¹¹⁵ Allen Sedller Ethiopian Civil Procedure Haile Selassie 1 university Addis Ababa 1968 pp. 8ff

¹¹⁶ Civil procedure Code Art.321

¹¹⁷ Administration of justice proclamation Art.8

decisions that came by appeal from the Wereda Gezat Court.¹¹⁸ The Woreda Guezat Court, which is the lowest court, is situated in each Woreda Guezat, vested with material jurisdiction to adjudicate minor civil cases.¹¹⁹ This structure existed in Ethiopia until the demise of the Dergue, and the coming of the 1991 Transitional Charter.¹²⁰

In addition to the above stated courts, there were also local judges, who exercised a sort of judicial power established by proclamation 1947¹²¹ The proclamation permits the appointment of an Atbia Dangua in each “locality”, with the jurisdiction to adjudicate cases not exceeding Eth. 25 birr of that time which had a big value during that time.. The Atbia Danguas are appointed by the Minister of Justice from lists submitted by the Presidents of the Awardja Guezat and Woreda Guezat Courts, with the consultation of local elders¹²².

There are some scholars who argue about the importance of Atbia dagna for disposing minor cases that arise in the society taking into consideration the culture ,tradition, and the disperse settlement of Ethiopian People and one of them is Professor Norman Singer.

Singer¹²³ argues that the existence of Atbia Dagna is reasonable. In a tribal society such as Ethiopia, large numbers of cases involving small claims or petty offenses should be litigated according to the traditional dispute mechanism of applying the general customary law of the country side. It seemed reasonable not to attempt to force such a great number of people into a formalized process that might be quite foreign to them.¹²⁴

He further states that it seemed appropriate at this early date to attempt to promulgate legislation that would create an institution allowing litigation of small claims according to

¹¹⁸ Civil procedure Code Art 321

¹¹⁹ Civil Procedure Code Art.13

¹²⁰ See the Derge and the Transitional government Court Structure .See The Ethiopian Civil procedure Code of 1960 which is serving up to now except minor amendments on the material jurisdiction of Courts and the dissolution of Awraja Courts which is merged to the material jurisdiction of Wereda Courts.

¹²¹ Establishment of local judges proclamation, 1947, proc.no90/neg.Gaz.,year 6,no 10.

¹²² Supra note at 121

¹²³ Supra note 86

¹²⁴ Ibid

customary law, and at the same time would be tied to the national legal system and provide a link for many non-Amhara people to the official government hierarchy.¹²⁵ Therefore, the legislation promoted the integration of customary law into the central government system. He states that it was clear that many of the non-Amharas would rather refer their disputes to a person within their own social system, who would be capable of producing a settlement acceptable to both parties.¹²⁶ Singer emphasizes that the Atbia Dagna system helped the gradual integration of many diverse people into one system,¹²⁷ stating that:

In sum, the institution of the Atbia Dagna represented the first meaningful attempt on the part of the Amhara power structure to recognize individual systems within the Empire and to use them as the foundation for a gradual integration of many diverse peoples into one system. Clearly the Atbia Dagna was designed not to stand alone, for alone it could certainly not be a vehicle for integration. Rather it was to be part of an overall development scheme with this ultimate aim of creating a unified society in which all persons assumed Amhara social ideologies.¹²⁸

Some of the assertions made by Professor Singer are correct, such as the statement that the Atbia Dagna (judge) is of great value in disposing minor claims and settling disputes amicably, while also having some defects. Since they were nobles, they were very discriminatory and they were forcing people to give them bribes.¹²⁹ The people were not interested in them because they were not real shemagles selected by the people; they were machines of the ruling monarch. It is quite right there was Amhara ruling class dominance but it is not warranted to

¹²⁵Ibid

¹²⁶Ibid

¹²⁷Ibid

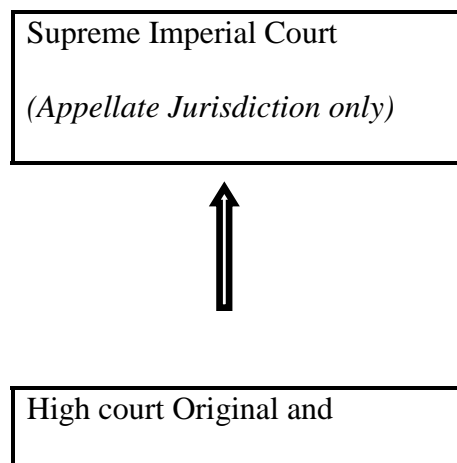
¹²⁸Ibid

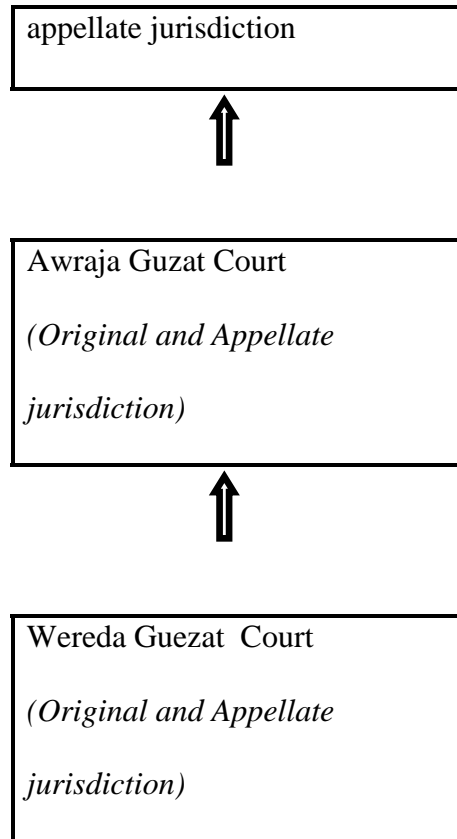
¹²⁹Ibid

conclude there was Amhara people dominance in general. The writer of this paper argues that the poor Amhara has no power to oppress or promote their dominance by associating themselves with Solomonic Dynasty of Shewa. The ruling classes of Amhara were imposing their dominance and oppressing the Ethiopian people using whatever machinery and ideology they thought fit. The establishment of formal courts with a formal judicial structure introduced the country to a modern system of judicial structure, different from their traditional dispute resolution system. However, not only the judiciary, but the overall administration of the unitary system of that time lacked public trust and confidence. This was the cause of many liberation fronts' flourishing in Ethiopia at different times under different names.

To conclude, after the 1962 establishment of the Proclamation of Courts, there was a judicial structure with four tiers of courts in Ethiopia. The Supreme Imperial Court, which heard appeals from the High Court; the High Court, which exercised original jurisdiction in the more important cases and which heard appeals from the Awraja Gezat Court; and the Awraja Gezat Court, which exercised original jurisdiction with the less material jurisdiction. The Wereda Gezat Court, which was the lowest organ of the judiciary, was vested with minor civil cases.

FIGURE 2.3.2: THE STRUCTURE OF COURTS UNDER PROCLAMATION NO.195 OF 1962





Source: Proclamation of 1962

With regard to the judicial structure of the unitary system we have seen that at the end it had four tiers of court structure.

However, there was the Chilot Jurisdiction of the Emperor, which rendered judgment equivalent to that of the ordinary courts. The revised Constitution of 1955 G.C said nothing about this except Article 108 of the revised Constitution which states that the judicial power shall be vested in the courts, established by law be exercised by the courts in accordance with the law and in the name of the Emperor. Hence in the spirit of the above Constitution it is quite clear Chilot is not a court. However, Chilot has got recognition under Article 322 of the Civil Procedure Code, which stipulates that: “Nothing in Art.320 of the civil procedure code shall

prevent an applicant his rights of appeal from applying to His Imperial Majesty's Chilot for a Review of the case."¹³⁰

Here, we can infer that although Chilot did not have constitutional recognition, it was recognized by other legislations. The main reason for this, according to Robert Allen Sedler¹³¹: Since ancient times, the people of Ethiopia have looked to the Emperor as the ultimate source of justice. The duty of the emperor from the earliest times was to adjudicate disputes. The legal tradition of Ethiopia demonstrates that the country established the Emperor as the ultimate source of justice. After a case had been heard elsewhere, a party could petition the emperor for review, and his decision was final. Therefore, he continued to exercise the power of review that he had always possessed. Sedler continues to say that the concept of the sovereign prerogative to see that justice is done best explains the nature of the legal basis of Chilot. Chilot was also supported by Fird Mirmera¹³² and Seber Semi,¹³³ where the function of Fird Mirmera was to screen petitions for review by Chilot, decide whether they had merit and recommend to the Emperor whether the case should be reviewed in Chilot. If not, the recommendation would be to the court to settle the matter. When the Fird Mirmera decided that the petition for review lacked merit, it had authority from the Emperor to dismiss it.¹³⁴ The function of the Seber Semi was to give an opinion on a question of law when the Emperor referred such a question to it.

¹³⁰ The Ethiopian Civil Procedure Code Art.322

¹³¹ R Sedler "The Chilot Jurisdiction of the Emperor of Ethiopia" J.African Law, volume 8 (1964)

¹³² Ibid

¹³³ Refer to file no.1826/61 a civil case petition to the Emperors Chilot against ato Zeleke Teklemariam and a file no.1825/61 a petition filed by ato legesse Chernet against weizero Zenebework Balcha. As quoted by Sedler

¹³⁴ The above cases were the cases dismissed by Fird Mirmera because of lacking merit for review by Chilot.

¹³⁵ E.Hambro,"The Rebillion Trails in Ethiopia" Bull. International community of jurists vol.12 (1961)pp29-30 as queted by Sedler

¹³⁶ Supra note 131 pp. 14-18

E.Hambro¹³⁵ also elaborates that the reason why Chilot exists is that “It is a thought dear to most Ethiopians that they can obtain justice from His Imperial Majesty even if the courts have failed them.”

Sedler¹³⁶ states that prerogative of the sovereign to see that justice was done had many advantages. First, he possessed the power to establish courts to administer the law, and as the King’s authority was consolidated, the jurisdiction of these courts superseded that of any other tribunal. Also, the sovereign possessed a residuum of justice to which people could turn when the courts had failed them. The failure of the courts may have been either due to defects in the law they were applying, or due to the manner in which they administered the law.

Sedler has tried to clarify “due to the manner courts administer the law” to mean the following:¹³⁷ The court may have misapplied the law, their proceedings may have been unfair or the law itself may have been inadequate to meet the needs of justice in the particular case. Sedler argues that in such circumstances, people could turn to the sovereign and ask for the exercise of his prerogative. This existed not only in Ethiopia, as the sovereign prerogative of the king to administer justice was recognized as an integral part of the English Legal System.¹³⁸

There are also other scholars who argue that this is against the spirit of the revised constitution of 1955.¹³⁹ The Constitution only recognizes formal courts, which are independent. The Chilot jurisdiction violates their independence. The Emperor’s jurisdiction is not limited to entertaining cases previously settled by the courts when an aggrieved party applies for justice, the Emperor has the power to accept and entertain a case even if it was never seen in the courts.

¹³⁷ Supra note 131
¹³⁸ Ibid

This again violates the overall structural jurisdiction of courts, and will obviously sway people to not trust the courts.

The other issue that needs mentioned with regard to the judicial structure of that time is the independence of the judiciary. The 1955 Constitution explains the independence of judiciary as follows:¹⁴⁰“The judicial power shall be vested in the courts established by law and shall be exercised by the courts in accordance with the law and in the name of the Emperor.”

After all, an independent judiciary is impossible when the King is above the law. Courts were only there to settle disputes of the people. Looking at the appointment, selection and dismissal of judges, one can easily reach the conclusion that the independence of the judiciary was at stake.¹⁴¹ Additionally, the existence of the jurisdiction of His Imperial Chilot existed to strengthen his power, as well as to have a strong reputation and conviction with his subjects. This spirit and conviction of the people enabled the Emperor to rule the country for long period of time. After his death, people did not easily believe the media and press when they were informed of the regime Dergue, who toppled and killed the emperor, because the Emperor was viewed as next God.¹⁴²

In summary, at the time of the Emperor the judicial structure with an independent judiciary did not exist. Before the establishment of formal courts, the Kings, the Nobles and the Clan leaders were dominant in serving as judges, who are loyal to the Emperor and to the nobles of that time. After formal courts also got recognition, they did not serve people properly. They were not accessible or speedy, because most of the courts were situated at the capital city of the province, especially the Supreme Court situated in Addis Ababa, with a branch in Asmara,

¹³⁹ Revised Constitution of Ethiopia,(1955), Proclamation No.149, Negarit Gazet'a,Year 15 No.2 Art. 108 see also See also Menber Tsehay Tadesse(Dr) Justice and Democratic System in Ethiopia a paper presented at national conference held at Addis Ababa on Agust 5-6/ 2000

¹⁴⁰Ibid Art 111 It talks the judges shall be appointed by the Emperor.

¹⁴¹ Supra not 131 p 287 which states it is a thought clear most Ethiopians that they can obtain justice from His Imperial Majesty even if the courts have failed them.

Eritrea. Particularly those from remote areas suffered in accessing the courts. There were situations where people from different rural areas who go to file their case in the big cities where the courts situate remained in big cities as beggars because of long adjournments and lack of provisions. It was not possible to access even the Wereda Courts because of the shortage of infrastructure such as roads and other means of transportation. The scattered settlements of the people from one corner of the country to another also aggravated the problem of accessibility. The courts themselves did not having buildings fit for court to be held. Judges were forced to handwrite everything, except in the High Court and Supreme Courts, where a small number of typewriters were used. There were no recording machines to record witness testimony and other statements. The judge had to write everything by hand all day, which was laborious and boring. Because of this and other issues, delay was inevitable, which discouraged people from accessing courts.¹⁴³ The most convenient way to dispose of disputes was the traditional system, which was highly accessible, less costly and speedy, and where no language barrier existed. Ethiopia is a country of nations and nationalities that have more than 80 different languages, but the working language of all courts of the nation was Amharic: the official language of the country. This was, by itself, a major impediment for the people of different nations and nationalities. The people of Ethiopia going to courts were facing a deficiency of interpreters was a serious problem. Since all the codes were imported from foreign countries,¹⁴⁴ predominantly from countries of civil law, but also from countries that follow common law, the procedures that the courts follow (the Civil Procedure Code and Criminal Procedure Code) were difficult to grasp and understand because of their rigorous application. They were difficult to understand; especially for laypeople who were

¹⁴² See Journal of Ethiopian Law vol.8 no.2 1969 Faculty of law Addis Ababa University p 427ff article 2 in its title People, Practice, Attitudes and Problem in The Lower Courts of Ethiopia.

¹⁴³ Interview with the then disputants

¹⁴⁴ Heinric Scholler : Ethiopian Constitutional and Legal Development Volume 1 p 19 and 28 for example The 1931 Constitution was influenced by the Prussian and German Constitution of 1851 and 1971 and Japanese Constitution of 1868. The revised Constitution of 1955 was influenced by the American Constitution The Dergue Constitution of 1987 had a strong Marxists Influence The civil code of 1960 was highly influenced by the French Civil code RThe Civil Procedure was influenced by the Indian Civil procedure code

not dominantly literate, since they were even difficult to those who were literate. Especially during the establishment of the courts, the judges were foreigners.¹⁴⁵ This situation could heighten the difficulty of accessing the courts. After the establishment of the law faculty at Addis Ababa University, law graduates started to join the courts. This happened also in the Supreme Courts and High Courts. At the Awraja and Wereda levels, nobles and those who got an education from churches were used as judges. This was the practice from 1931 G.C up to 1982 EC. The constitutional rights of the people to an interpreter and legal counsel are difficult even today.

In general, we can conclude that even if there were formal courts with formal court structure, they were not independent, competent and accessible in order to render fair and impartial judgment for the society. With all the above stated barriers it is something odd thinking of strong independent judiciary therefore the only remedy was to look for a system change. And that is the reason by the revolution of 1974 toppled the Emperor's regime and the coming of the Derge became reality. Anyway before proceeding to the structure of courts in the Derge regime as of highlight the education of judges in 1998G.C is shown in the next table.¹⁴⁶

¹⁴⁵ to cite some of them, Dr Buhaga, and Mr.G.Dabas who were Supreme Imperial Court judges, Mr.S Stifensen a high court judge William Buhagiar President of the Imperial High Court. See Civil Appeal No 413/49 Francisconi Facondo vs Ghiandoni Trenzio, Ato Getachew vs The Advocate Center Criminal Appeal No 05/51 E.C Woz. Workinesh Bezabih, and Others v. Woz. Yidenuku Civil Appeal No. 883/55 E.C Journal Of Ethiopian Law vol.1 No.1 Faculty of law of Haile Sellasie 1 University 1964 p3ff

¹⁴⁶ See Menberetsehay Tadesse (Dr) an article on the title Process of Justice and Democracy in Ethiopia presented on National Conference on August 5-6/2000

FIGURE 2.3.3: EDUCATIONAL BACKGROUND OF JUDGES

Level of education	Years
PHD	0.1%
LLM	0.4%
LLB	7.3%
Diploma	7.9%
Certificate	5.7%
1-6	14.4%
7-12	17.2%
Church School	47%

Source: Paper Presented by the Former Vice President of the Federal Supreme Court in the Year 2000.

According to one writer's¹⁴⁷ evaluation, the courts at the time of the Emperor merged power at the top, in the hands of the Emperor, actually and not merely in theory. Second, at the bottom, executive functions were combined with judicial functions under the same person, like the Miktel Wereda governor who also sat as a judge. Third, all of the other governors from the Teklay Guzat to the subordinate governor served as presidents of their respective courts under Decree No.1 of 1944, Provincial Administration, and they could preside over any session of the Courts.

The interview conducted with litigants ten years after the establishment of the formal court system revealed that the most common suggestion for improvement was that cases should

¹⁴⁷Ibid

be decided more quickly.¹⁴⁸ Litigants said judges gave too many appointments, bribes were often used, courts lacked the power to execute their judgments and the power they had was not executed effectively. Judges were not in court promptly, and the structure of courts needed to be reorganized to make them accessible.

After the above assertions about the judicial structure of the emperor's regime, this research analyzes the judicial structure of the Derge Regime.

2.4 STRUCTURE OF COURTS DURING THE DERGE REGIME (1974-1991) G.C

Proclamation No. 52 of 1975 of the Derge established the structure of courts.¹⁴⁹ This proclamation repealed most of the provisions of Proclamation No. 2 of 1942 and established under Article 3 of the Proclamation the Supreme Court, the High Court, the Awraja Courts and the Woreda Courts. These courts were to exercise criminal and civil jurisdictions within the local administrative limits where they were established. The High Courts were to sit on a permanent basis in each of the provincial capitals. The Supreme Court was empowered to exercise its jurisdiction throughout the country.¹⁵⁰

A single judge presides in each of the Woreda Courts, the Awraja Courts and the High Courts. However, in the case of the High Court, if the criminal was brought before the court under charges punishable by the death penalty or rigorous imprisonment of 15 years or more, the court was to have a panel of three judges. Every division of the Supreme Court was of the opinion that if the complexity of the case warranted more serious consideration, the court could be comprised of more than three judges.¹⁵¹ The Minister of Justice or any authorized judicial official could

¹⁴⁸ Supra note at 69

¹⁴⁹ See Art.3 (2) of the Proclamation No.52 of 1975.

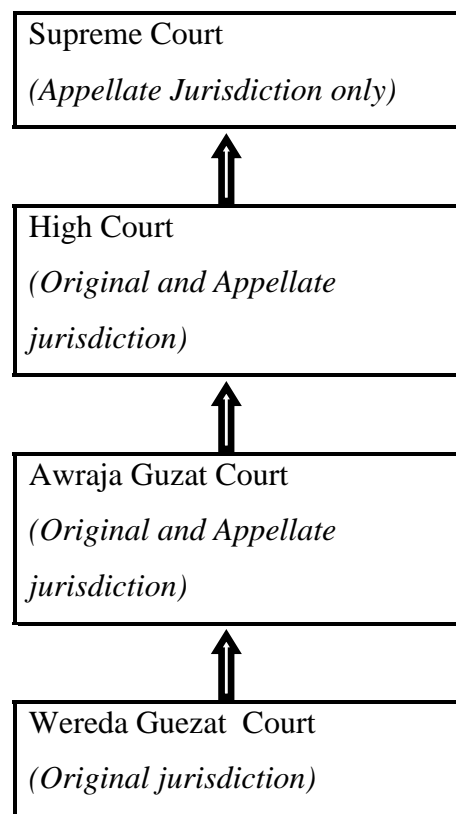
¹⁵⁰ Ibid

¹⁵¹ Ibid Art.4(1)

assign a High Court judge to sit in an Awraja court or an Awraja court judge to sit in Wereda Courts.¹⁵²

In addition to the two divisions of the Supreme Court (one in Addis Ababa and the other in Asmara), the Dergue introduced circuit Supreme Courts to tour other regions and deal with cases beyond the jurisdiction of the high courts, as well as to handle appellate cases.

FIGURE 2.4: THE STRUCTURE OF COURTS DURING THE DERGUE REGIME BEFORE THE 1987 CONSTITUTION



Source: Proclamation No.52 of 1975

The Derge regime also established special courts in line with the formal courts. The Preamble to Proclamation No. 215 of 1981, which established the special courts stated “... to provide for an efficient judicial machinery to try offenses against the unity, independence and the revolution of Ethiopia and the peace and order of the people.” Such courts were supposed to deal

¹⁵²Ibid Art.4(2)

with “offenses such as exploitation were to fullness, abuse of authority, judicial misfeasance, and corrupt practiced and favoritism.”¹⁵³

The special courts had two levels: a first instance special court and an appellate special court.¹⁵⁴

The First Instance Special Courts had jurisdiction over all criminal cases and cases arising under the Special Penal Code Proclamation. The Appellate Special Courts heard and decided appeals against the decisions of the First Instance Special Courts.¹⁵⁵ The Head of State appointed judges, prosecutors and registrars of the special courts.¹⁵⁶ In 1987 the Dergue, under proclamation No. 10 of 1987 established the military courts under the Military Division of the Supreme Court, which was set up under proclamation No. 9 of 1987.¹⁵⁷ The benches of the military courts consisted of three judges, unless otherwise stated. The presiding judge had to be superior in rank to the accused. As much as possible, the other judges were not supposed to be subordinate to the accused.¹⁵⁸

The judges of the Military High Courts and Primary Courts were appointed for a term of five years by the President of the Republic from candidates presented by the Minister of National

¹⁵³ See Art 2 of the “Proclamation to provide for the Establishment of the special court” No.215/1981

¹⁵⁴ Ibid Art 4 and 5 To summon any person to give evidence, testimony or opinion on a case before the court.

1. To order and compel the production of any document or evidence material in the hands of or under the control of any person or organization for a case pending before the court;
2. To order government or mass organizations to execute its orders and directives.
3. To decide, in accordance with the law, any cases charged under the special penal code, when it deems necessary for the proper dispensation of justice;
4. To prohibit, until such time which the court will determine or until judgment is given, the sale or transfer of any property where the case the court is considering is related to such property.
5. To impound (seize and take legal possession of something) any property, for such a time as the court may decide or until judgment is given, where the court has reason to believe doing so is in the interest of justice.

¹⁵⁵ Ibid Art. 14 Article 3 of the proclamation gave the following powers to the special courts.

¹⁵⁶ Ibid

¹⁵⁷ See Proclamation No.9/1987 The Military Court consisted of

- (1) A military high court and
- (2) A military primary court

The military courts had the following objectives:

1. To implement laws issued to prevent crimes against the peace and security of the people’s democratic republic of Ethiopia;
2. To assist in promoting military discipline efficiency and combat readiness by implementing military laws and by maintaining order;
3. To safeguard the legally protected rights, interests and freedom of citizens; and
4. To raise the legal consciousness of the members of the Armed forces and ensure the observance of socialist legality.¹⁵⁷

¹⁵⁷ Ibid Art .4

Defense.¹⁵⁹ A candidate appointed as a judge of the military courts had to be a military officer on active military duty. He needed to be trained in law or have acquired broad legal knowledge through experience, be of the highest caliber and character, and have the right to vote or to be elected.¹⁶⁰ The President of the Republic appointed the Presidents and the Vice Presidents of the military courts for a period of five years.

They could be removed only after the Judicial Disciplinary Committee established that that they had committed faults that would justify their removal. Pending their removal, the President of the Supreme Court could suspend any judge of the Military High Court from his from his judicial post.¹⁶¹ Military courts also had jurisdiction over civil cases arising from criminal cases submitted to them.¹⁶²

The Military Division of the Supreme Court had two vice presidents and a number of judges and other employees. It had both first instance and appellate jurisdiction. In its first instance jurisdiction it handled cases of offenses committed under Article 16 of the Proclamation by high-ranking officers (brigadier general and above).¹⁶³

For the first time in the history of Ethiopia, the Military gained such strong power that it was enabled to rule the country as a full dictatorship, depriving the courts of their independence. The military courts were there not to render justice, but to severely punish to those against the Dergue

¹⁵⁹Ibid Art .5

¹⁶⁰Ibid Art 6

¹⁶¹Ibid Art.8

¹⁶²Ibid Art.17

The military courts had the following jurisdictions:

1. Military offences committed by members of the armed forces and any other offence committed by a member of the Armed forces against any other member of the same force;
2. Offences committed against property or interest of the defense forces of the country by members of the Armed forces or by non-military employees of the defense forces;
3. Any offence committed by members of the Armed or police force, or other persons having obligations of military service while in combat duty.
4. Any military offence committed by persons having obligations of reserve military service while undergoing training.
5. Offences under Art 296 – 99 inclusive, of the penal codes, committed by persons subject to national military service;
6. Any offence of espionage committed by members of the armed forces; and
7. Other cases determined to fall under the jurisdiction of military courts.

¹⁶³Ibid Art.28 -29 These special courts were the military courts (proclamation No. 10 of 1987 dealing with military offenses) and the social courts (proclamation No. 37 of 1987, dealing with offenses under specific articles of the special part of the petty offenses in the penal code of 1957)

regime. They were strong mechanisms of the system. Even after the demise of the Emperor, the Derge judicial structure lacked the power to safeguard Ethiopian citizens. It was the worst time for Ethiopians, where they lost hope in voicing their grievances. The only hope was to pray to God to one day see the downfall of the Derge after the Derge ruled the country for more than thirteen years without a constitution, in 1987 E.C it adopted a constitution. In this constitution, the structure of the courts was stipulated to, as explained in the following section.

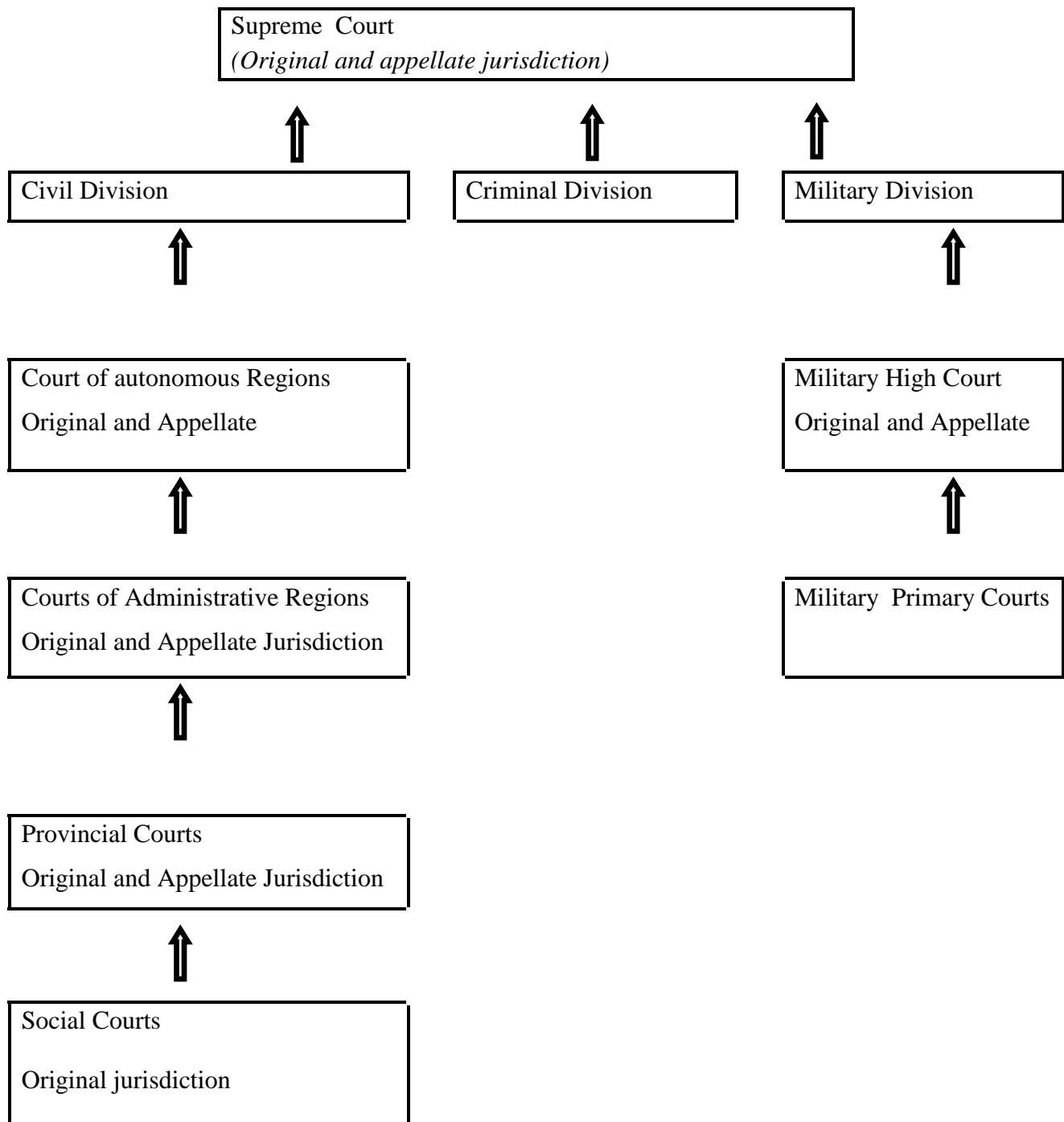
2.4.1 ORGANIZATION OF COURTS UNDER THE 1987 DERGUE CONSTITUTION

This Constitution stipulated that the Supreme Court, the regional courts, the courts of autonomous regions and other courts were to be established under the law.¹⁶⁴ The courts were classified into two groups. The first group consisted of the Supreme Courts, regional courts, and courts of autonomous regions. These regular courts were supposed to deal with both criminal and civil cases. The civil and criminal procedure codes governed these proceedings. The second group of courts was the special courts, which were supposed to deal with special cases, both civil and criminal. Their specific tasks were delineated in the specific laws under which they were established.¹⁶⁵ The structure of Courts looks like the following chart:

¹⁶⁴ See Proclamation no.1/ 1987Art.101ff

¹⁶⁵ Ibid

FIGURE 2.4.1: STRUCTURE OF JUDICIARY UNDER THE 1987 DERGUE CONSTITUTION



Source: the 1987 Derge Constitution

Even though there was a cassation bench under the Supreme Court to hear appeals of final decisions with a basic error of law, it is impossible to understand it entirely, since this

structure did not work for long. In general, because of the demise of the Dergue by the Ethiopian People's Revolutionary Democratic Front, (hereinafter called EPRDF) this structure could not serve for very long.

In conclusion, from the time the Derge came to power, it confronted different conflicts with organizations that called themselves liberation movements. The country had no constitution for about thirteen years, although there are scholars who argue it had rules and regulations that served as a constitution.¹⁶⁶

In any case, even if a structure of court existed in the Derge regime, it was nominal. Most issues were associated with politics and were dealt with by ad hoc or military courts. The Red Terror campaign during 1978-1980 G.C when people were killed without going to court by mere the decision of military forces was an example of this. The judges themselves were not independent, as they were under the Ministry of Justice. Besides the language and infrastructure barriers, areas that were liberated by different liberation campaigns did not have access to the courts. This was especially true for the people of Amhara, Tigray and Oromia, where strong liberation movements existed. At the end, when the Derge lost its power, courts of the Derge were only shrinking in the capital cities, and at the end all were gathered in Addis Ababa, the capital city of Ethiopia. Courts were highly influenced by the socialist or Marxist ideologies, which can be seen at the end of the statement of claim, defense or appeal of each pleading, as it was mandatory to write slogans¹⁶⁷ respecting the Marxist party of the Derge. Therefore, it is reasonable to conclude that during the Derge Regime there was no independent court structure with a strong judiciary and judicial structure. It was unable to render fair, impartial judgment,

¹⁶⁶ See Dr Faffisl Nahom argues that such as the proclamation Ethiopia Tikdem and the land Reform Proclamation

¹⁶⁷ The mission of Ethiopian workers party will be accomplished Ethiopia First Ethiopian Workers Party will come into reality through the Union of Communists and others.

which was the demand of the people since from the time of the Emperor. This was, of course, one of the reasons for the downfall of the Derge regime.

2.5 THE STRUCTURE OF COURTS DURING THE TRANSITIONAL PERIOD

After the EPRDF overthrew the Derge in May of 1991, the country was without a court system for over a year and half, apart from the neighborhood reconciliation committees established by EPRDF. These committees adjudicated, at neighborhood levels, disputes and conflicts that arose between individuals. In some areas of the country, people were without any court system even longer, since liberation started in February of 1989.¹⁶⁸ The whole administration was abolished and institutions formed by the leaders of the liberation front governed. Bittos, courts where laymen elected by the people served as judges, replaced the formal courts of the Dergue. The judges disposed of cases under laws formulated by agreements of the people where the court was situated. This was also replicated when Addis Ababa was liberated. This Bitto system that was exercised by the first liberated areas stayed in place for a year. Since the Preamble of the Charter talks about rebuilding and reconstructing the state democratically, courts were restructured on the basis of this Charter, in line with the proclamation of 1992.¹⁶⁹ Courts were reorganized according to the organizational structure of nationalities of Ethiopia, which were recognized by Article 2 of the Charter. Therefore, based on the Charter and Proclamation No. 7 of 1992, Ethiopia was divided into 14 regions with self-administration.¹⁷⁰ Every region was also vested with the power to have its own judiciary and judicial structure.¹⁷¹ The transitional government, as empowered by Article 9(f) of the

¹⁶⁸ For example Tigray Region was liberated in 1989 before Addis Ababa which was liberated in 1991.

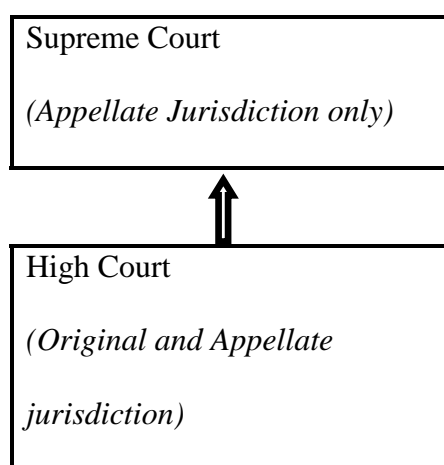
¹⁶⁹ Bitos are those serving as judicial institution in the liberated areas where the judges are selected by the people from the community. They are all lay men with no knowledge of law. They were applying the regulations set by common understanding of the community.

¹⁷⁰ See Art 3 part 23 of the "Proclamation to Provide for the Establishment of National Regional self –Governments", *Negarit Gazeta*, Proclamation No.7/1992

¹⁷¹ Ibid

Provisional Period Charter, eventually issued Proclamation No. 40 of 1993 G.C and established, under Article 3, the formal courts.¹⁷² They included the Central Supreme Court, the Central High Court and the Central First Instance Court. This was done by repealing Proclamation No. 24 of 1988 G.C, which established the High Court and the Awraja Court, and Proclamation No. 9 of 1987, which set up the Supreme Court, as well as regulation No. 438 of 1973 G.C. Article 23 of Proclamation No. 7 of 1992 G.C stipulates that, “Judicial power in any National/Regional transitional Self-Government shall exclusively be vested in court...with the exception of matters specifically determined by law to be under the jurisdiction of the Supreme Court of the Central Government, a decision of the National or Regional Superior Court on any case is final.”¹⁷³ It also states, “Judges shall exercise their judicial function in complete independence; they shall be guided by no other authority than that of law,”¹⁷⁴ and “Judicial proceedings shall be conducted in the working language of the National/Regional Transitional Self Government. Interpretation shall be assigned to those parties who do not understand the working language.”¹⁷⁵

FIGURE 2.5: THE STRUCTURE OF NATIONAL AND REGIONAL COURTS DURING THE TRANSITIONAL PERIOD

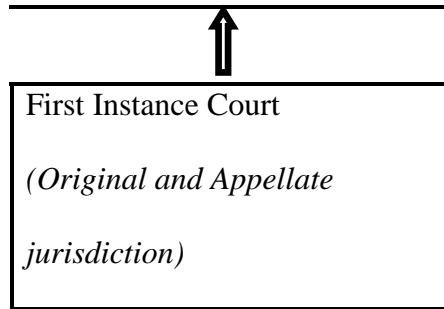


¹⁷²Ibid Art 28, 29

¹⁷³Ibid art 30

¹⁷⁴Ibid Art 15

¹⁷⁵Ibid Art 27



Source: Proclamation No.24 of 1988

From the above assertions of the Charter, the country showed a diametrically opposite shift in government from an entirely centralized to a legally decentralized structure. The latter had one central government in the center and 14 regional governments vested with self-administration. Also, the division of power was decentralized between the center and regional government organs. This resulted from the recognition by the Charter of the principle of self-determination of nations and regions to administer themselves without interference by the center. This shift in government structure also brought a structural shift to the courts of the nation. For the first time Ethiopia had two separate court systems: one in the center and another in the regions, where one did not interfere with the other. Also, for the first time, the working language of courts was the language of the region where the court is situated.¹⁷⁶ Even the appointment and discipline of judges was based upon the law of the regional council. This structure, created by the Charter, has served as the basis for the current federalist system, as well as for the current federal judicial structure. This will be dealt with in depth in the next chapters, as it is the core issue of this dissertation.

In conclusion, prior to the existence of the formal court structure, the traditional dispute resolution mechanism played a significant role in administering justice in the nation. The Nobles, Clan leaders and Shemagles, based on the language, culture and traditions of the society of each

¹⁷⁶Ibid

locality performed this type of justice in a scattered manner. With the centralization of the country, the 1931 Constitution created a foundation for the establishment of formal courts, although it had constraints as discussed above. The 1955 constitution strengthened the system, but people were dissatisfied with the judiciary and judicial structure at that time, and fought for change. With the demise of the Emperor, people expected a strong judiciary that would safeguard their rights. However, the Derge regime ruled the country for thirteen years without a constitution. Even if the judiciary existed without constitutional or legal recognition, it was ineffective in safeguarding the rights of the people. The people of the nation saw overthrowing the Dergue as their only option in trying to bring about change. The country had a socialist government, which was highly centralized with a prevailing dictatorship. It was impossible for a strong judiciary to safeguard the rights of citizens. The dictatorship nature of the Dergue, the demands for a strong judiciary and other societal demands contributed to the toppling of the Derge regime by the EPRDF after 17 years of protracted war. Afterwards, the EPRDF created a judicial structure in the center and states for the first time by the transitional charter. Later, this structure got constitutional recognition, changing the country from a unitary system to a federal system. This judicial structure facilitated the country's strong judiciary with its strong judicial structure, which had been the demand of the people during the previous regimes. Whether it needs reorganization is a question to be analyzed and addressed in this dissertation. Before analyzing the main topic of the dissertation, the workings of the federal judiciary and its structure, on federalism will be highlight in brief, in order to maximize understanding of federalism before addressing the judicial structure that exists in a federal system such as Ethiopia.

CHAPTER 3

3. FEDERALISM, JUDICIAL FEDERALISM AND ITS EVOLUTION OF FEDERAL IDEAS IN ETHIOPIA

3.1 INTRODUCTION

In chapter two, the practice of the informal traditional dispute resolution mechanism is explained. As described, it was the first indigenous mechanism of dispute resolution in the history of Ethiopia, and is still vastly practiced in many rural areas of the nation, as well as in urban areas for certain matters. Next, the establishment of formal courts after 1931 with the first constitution of the country was discussed. Since the inception of formal courts, they were reorganized by different regimes in the unitary system. Because of the dissatisfaction of the people with all of the regimes that were present under the unitary system, the system was changed by a protracted war, and federalism was introduced for the first time in the history of the country. One cause of the war was the issue of justice, and one of the elements of justice was the need for strong judiciary with a strong judicial structure. To address the demand of the people for a strong independent judiciary, the country reorganized the structure of courts that was existed in the previous unitary system into a federal state structure. Therefore to vividly understand the working of the current federal judiciary with its challenges and impacts, which is the core topic of this research, it is found wise first to start the discussion with the theory and concepts federalism, how it is defined by different scholars, the main essential elements of federalism, why in today's world so many countries adopt federalism, and the concept and ingredients of judicial federalism are discussed, with brief comparison whenever it demands.

Along with the above issues, since the main idea to be addressed in this dissertation is the working of federal judiciary in the Ethiopian context, the historical development and the essential features of Ethiopian federalism is also part of this discussion, in order to ensure understanding of the coming chapters that are fully devoted to the working of the federal judiciary in Ethiopia and its challenges and impacts.

3.1.1 CONCEPT OF FEDERALISM GENERAL OVERVIEW

Federalism, which is a historical product, is not a static or rigid concept. The birth and development of federalism resulted from various forces, which are also dynamic. The driving force can emanate because of inherently dynamic nature of a society, an ever-growing economy and social needs, the number of constituent units and the degree of symmetry or asymmetry in their size, resources, therefore, federalism is a process that is developing from time to time in our world today 28 countries of the world with more than 40 percent of the world's population exhibits basic characteristics of federation. Therefore, it is good to understand that no single pure model of federation that is applicable everywhere. Federal system is applied differently in different plural societies to suit their historical, economic, political, social and cultural conditions. It is important to explain that while their particular factors encouraging unity and regional autonomy have varied in the formation of federations what is common to all is the successful instance that is the existence of a relative balance in the pressures for political integration and for regional autonomy.¹⁷⁷ The above basic concept of federalism is propounded by different scholars.

¹⁷⁷ R.L. Watts : Comparing Federal Systems McGill-Queen's University Press – London 3rd edition pp: 63-64

Dicey, States that “federalism is the desire for a union without unitary government, which is a condition absolutely essential to the founding of a federal system”.¹⁷⁸ According to Dicey’s clarification, federalism is a system different from that of the unitary. Therefore, a federal State is a political contrivance intended to reconcile national unity and power with the maintenance of State rights.¹⁷⁹

Federalism as a system has been introduced in different countries at different times. As a form of political organizations, Frankfurt says, “Federalism has nowhere been adopted on the theoretical grounds of its real or hypothetical virtues, rather it has always emerged as a product of compromise and expedience and the driving forces behind it have invariably been the history, circumstances and problems of adopting it.”¹⁸⁰

Livingstone in his famous statement stated that

The essential nature of federalism is to be sought for, not in the shading of legal and constitutional terminology; but in the forces-economic, social, political, cultural that have made the outward forms of federal is necessary...the essence of federalism lies not in the institutional or constitutional structure, but in the society itself.

Federal government is a device by which the federal qualities of the society are articulated and protected. Sobi Mogi also emphasizes the above assertion by stating that the “Federal idea is not confined to the political sphere of the state, but is the general basis of human organization.”¹⁸¹

¹⁷⁸ A.U .Dicey; An Introduction to the study of the law of the Constitution,10th edition,1959,second Indian reprint,1998,p:141

¹⁷⁹ Ibid page p 143

¹⁸⁰ According to A.N. Holcoms, what has come to be known as American Federalism is not the product of a preconceived and approved principle. The federal union was the creature of expediency rather than principle, Quoted in J.M.C.Vile. The Structure of American Federalism, 1961 p.391 See also JMC Vile federalism in USA, Canada, and Australia (1973)

¹⁸¹ Sobei Mogi, The problem of federalism: A study in the study of political theory,1931,p. 1059 Livingstone, a note on the nature of federalism 83-84 quoted by Micheal Burgess in his book comparative federalism p.29

From the above stated assertions, the inference can be made that countries adopt federalism not only to maintain diversity within unity, they may have different problems that need to be solved. They may choose federalism to curb the challenges and evils that they encountered in whatever other system they were using. The aim of federal judiciary that exists in the federal system is not far from the above assertion. The purpose of the federal judiciary and its structure is to ameliorate all the dissatisfactions of the society that were existed in different forms in the working of the unitary judicial system. Of course, this can only happen by collaborating with other institutions that exist in the federal system. With regard to the above reality, Daniel J. Elazar states that

Federal principles are concerned with the Combination of self-rule and shared rule.

In the broadest sense, federalism involves the linking of individuals, groups, and polities, in lasting but limited union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties.¹⁸²

Therefore says Watt “one cannot pick model of a shelf. Even where similar institutions are adopted, different circumstances may make them operate differently.”¹⁸³

All the above assertions show the concept of federalism in full with all its driving forces to adopt federalism associating it with historical and other compelling factors of a country. The above discussions show that the reason for adopting of federalism differs from country to country. One model of federalism cannot fit for all. However, countries adopt federalism not only to accommodate unity and diversity, or to implement shared rule and self-rule, but also to ameliorate problems of the country and to create peace and stability. The federal judiciary and its

¹⁸²J. Elazar Exploring federalism The University of Alabama Press 1991P.5

¹⁸³ See Watt Comparing Federal Systems p2 see also M.J.C,Vile: The Structure of American Federalism, 1961,p.39

structure have to coincide with the overall concept of federalism and with the intentions of the country that adopted federalism. Although there can be variation of judicial structure in those countries that implement federal system but the federal judiciary has to be structured and organized to address the issues of justice and rule of law of that country. This will be discussed in detail in the coming chapters, after the discussion of the definition of federalism and other related issues in the coming sub topics.

3.1.2 FEDERALISM DEFINED

Federalism doesn't have a clear, universally accepted definition, because federalism can have different meanings to different people in different times.

With regard to the difficulty of defining federalism, Elazar says, "Federalism is a phenomenon that provides many options for the organization of political authority and power, as long as the proper relation is created, a wide variety of political structures can be developed that are consistent with federal principles",¹⁸⁴

However, it is necessary to examine some definitions given by different scholars. Etymologically, the expression federalism is derived from the Latin word *foedus*, which means treaty or covenant.¹⁸⁵ K.C Wheare, a classical scholar of federalism, defines it as "A system of government which embodies predominantly a division of power between general and regional authorities, each of which in its own sphere there is coordinate with the others and independent of them."¹⁸⁶

K.C Wheare emphasizes the coordinating nature of the system between the two levels of government. However, in our today's world we observe federal systems that are not only

¹⁸⁴ Supra note 182 P12

¹⁸⁵ K.C.Wheare, Federal Government,P.33

¹⁸⁶ Ibid

coordinate but also cooperative. According to Finer a “federal state is one in which part of the authority and power is vested in the local areas while another part is vested in a central institutions deliberately constituted by an association of the local areas.”¹⁸⁷

Elazar also says “the simplest possible definition is self-rule plus shared rule” he also continues to say “federalism understood in its own terms offers an alternative to the center-periphery model for political integration as for other things political”.¹⁸⁸

Corry and Abraham explain, “Federalism is dual forms of government, based on territorial and functional divisions of powers calculated to reconcile unity with diversity.”¹⁸⁹ This definition says that the main aim of federal system is creating a dual form of government where citizens reconcile unity with diversity. However, one of the essential elements of a federal government is to create a dual form of government so the people of the nation can keep their diversity within a system of unity. When the people of one nation choose the federal form of government than another government system, their target is to create a strong nation that satisfies their overall political, economic, social and cultural interests; maintains peace and stability; that enables them to live a wealthy and prosperous life; preserves their diversity within unity and allows the nation to function as a competent nation of the world. The aim of the judicial structure in a federal government is also to strengthen the above assertion. Other scholars also have tried defining federalism. Watts says

Federalism is used basically not as a dissipative but as a normative term and refers to the advocacy of multi-tiered government combining elements of shared rule and regional self-rule. It is based on the presumed value and validity of combining unity and diversity of accommodating, preserving and promoting distinct

¹⁸⁷ Ibid

¹⁸⁸ Supra note 182 p.13

¹⁸⁹ J.A.Corry and HenryJ.Abraham : Elements of Democratic Government (1964) p.159

identities within a longer political union. The essence of federalism as a normative principle is the value of perpetuating both unions, non-centralization at the same time.¹⁹⁰

Watts' definition seems to include all of the elements of federalism, especially because he mentions that federalism is not static to only maintain the existing diversity, but should also accommodate, preserve and promote distinct identities within a larger political union. The existence of judicial structure that exists in the federal system is , that as a third organ of the government which is established on the division of the center and the states to strengthen the federal system by timely and efficiently disposing of disputes and by maintaining as a whole rule of law.

Garner also defines federalism

As a system of central and local government combined under a common sovereignty, both the central and local organizations being supreme with definite spheres, marked out for them by the general Constitution by the act of parliament which creates the system... Federal government is not as it often loosely said, the central government alone, but it is a system as the central government is, although they are not the creation of or subject to control of the Central government.¹⁹¹

Garner gives an emphasis on the existence of dual governments one is not subordinate to the other.

In today's world, says Watt,¹⁹² federal government systems are varied in many ways:

In the character and significance of the underlying economic and social diversities; in the number of constituent units and the degree of symmetry or asymmetry in their size; in their

¹⁹⁰ Watts, Ronald L., Comparing Federal System, 3rd edition 2008

¹⁹¹ Garner: Federal Government, p.14

¹⁹² Supra note at 190

services and constitutional status; in the scope of the allocation of legislative, executive and expenditure responsibilities; in the allocation of taxing power and resources in federal institutions; in the degree of regional input in federal policy making in the procedures for resolving conflicts and facilitating collaboration between interdependent governments and in procedures for formal and informal adaptation and change.

Watts clearly explained the reasons why even though they have certain common elements; there is variation in these governments. This is the reason why most scholars of federalism vary in defining federalism, and why all agree that federalism is a dynamic concept, a means to an end instead of a one-size-fits-all system. The Judiciary which exists in a federal system even if it has essential factors as a common factor it may have its own peculiar nature that fits to its political, economy social cultural values and norms of each country. However, all of the above definitions indicate that no single definition of federalism is applicable to any federal system. Rather, the basic notion that should not be missed by those governments who think of the federal system is the creation of a dual government with shared rule and self-rule that accommodates preserves and promotes unity and diversity, while clearly avoiding centralization that exists in the unitary system which erodes the overall principle of federalism.

To conclude from the above definitions given by different scholars, federalism is a term that can be used very broadly to describe the mode of political organization that unites separate polities and maintains their fundamental political integrity. This is done by distributing power among general and constituent governments, enabling them to share in the processes of decision-making and execution. Therefore, federalism is in fact a developing idea. It is not a rigid concept confined to a particular pattern. Different countries have adopted this system to suit their needs and solve their problems. It is, therefore, unwise to expect a one size fit for all definition to

explain the federal idea as it has been applied to various countries, each having some special features of its own while sharing the essential features with others. This also works to the establishment of judiciary with its structure and jurisdiction. Though the federal system varies from country to country and can have different forms, there are certain essential principles that they share. Therefore, the research will examine forms and the essential features that should exist and be shared by different forms of federal governments.

3.1.3 FORMS OF FEDERAL GOVERNMENTS

Before discussing the essential features shared by nations with federalism, some forms of federal governments based on the unique features of their various circumstances will be discussed.

Although a federal system can have different forms, the main forms can be stated as coordinate (dual federalism), cooperative federalism and organic (integrated federalism).¹⁹³ Coordinate federalism, for the purpose of this paper to put in brief presupposes the center and the states respectively to be independent in their sphere, without interfering in each other's jurisdiction.¹⁹⁴ Coordinate federalism implies the absence of any formal subordination of the members of the federation to the center.¹⁹⁵ This principle fits the definition of K.C. Wheare, which states that, "the method of dividing powers so that the general and the regional governments are each within a sphere, co-ordinate and independent."¹⁹⁶ Cooperative federalism is the second stage of federalism, shown in the recent developments in America, Canada, and Australia.¹⁹⁷ The main focus of cooperative federalism is not to erode the essential principle of a dual government with a shared and self-rule coordinate and independent

¹⁹³ Goffery Sawyer; Modern Federalism (1969) p.65

¹⁹⁴ Ibid

¹⁹⁵ Ibid p 123

¹⁹⁶ K.C. Wheare., Federal Government P 119

¹⁹⁷ Supra note 130 page 122

in their constitutional limits. However in the modern global world, there are many situations that demands global and domestic cooperation to address the interests and the sovereignty of the nation. In the Ethiopian situation, there is no clear provision that talks about cooperative federalism, which also applies to the judicial structure of Ethiopia. However, the overall arrangement and the Preamble of the Constitution, which states the conviction of the nation's nationalities and people to build one political community and one political economy, show that Ethiopian federalism is based on coordination and cooperation.¹⁹⁸ Hence it will not be out of the above stated reality but it will be discussed in detail in relation to the arrangement of the federal judiciary.

The third stage of federalism is organic federalism which is based on the principle that a federal system which the center has extensive power gives a strong lead to states in the most important areas of their individual and cooperative activities. A federation in fact says Watt "have been created in three different ways. One is the aggregation of formerly separate units. The United States, Switzerland, and Australia are classic examples. A second pattern has been through devolution from a previous unitary regime. Examples of this pattern are Belgium, Germany, Nigeria and Spain, A third pattern has been the combination of the above two Canada and India are Examples. Ethiopia is included in the second type (the view of the writer)

The emphasis on the nature of federalism is simply to indicate that although the nature of the federal system of a country can vary from one scholar to another, the reality is that federalism is the outcome of historical conditions, rather than of theoretical devices designed by man.. The federal constitutions are generally products of history, determined by socio-economic and political conditions and compulsions. Therefore, features of a federal system of any country indicate the existence of its historical background, s socio-economic and political conditions and

¹⁹⁸ Supra note 190 P. 65. See also the preamble of the FDRE Constitution

compulsions. The federal system of each country has to be examined with the country's historical conditions in mind. With regard to importance of historical conditions that forces governments to opt federalism Shrick Santhanam, a prominent member of the Indian Constituent Assembly, notes that "There are many federal systems in the world, but each federal system differs from others owing to the different historical backgrounds. Therefore it is necessary that we should view any federalism from its historical back ground."¹⁹⁹ This assertion implies that one form of federal government is not mandatory, except for the basic or essential elements of federalism that make it different from other government systems. The historical background of Ethiopian federalism and the nature of its judicial structure is also based on its overall history that is to change the overall impediments of the unitary system and to build a federal system that results transformation in the country..

3.1.4 ESSENTIAL FEATURES OF FEDERALISM

In our previous discussion we have observed federal governments differ because of their history, economy, society and culture of the nation and the question they intend to address by introducing federalism. However, if any government is to be classified as a federal government, according to Marriati, Wheare and Finer they have to incorporate certain essential elements.²⁰⁰

¹⁹⁹ K.Sanathanam, Union State Relation in India (1960)p.2

²⁰⁰ The existence of two sets of government one central and other regional;

- (i) A precise distribution of powers (legislative, executive, judiciary) between the center and the units;
- (ii) A constitution which is the result of a deliberate act of construction
- (iii) The supremacy of the constitution;
- (iv) The constitution having a written and rigid character;
- (v) The concept of limited and constitutional government
- (vi) Some arrangement to settle disputes arising amongst the units or between the centre and constituent unit;
- (vii) Some stipulation regarding the form of government of the constituent;
- (viii) Some provision regarding the representation of constituent units in the federal parliament and
- (ix) Some provisions to safeguard the rights of constituent units and the distribution of powers.

Finer: The theory and practice of modern government, Wehare: Modern Constitution

Dicey advocates that a constitution should not only be written, but also be rigid. Dicey says that, “A written constitution is not logically required by the federal principle, but it is a practical necessity”²⁰¹ Dicey argues that; to avoid inconveniences and build trust among the members of the union, the federal constitution has to be written and rigid. He also adds that besides being written and rigid, it is desirable for the constitution to be the supreme law of the land. This ensures that the terms of agreement are accepted as binding by the central and regional governments. Hence, the federal government must inevitably be a limited and constitutional government. The provisions relating to the distribution of powers and the rights of constituent units should, in particular, be difficult to amend.²⁰²

Thomas O. Hueglin and Alan Fenna shares Dicey’s view, stating that, “Since it provides a legal point of references for the division of powers as agreed to among the constituent members of a federation, a codified (written) Constitution is an essential part of the federal system.”²⁰³ In addition to the above essential elements stated by different scholars, examining the classical federalism of the USA as an example is important. The USA has a federal form of government. K.C.Wheare argues that the Constitution of the United States has all of the features that are essential for a federal government: a division of power between the federation and the states, which is a dual form of government; a constitution that is not only written, but also rigid; supremacy of the constitution; an independent judiciary; a bicameral federal legislature (congress consisting of the House of Representatives and the Senate); equal representation of the states in the upper house of the congress(the Senate) and dual citizenship.²⁰⁴ The Ethiopian Federalism embodies the above stated essential features of federalism except the controversy on the existence

²⁰¹ Dicey : Introduction to the study of the law of Constitutions p 142

²⁰² Ibid

²⁰³ Thomas O. Hueglin and Alan Fenna : Comparative Federalism P42

²⁰⁴ Supra Note 5 P.91

of dual judicial structure and judicial review which is subject to debate and that will be discussed in this research.

Daniel Elazar has summarized the characteristics of federalism with a number of propositions.²⁰⁵ However, Watts also argues that for the state to be federal, it is not necessary for the constitution to adopt the federal principle completely. It is enough if the basic federal principle is the predominant principle in the constitution.²⁰⁶

To conclude in the adoption of federalism all countries might have their own driving force that is to be discussed in the following subtopic however all incorporate dominant essential features that has to be found in one federal system to be classified as federal keeping their own unique features that goes with their historical background. This works also to the Ethiopian federalism as a whole and to the judicial system in particular that is discussed in the subtopic of this chapter. The working of the Ethiopian federal judiciary is also analyzed based on the above principles with its practical application its challenges and impacts.

3.1.5 GROUNDS FOR NATIONS TO ADOPT FEDERALISM

Watts and other scholars argue that countries of the world are not expected to share a single form of federal arrangements. Instead, in solving their own peculiar needs and challenges, they tend to adopt a structure that best fits them. According to Watts, there is no single ideal or pure form of federalism.²⁰⁷

Various theorists have written different conditions under which the federal system of government is chosen by different nations.

²⁰⁵Elazar, Federalism , 2-7 and Daniel J Elazar, ed., Federal Systems of the world,2nd ed. (harlow; Longman group, 1994), pxvi at least two orders of government, a formal constitutional division of power and allocation of revenue resources between the two orders of government ensuring some areas of genuine autonomy for each other, a supreme written Constitution not unilaterally amenable and requiring the consent of amendment, an umpire (in the forms of courts, provision for referendum, or an upper house with special powers), process and institutions to facilitate intergovernmental collaboration for those areas where governmental responsibilities are shared or inevitably overlap.

²⁰⁶ Supra not at 190

²⁰⁷ Ronald Watts: Comparing Federal System,2nd edition Montreal MC Gill Queen's University Press,(1999)

K.C. Wheare, for example, has mentioned six conditions as the reason why different countries adopt federalism.²⁰⁸ R.W. Deutsch and his collaborators enumerate nine conditions as the basis of a federal government.²⁰⁹ Some scholars also emphasize two or three more conditions to satisfy the proper functioning of federalism. According to Mill, for properly functioning federalism, “There should not be any one state so much more powerful than the rest as to be capable of using its strength with many of the combined.”²¹⁰ Second, a good party system is of primary importance in the organization of federalism.²¹¹ Third, the establishment of a powerful second chamber giving equal representation to the component states is necessary in order:

- i) To check the swallowing tendency of the central government
- ii) To check the usurpation of power by more populous states and
- iii) To safeguard the rights and interests of smaller states in matters falling within the jurisdiction of the central government.²¹²

The famous scholar Watts also states five reasons for states to adopt federalism.²¹³

²⁰⁸ Supra note at 196

A sense of militarily in security and the consequent need for common defense
 A desire to be independent of foreign powers for which un win is necessity
 A hope of economic advantage from un win
 Geographical neighborhood
 Similarity of political institutions

²⁰⁹ W Deutsch: Political Community in the North Atlantic Area (1957) p.55

- a) Mutual compatibility of main values,
- b) A distinctive way of life
- c) expectations of stronger economic ties or gains;
- d) A marked increase in political and administrative capabilities of at least some participating units.
- e) Unbroken links of social communications, both geographically, between territories and sociologically, between different social strata.
- f) A broadening of the political life
- g) Mobility of persons at least among the politically relevant strata; and
- h) A multiplicity of ranges of communications and transactions
- i) Superior economic growth on the part at least some participating units;

²¹⁰ J.S. Mill: Utilitarianism Liberty and Representative

²¹¹ J.S. Mill., Utilitarianism Liberty and representative government, 1964 ,P.365

²¹² U.N.ShuklaP: “Federalism and Parliamentary Government” Journal of constitutional and parliamentary studies vol.2,1968,pp,47-51

²¹³ Ronald Watts L., Comparing Constitutions 3rd edition P4-6 First the pressure on modern development in transportation social communications, technology and industrial organization, this again arises the desire for progress a rising standards of living social justice the desire for smaller, self governing political units has arisen from the desires to make governments more responsible to the individual citizen and to give expression to primary group attachment linguistic and cultural ties religious connections historical traditions and social practice.

- The second reason says Watt, Global communications and consumer ship have awakened desire in the smallest and most remote villages around the world for access to the global market place of powers and service. As a result, government have been faced increasingly with the

According to Watts, the federal idea is now more popular internationally than at any time in history. Taking, as an example, Ethiopia is one of the countries that recently adopted federalism that can substantiate Watts' assertion.

There are other scholars who evaluate the desire to have a federal system from other perspectives. Some scholars admit that federal states in most cases are the result of compromise among competing ethnicities; the compromise is usually about different cultural interests such as language, religion or generally distinct cultural histories. In these cases of cultural federalism, the motivation for federalism is the desire to build a strong union without giving up regional cultural autonomy.²¹⁴

On the other hand, some federal systems form when an existing large polity is divided into various subunits that enjoy sovereignty over certain policy areas. This kind of federalism is an approach used to cope with ethnic divisions, and it is a strategy used to save disintegrating unitary states.²¹⁵ Here Ethiopian federalism can be mentioned as an example. As discussed above, different nations are not expected to share a single form of federal arrangement. However, this does not mean that they do not have some basic elements in common.

Therefore, some of the basic essential elements that the Ethiopian federal government shares is examined, bearing in mind the unique features relating to the historical circumstances. Since the topic of this dissertation, is the workings of the federal judiciary, the essential features of judicial federalism, is discussed as a sub topic of this chapter.

desires of their people to be both global consumer and local citizens at the same time in such as context federalism with its different interacting levels of government has provided away of mediating the variety of global and local citizen preferences.

- The third idea according to Watt is the spread of market based economics is increasing socio economic conditions conducive to support federal idea.
- The fourth is related to changes in technology which generated new and more federal models of industrial organization with decentralized and flattened hierarchies involving non-centralized interactive network.
- The fifth is the increasing public attention, especially in Europe has been given to the principle of subsidiary, the notion that a "higher" political body should take up only those tasks that cannot be accomplished by the "lower" political bodies themselves.

²¹⁴Thomas O.Hueglin; conflict resolution in an emerging multilateral world, Curtin University,(1999) Western Australia.

²¹⁵Supra note at 117.

3.1.6 JUDICIAL FEDERALISM ITS CONCEPT AND DEFINITION

Judicial federalism is a concept, which ascertains whether all essential features of federal principles that exist in a federal government do exist in the judicial structure of a federal government.

One of the government structures is the judiciary, which is expected to exist in the center and the states, in line with principle of the division of government organs in the center and the states. Especially in a federal system, where the division of power is very delicate and prone to diversified conflicts, the existence of a fair, impartial and independent judiciary is indispensable for the federal system to have a sustainable and enduring future. How this works in the Ethiopian Federalism is the issue that is discussed in this research.

K.C. Wheare asserts, “Principles of federalism to be tacitly applied one would look for a dual court system to be established in a federal system, one level of courts to apply and interpret the law of the national government, and another to enforce and interpret the law of each state.”²¹⁶ He continues to add, “State courts be left quite independent in all federated state matters and decide the interpretation of the regional state constitution, and all state legislation nor does any appeal lodged from them to the federal courts.”²¹⁷ This is the gap found in the Ethiopian federal judiciary which is a point of controversy.

From the assertions of K.C. Wheare, since the basic principle of federalism is to form a dual government, the power should also be based on the federal principle that there must be legislative, executive and judicial bodies in both the center and the states. Not only should such a division exist, but also power should be divided where the federal courts decide federal matters and state courts decide state matters. Without the proper functioning of such a judiciary, a strong

²¹⁶ Supra note at 109 p.68

²¹⁷ ibid

federal system cannot exist. Therefore, Does the Ethiopia federalism satisfy the above assertion is the issue that is to be discussed in this dissertation so that to conclude there is judicial federalism?

The separate jurisdictions of courts originated from the principle of constitutional division of power between the national government and federal states. The devolution of power between federal and state courts is based on the essential principle of federalism: shared rule and self-rule. This principle implies that the federal courts should entertain issues of national interest and state courts should address issues of state interest. This enables the regional states to preserve and promote their language and culture, and to effectively handle local disputes with accessibility and without a language barrier. Federal government courts, therefore, should focus on national concerns in order to achieve one economic community, applying uniform commercial transactions and preserving peace and security of the nation. Meanwhile, regional state courts should provide local solutions to local problems and conflicts in order to enhance local pluralism and secure their local sovereignty. Having separate jurisdictions of courts in the center and states enables the division of issues by classifying them into federal matters and state matters in each respective jurisdiction without interference of federal government. How this works in the federal judicial structure of Ethiopia will be discussed in detail in the coming chapters. Today there are variations in the organization of courts in federal systems around the world. Whichever form it has, “Organization of the judiciary and distribution of power between national and State courts is referred for some writers as federal judicial structure or judicial federalism.”²¹⁸ Judicial federalism is also considered by others to be “a term that encompasses

²¹⁸ Supra note at 119

both how federal courts police the boundaries between federal and state power and how federal and state courts inter act.”²¹⁹

The configuration of courts and their operation materially affects the federal system in different ways, particularly with regard to the tendencies (centrifugal or centripetal) of federalism and their role in shaping federalism.²²⁰ The dynamics of judicial federalism, especially in the context of the dual court configuration, raises a number of important questions.

The following are some of the questions from John W. Winkle:²²¹

...To what extent, if any, the configuration courts affect litigants? Do inter system conflicts disrupt judicial administration and there by impair citizen’s confidence in the courts? ... Does the increasing trend towards centralization and the dissolution of state political autonomy have concomitant implication for judicial equilibrium? How long judicial resource with stand the demands imposed by separate court system? Can policies be formulated to minimize friction and maximize co-ordination?

It is obvious that these questions are some of the issues related to judicial federalism. Each and every federal polity has issues related to its unique nature. Not all of these questions can be answered, but they illustrate how judicial federalism plays an important role between the center and states when federalism is adopted as a system. How are those questions answered in the Ethiopian federal judiciary is addressed in this research.

²¹⁹ Elazar Daniel, American Federalism:” A view from the States” 3rd ed.(1984)

²²⁰ Riker William :Federalism origin, operation (1989)

²²¹ JoneW.Winkle,” Dimension of Judicial federalism” Annals of the American Academy of political and social science ,vol 416, (1974)

3.2 ORGANIZATION OF COURTS IN DIFFERENT FEDERAL COUNTRIES

/COMPARATIVE/

This part of the paper attempts to explore the judicial structures in different federal countries before directly discussing the Ethiopian Federal judiciary and its structure.

In Germany, the court system is unified. All intermediate appellate courts are state courts, whereas all courts of final appeal are federal.²²² Federal appellate review in Germany promotes uniformity, even in areas outside of the legislative authority of the federation.²²³ All judicial power not given to the federal courts is reserved for state courts.²²⁴

The basic law expressly gives federal courts jurisdiction for matters like military, civil service and intellectual property.²²⁵ Although the organization and the jurisdiction are different in the court system in Canada,²²⁶ it is unified, like in Germany,²²⁷ at the apex by federal court.

The structure of the court system in these countries can be conceptualized as a simple pyramid. The Indian Constitution sets up a federal judiciary consisting only of the Supreme Court.²²⁸ The

Constitution also sets out in details the organization of state high courts. Although the organization of subordinate courts is left to states, state high courts are given authority to supervise all courts under its jurisdiction to assure the integrated nature of the system.²²⁹ The Supreme Court of India is the ultimate interpreter of the Constitution and the laws of the land.²³⁰

There is a single integrated court system for both the union and the states, and at the apex of the

²²² "Rethinking federalism" Overview of Current debates with some reflections in Indian Context; Economic and political weekly, (2000)

²²³ Ibid

²²⁴ Ibid

²²⁵ The German Basic law David Currie ,The Constitution of the federal Republic of Germany

²²⁶ Louis University Law School, Legal system of Canada ,St ,Louis University Law Journal (1966)

²²⁷ Supra not 232

²²⁸ Indian Constitution Art 227 and 233

²²⁹ Ibid

²⁴³ Ibid

entire system stands the Supreme Court of India.²³¹ Below the Supreme Court of India is the high court of each state and under the high court there is a hierarchy of other subordinate courts.²³²

The Nigerian experience is different from the aforementioned countries. The federal judiciary has three tiers of courts: The Supreme Court of Nigeria, the Federal Court of Appeal and the Federal High Court.²³³ The Supreme Court of Nigeria is the final court of appeal for both state and federal matters. It also has original and exclusive jurisdiction over disputes between the states and the federal government.²³⁴ The Federal Court of Appeal is the second-highest court in the hierarchy of the Nigerian judicial structure. It hears appeals from the Federal High Court, the state's High Courts, and the state's Sheria courts of appeal, customary courts of appeal and from tribunals and other courts of law established by the National Assembly.²³⁵ The Federal High Court and the state High Courts are the lowest courts in the Nigerian federal system. They have concurrent jurisdiction over certain cases.²³⁶ The state high courts have unlimited jurisdiction to hear and to decide any civil and criminal cases, as well as appellate jurisdiction from all courts except religious ones.²³⁷ The Federal High Court, however, has limited jurisdiction over matters connected with or pertaining to the revenue of the federal government, as well as such matters as may be prescribed by the National Assembly.²³⁸ The Nigerian judiciary, though it has a dual court nature in the hierarchy of the court structure at the intermediate and final levels of appeal, is unified unlike other federal arrangements.

²³¹ Ibid

²³² Ibid

²⁴⁶ See Nigerian Constitution

²³⁴ Ibid

²³⁵ Ibid

²³⁶ Ibid

²³⁷ Ibid

²³⁸ Ibid

The United States has a different judicial structure that is a dual court system.²³⁹ The constitution provides that judicial power shall be vested in one Supreme Court (US constitution Article Three) and in such inferior courts as Congress may ordain and establish.²⁴⁰ The federal courts have three lower tiers: district courts, circuit courts and courts of appeal. The Federal Supreme Court is at the apex of the federal court structure, and its jurisdiction is confined to cases arising out of the federal relationship or those relating to the constitutional validity of laws and treaties.²⁴¹

At state level, each state has its own judiciary. No two states have a system that is exactly the same.²⁴² The highest court at state level has ultimate authority over state matters. Most states have a three-tiered court system.²⁴³ While the federal courts apply and interpret federal laws, state courts interpret and apply their respective state laws. If the remedies at state level are exhausted and substantial federal law question is present, cases can go to the Federal Supreme Court.²⁴⁴ This is where the two court systems come together, at the level of the Federal Supreme Court.

The existence of the dual court system in a federal system that is coordinate and independent is the basic principle even though this varies from country to country. Therefore, those countries with dual court systems should structure their courts to be coordinate and independent so that judicial federalism can work effectively in line with the essential principle of federalism. This basic principle of judicial federalism to be fulfilled it has not to be only based on coordination and independence of the center and the regions but it has to be neither subordinate.²⁴⁵ Since there is no subordination between them there is either powers balance.²⁴⁶

²³⁹ USA Constitution Art 3 see also Daniel John Meador., American Courts, St. Paul, MINN. West Publishing Company 1991 Pp. 10ff

²⁴⁰ Ibid

²⁴¹ Ibid

²⁴² Ibid

²⁴³ Ibid

²⁴⁴ See O' Hagan "The judicial branch of State Government People process and Politics, 2006

²⁴⁵ Watts R., New Federations, Experience in the Common Wealth, 1966, p.10

²⁴⁶ Geoffrey Sawyer, Modern Federalism, 1969 pp1-2

However, this doesn't mean that all federal systems are the same. There are indeed, "as many types of federal systems as there are federal states, not two of them exactly alike."²⁴⁷ There are basically two reasons for such diversity. First, each federal system was created at "Different times from every other, under different circumstances, by different leaders under the influence of different ideas to serve the special as well as the general needs of a different people." This idea is supported by Livingston Stating as follows:²⁴⁸

The essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces – economic, social, political, cultural, that have made the outward forms of federalism necessary... The essence of federalism lies not in the constitutional or institutional structure but in the society itself. Federal Government is a device of by which the federal qualities of the society are articulated and protected.

Even if power is divided between the center and state, usually into the legislative, executive and judicial branches found in the center and states where each has their own separate legal existence and their own powers, functions, duties and rights, since none of them are absolutely independent of the others, interdependence and cooperation between the various organs is inevitable.²⁴⁹ How well the various organs work together at any given time in their operations provides a sort of index of how well the government as a whole is functioning.

The idea of judicial federalism should be addressed given the above reality. Judicial federalism, in coordinate, cooperative or organic federalism, does not stand in isolation, even though it has to have an independent sphere. There has to be cooperation with other organs of the government and with its vertical and horizontal counter parts within the judiciary. Of course, this will be

²⁴⁷D.Anckar, Lilliput, Federalism: Profiles and Variets "Regional and Federal Studies,13.3 (2003):107-24

²⁴⁸ K.C. Whare, Federal Government (London: Oxford University Press, 1946) ch.3 See also his "Federalism and the Making of Nations," A.W.Macmahon,ed., Federalism mature and emergent (New York: Russell and Russell,1955),pp. 28-43 See also W.S. Livingstone, Federalism and Constitutional Change (Oxford: Clarendon Press, 1956), pp1-2

²⁴⁹Ibid

discussed in detail in relation to the Ethiopian federal judicial structure which is of course highly debatable that is not addressed up to date.

In any case, courts are one of the basic organs of every government, whether unitary or federal. Especially in a federal system which accommodates diversity within unity; where diversified interests are entertained; and where those interests ignite diversified challenges, conflicts and disputes, the existence of a strong and independent judiciary in the center and states is very vital. Without it, the federal government cannot remain strong and sustainable. To render fair, speedy and impartial judgment and to have an accessible, well-structured and organized judiciary with a strong structure in the center and the states is indispensable in a federal form of government. These courts should be independent in each of their spheres, institutionally and functionally. The United States Constitution is the best example of the dual court system, which still functions as a guardian of the society, as an interpreter of the constitution and as an institution of dispute resolution that emanates from different corners. As De Tocqueville observed with considerable prescience of the United States in the mid nineteenth century, “Scarcely any political question arises that is not resolved sooner or later, into judicial question”²⁵⁰. Whatever the classification might be judicial federalism or not, the structure of federal courts cannot be absolutely identical although some essential elements remain the same. Since the federal system of each country differs, the structure and the jurisdiction of courts in a federal system also vary from country to country. In some federal countries like India, there is a vertical relationship between the Federal Supreme Court and state high courts according to Ramswamy.

The Supreme Court of India will, under terms of the constitution, exercise a very wide jurisdiction. It will not only deal with purely constitutional matters but will also function as a

²⁵⁰ De Tscqueville, Democracy in America 1956. The case of Al Gore and Bush election was finally resolved by the court.

court of appeal in civil cases from state high courts in ordinary litigation”²⁵¹In India, there is no dual court system or parallel structure. There are some writers like K.C Wheare who say this structure goes against judicial federalism.²⁵² There are also some scholars who argue that federal systems must not be carbon copies of American federalism. As far as it serves the mission of that country, there is no reason why the Indian judicial structure cannot be classified as judicial federalism.²⁵³The next chapter deals in relation to the above assertions of different scholars’ to analyze where to classify the Ethiopian federal judiciary and its structure.

In Switzerland, for example, there is a tendency that a cantonal decision contrary to the federal law is deemed null and void. If the court contravenes the federal constitution, the appeal is not to the court of cassation in nullity, but to an appellate court with ordinary jurisdiction.²⁵⁴ Some federal countries have separate jurisdiction between the federal government and federated states. The experiences of the Supreme Courts of the USA and Germany show that revision by appeal of state matters is not vested in the Supreme Courts of the federal government. “American supreme court may not take case if the courts judgment can be sustained on an independent ground of state law.”²⁵⁵

According to Wright, the Constitution of the USA does not in clear terms empower the Supreme Court to review judgments of state courts. Hence, the Supreme Court can review state court decisions only if a federal question is involved.²⁵⁶

American federal courts are courts of limited jurisdiction, while state courts have general jurisdiction. American courts are structured in a dual system and have parallel systems. Even though there is no uniform court structure in most federal systems, for there to be judicial

²⁵¹Ramas,Wamy,M: The constitution of India republic a brief expository survey p.5

²⁵²Supra note248

²⁵³Supra note 198

²⁵⁴Huges Christopher :The federal Constitution Of Switzerland and Commentary.(1954) p.144

²⁵⁵Abraham Henery, The Judicial Process (1986) p.181

²⁵⁶Wright Alan : Law Of Federal Courts (1994) p 778,790

federalism in a country with a federal system, federal courts would not handle federated state jurisdictions. The Ethiopian federal judicial structure seems as if it creates a dual court system at first glance. This will be analyzed by looking at the Constitution and assessing the strengths and weaknesses of the overall Ethiopian judicial structure. Ethiopia has enshrined a Court system that exists in the Center and States with three tiers each in its constitution and this is dealt in depth in the coming chapter.²⁵⁷

The other issue in countries with a federal system is the power of courts within judicial federalism to umpire constitutional disputes. The Federal Supreme courts of the USA, India, Canada, Austria and Malaysia are vested with the power of constitutional interpretation. In Switzerland, the Supreme Court of the federal government checks cantonal laws, and whether or not they are in line with the federal constitution. In Germany, Belgium and Spain, constitutional courts moderate constitutional disputes.²⁵⁸ In Ethiopia, the Supreme Court of the federal government has no power to adjudicate constitutional disputes. This power is given to the House of Federation, which is the second chamber of the house.²⁵⁹ Why this is the Ethiopian system is discussed in the fifth chapter.

Considering all of the differences that can exist among different federal systems, the existence of a well-organized and independent judicial system is imperative in every federal government. The prominence of a strong judiciary with a strong judicial structure to a nation is illuminated at different times by different documents and international instruments. The Magna Carta²⁶⁰ insisted:

No free man shall be taken or imprisoned or diseased, or out lawed his rights or possessions, or outlawed or exiled or in any way destroyed, nor will we go upon him way, Nor

²⁵⁷ See art 79 of the FDRE Constitution

²⁵⁸ See the German Constitution

²⁵⁹ See the FDRE Constitution Art 62 and Art 84.

²⁶⁰ Magna Carta (1215) Arc 39

will be sent against him with force against him, except by Lawful judgment of his peers or by the law of the land. It also declares that ²⁶¹“To none will we sell, to none will we deny or delay, right or justice”

From the reading of MagnaCarta, access to justice utmost requires a system of courts or their equivalent to which a person with sufficient interest in the matter may make a legitimate claim. Once access to courts is gained the litigants require a fair trial to be conducted before an independent judiciary as is said “Justice must not only be done but seen to be done.” This builds public, Confidence on the impartiality of the judicial structure.

However approximately 60% of the world’s population lives without any access to, or interaction with, a formal legal system of any kind.²⁶²The UNDP report on legal empowerment of the poor stated that in the determination of the civil obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.²⁶³

The Universal Declaration of Human Rights declares that “everyone has the right to an effective remedy by competent national tribunals for acts violating the fundamental rights granted him by his constitution or by law”.²⁶⁴

The International Covenant on Civil and Political Rights states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit of law

²⁶¹Ibid Art 40

²⁶² Ibid Art 40

²⁶³ United Nations Development (UNDP) making the law work for everyone, Report of the Commission on Legal Empowerment of the poor(2008) [http://www.unpol.org/file/making the law for everyone pdf](http://www.unpol.org/file/making%20the%20law%20for%20everyone.pdf).(accessed 16 April/2016

²⁶⁴ Art 8 of the Universal Declaration of Human Rights adopted and proclaimed by the UN General Assembly in resolution 217 A(111) of 10 December 1948 at Paris

every one shall be entitled to a fair and public hearing of a competent, independent and impartial tribunal established by law.²⁶⁵

The Preamble of the Convention on Political, Economic, Social, and Cultural rights reveals that “those rights are indispensable for the promotion of inherent dignity and to the equal and inalienable rights of all members of the human family in the foundation of freedom, justice and peace in the world”.²⁶⁶

The African Charter on Human and Peoples Rights states that

Every person has the right to a hearing, with certain guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.²⁶⁷

A basic principle on the Independent of Judiciary declares that “the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governments and other institutions to respect and observe the independence of judiciary”.²⁶⁸

²⁶⁵ Art 14 of International Covenant on Civil and Political Rights adopted by the UN General Assembly in resolution 2200 A (xxi) of 16 December 1966 at New York opened for signature, and accession on 19 December 1966 entered into force on 23 March 1976.

²⁶⁶ See International Covenant on Economic, Social, And Cultural Rights adopted by the UN General Assembly in resolution 2200 A (xxi) of 16 December 1966 at New York opened for signature, ratification and accession on 1966 entered into force on 3 January 1976. See also Art 5 of the International Convention on the Elimination of all Forms of Racial Discrimination adopted by the UN General Assembly in resolution 2106 A (xx) of 21 December 1965 at New York opened for signature ratification and accession on 7 March 1966 entered into force on January 1969. See also Art 15 of the Convention on The elimination of All Forms of Discrimination Against Women adopted by the UN General assembly in resolution 34/ 180 of December 1979 at New York opened for signature, ratification, and accession on 18 December 1979 entered into force on 3 September 1981 see also Art 2 of the Convention Against Torture And Other Cruel , Inhuman or Degrading Treatment or Punishment opened for signature, ratification, and accession on 10 December 1984 entered into force on 26 June 1987. See also Article 40 of the Convention on The Right of The Child adopted by the UN General assembly in resolution 44/ 25 of 20 November 1989 at New York opened for signature and ratification on 26 January 1990. See also the Body of Principles For The Protection of All Persons Under any Form of Detention or Imprisonment adopted by the UN General Assembly in resolution 43/173 on 9 December 1988 at New York

²⁶⁷ See Art 7 of African Charter On Human and Peoples Rights adopted 27 June 1981 by the 18th Assembly of Heads of State of the Organization of African Unity at Nairobi opened for signature, ratification, and accession on 27 June 1981 entered into force on 21 October 1986.

²⁶⁸ See, Basic Principles on the independence of the Judiciary adopted at the seventh UN Congress on the prevention of crime and the treatment of offenders on 26 August 6 September 1985 at Milan(A/CONF.121/22/Rev.1) endorsed by the UN General Assembly in resolution 40/32 of 29 November 1985 and resolution 40/146 of 13 December 1985

This principle incorporates the following issues: a/ independence of judiciary, b/freedom of expression and association, qualifications, selection, and training, d, conditions of service and tenure, e, professional secrecy and immunity f, discipline, suspension and removal.

The American Declaration of the Rights and Duties of Men²⁶⁹ declares:

Every person may resort to the courts to ensure respect for his legal rights. There should be likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights” And the American Convention On Human Right states that “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, fiscal, or any other nature.

The European Convention on Human Rights stipulates that, “In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within an independent and impartial tribunal established by law.”²⁷⁰

All of the above conventions and reports support that establishing a strong judiciary that guarantees fair trials is crucial to a unitary or federal government without distinction. However, the delicate nature of federalism presupposes the existence of a strong federal judiciary with a strong structure which is highly mandatory to enforce the rights of citizens and to resolve the disputes that come before the courts, which emanate from the wider transaction of federalism. Additionally, the courts assure that other organs of the government discharge their constitutional obligations in the center and the states without abusing their power. The existence of a strong judiciary means a judiciary that is accessible, speedy, efficient, effective, independent and fair,

²⁶⁹ See Art 18 of the American Declaration of The Rights and Duties Of Men adopted by the Ninth International Conference of American States, on 2 May 1948 in Bogota, Colombia. See also Art 8 of the American Convention On Human rights adopted by the Inter- American Specialized Conference On Human Rights on 22 November 1969 opened for signature, ratification and accession on 22 November 1969 entered into force on 18 July 1978

²⁷⁰ European Convention for the Protection of Human Rights and fundamental freedoms as amended by protocol No-4 signed by members of the council of European 4 November 1950 at Rome opened for signature and Ratification on 4 November 1950 entered into force on 3 September 1953

proceedings that are open to the public (except in unique circumstances) and judgments that are properly reasoned, in order to demonstrate clearly that the court has applied only the law and its spirit to the matters, not influenced by anything else. According to Burgess “Elective government must be party government--- majority government, and unless the domain of individual member is protected by an independent, un political department, such government degenerates into party absolutism and then into Caesarism²⁷¹Therefore the proper discharge of the constitutional duty of judges and transparent demonstrations of this ensure credibility on the part of the federal system and the judiciary.²⁷²

The above propositions and international instruments are emphasized by S.A Palekar, who says that “the existence of a well-organized, effective and efficient judiciary is imperative in every democratic system. Without it, the rights and liberties of the people of the country can never be protected from possible violators by any arbitrary exercise of the nation”.²⁷³This necessity becomes a sine qua non if the democratic system has a federal constitution. With a constitution, an independent and well-organized judiciary is needed, both for the interpretation of the written Constitution and for the settlement of disputes.²⁷⁴

Now the next discussion is to examine the historical background of Ethiopian federalism and its essential features, as well as the organizational structure of the judiciary.

3.3 EVOLUTION OF FEDERAL IDEA IN ETHIOPIA

3.3.1 FEDERAL IDEA IN ETHIOPIA

The federal idea in Ethiopia can be traced back to the 1991 period of the Transitional Charter. The Charter, in its preamble, declared the “starting of a new chapter in the Ethiopian

²⁷¹ Supra note 5 page 90

²⁷² Ibid

²⁷³ Supra note 5 p.177ff

²⁷⁴ Ibid

history in which freedom, equal rights and self-determination of all the peoples, shall be the governing principles of political, economic and social life.” Article 2 of the Charter affirmed the right of nations and nationalities to self-determination.²⁷⁵ Article 2(b) guaranteed “each nation, nationality and people the right to administer its own affairs within its own defined territory and effectively participate in the central government on the basis of freedom, and fair and proper representation.” This included, for the first time, two parallel court systems in the Center and the states.²⁷⁶ This was a paradigm shift, from that of highly centralized court structure of previous regimes to a decentralized constitutionally guaranteed court structure. Therefore, although the Transitional Charter laIbid the foundation for federalism, the 1995 FDRE Constitution is the one that clearly introduce the Ethiopia federal system.²⁷⁷ According to the Constitution this federal system will not be touched even at the time of emergency.²⁷⁸ The Ethiopian Constitution of 1995 was clearly a departure from all previous Ethiopian Constitutions. The state it envisages and the government it establishes are different both in form and content.²⁷⁹ All previous Constitutions provided for a unitary and highly centralized form of government. For example, the Constitution of 1931, although only exercised in the country for a short period because of the war between Ethiopia and Italy,²⁸⁰ served as an instrument for securing national unity under the centralized rule of the Emperor and modernizing the state structure.²⁸¹ The 1931 Constitution was not aimed at realizing constitutionalism, rule of law or democracy, but rather at consolidating the power of the Emperor. The Constitution neither included provisions for human rights nor established a

²⁷⁵Transitional Charter of Ethiopia1991

²⁷⁶Ibid

²⁷⁷The FDRE Constitution in its Art 1 states that this Constitution establishes a Federal Democratic State Structure. Accordingly, the Ethiopian states shall be known as the Federal Democratic Republic of Ethiopia.

²⁷⁸ The FDRE Constitution in its Art 93(4,C) stipulates that “In the exercise of its emergency powers the council of Ministers cannot, however, suspend or limit the rights provided for in Articles1,18,25,andsub Articles1and 2 of Article 39of the constitution

²⁷⁹ FDRE Constitution Art 1, 45, 46

²⁸⁰ The Italian war stayed from !936-1945

²⁸¹See James C.N .Paul and Christopher Clapham Ethiopian Constitutional Development 1967 P74ff

representative legislature or an independent judicial system.²⁸² The modernizing element was highly manifested and developed by the 1955 Constitution, even if the main objective was to strengthen both centralization and the power of the Emperor. The 1987 Constitution strived to create a decentralization process by creating autonomous and administrative regions without changing the unitary system that had existed in the country for a long period of time. The 1995 Constitution provided for a federal system consisting of the nations, nationalities and peoples of Ethiopia, with a judicial structure in the center and the states of the federation. This was clearly stated by Dr. Fassil,

The nations, nationalities and peoples of Ethiopia have historically been denied their rights to self-determination. This was as true under the imperial regime as it was under the Marxist regime. The new Ethiopia is committed to redressing these historic wrongs, and to giving all its peoples the right to self-determination up to secession, to insure that the multi-cultural state remains in fact, there will be guarantees of individual and collective rights enshrined in a federal constitution.²⁸³

Edmond Keller and Lahra Smith²⁸⁴ also elaborated the above assertion of Dr.Fassil by stating that the framers of the federal Constitution were confronted with different options. Number one option was total denial of the existence of diversity and its political expression. Number two promoting Ethiopian nationality as an overarching ideology,²⁸⁵ the third was to promote Ethiopian nationality as a predominant principle. The fourth was to promote the right to self-determination as central. The final option was of course to promote Ethiopian nationalism, recognizing and permitting political expression and territorial self-rule for ethno-linguistic

²⁸²See the 1955 Revised Constitution of Ethiopia its preamble See the 1987 Derge Constitution

²⁸³Fassil Nahom : Constitutions For Nations of Nations Ethiopia Perspective

²⁸⁴Edmond: Keller and Lahra Smith: Obstacles to Implementing territorial decentralization; The first decade of Ethiopian Federalism.

²⁸⁵Ibid

communities. The last option was to promote unity with mutual respect and equality. From all those options they prefer federal system that creates a balance between the forces of unity and diversity.²⁸⁶

Although there are still differences of ideas propounded by different scholars,²⁸⁷ the federal choice in answering the age-old nationality question to avoid discrimination and inequality among the diverse nationalities of Ethiopia, as Dr. Fasil Nahom stated, can be seen as the best choice for the country. What the society expected was a constitutional order that, without sacrificing the fundamental values of the society, would propel it towards sustainable political and socio economic development in an orderly and peaceful fashion²⁸⁸

This seem why the Preamble of the Constitution did not start with the familiar, “We the people ...”, like that of the USA, India and others. It began with the words “We, the nations, nationalities and peoples of Ethiopia ...” This is not a Constitution that groups the Ethiopian citizens together as a people., “We the nations, nationalities and peoples ...” recognizes Ethiopia as a nation of nations. The federal Constitution of Ethiopia, therefore, necessarily becomes the Constitution of a nation nationalities and people. Chapter 2 of the Constitution deals with the fundamental principles of the Constitution, starting with the clear provision that “all sovereign power resides, in the nations, nationalities and peoples of Ethiopia.” Therefore, the Constitution is considered to be “an expression of their sovereignty.”²⁸⁹ As a concept, the federalism in Ethiopia is not territorial federalism but multinational federalism.²⁹⁰ Above all, the federal idea that was fully introduced by the 1995 Constitution of FDRE is expected a cure-all the evils that were facing the country. That being so, for the sake this research there is a question how much

²⁸⁶Ibid

²⁸⁷Supra note 296

²⁸⁸Ibid

²⁸⁹ See the Preamble of the FDRE Constitution See Art 8 of the FDRE Constitution in its Art 8 (2) states that “All sovereign power resides in the Nations, Nationalities and Peoples of Ethiopia.”

²⁹⁰ See Art 46(2) of the FDRE Constitution which states that “States shall be delimited on the basis of the settlement pattern, language identity, and consent .of the People concerned.

the federalism addresses the desire of the different nations, nationalities and peoples of Ethiopia for a strong judiciary, which they were fighting for. This, again, will be addressed in this dissertation. The essential features of Ethiopian federalism are discussed in brief before moving to the judicial structure.

3.3.2 ESSENTIAL FEATURES OF ETHIOPIAN FEDERALISM

Ethiopian federalism has incorporated some core essential features that are manifested in most governments with federal systems, as well as some unique features that will be discussed in dissertation. The main essential features are:

A.) Dual Form of Government

The Constitution of the FDRE establishes a dual form of government, consisting of the federal government and the member states. The Constitution calls them states;²⁹¹ there are nine member states and one self-governing city that are enumerated by the Constitution.²⁹²

The Constitution gives room for the States to establish their own States at any time under the procedure prescribed in the Constitution.²⁹³ This enables the State to devolve power and strengthen the local administration, and makes decentralization work down to the grassroots level, in order to maintain an accessible administration.

The federal government of Ethiopia is a parliamentary form of government, structured with legislative, executive, and judiciary institutions with a division of powers both in the center and the States.²⁹⁴ Apart from the structure mentioned above, the House of People's Representatives is the highest authority of the federal government. The people hold the House

²⁹¹See Art 46 and 47 of the FDRE Constitution

²⁹² The State of Tigray, The State of Afar, The State of Amhara, The State of Oromia, The State of Somalia, The state of BenshanguelGumuz, The State of Nations, Nationalities, and Peoples, The State of GambellaPeoles, The state of Harari People, Addis Ababa and Deredawa as to be administrated as federal cities.

²⁹³ See Art.47 (3) of the FDRE Constitution.

²⁹⁴ See Art.50(1) (2) of the FDRE Constitution

accountable. The State council is the highest organ of State authority. It is responsible to the people of the State.²⁹⁵

The other house is the House of Federation, which is the second chamber. Its main function, according to the Constitution, is to interpret the Constitution. The Constitution stipulates that the House has the power to interpret the Constitution. All constitutional disputes are decided by the House of Federation, and for legal advice, even though it is not binding, it organizes the Council of Constitutional Inquiry, which has eleven members.²⁹⁶ The constitution did not vest the power of constitutional review to the judiciary in which the Constitution is criticized this is review in examined in this dissertation as subtopic of chapter five.

The federal Constitution provides for the distribution of powers between the center and the states. This division of power under the FDRE Constitution is based on three categories: the power of the center, state power and concurrent power. As stated in to Art 52 of the FDREC “All powers not given expressly to the federal government alone or concurrently to the federal government and the states are reserved to the states.”²⁹⁷ Article 51 of the FDRE Constitution enumerates 21 provisions that are provided to the federal government. Article 52 enumerates items that are allotted to the member states. Article 98 contains three provisions that stipulate concurrent powers, mainly related to power of taxation. However, Solomon argues that “the power given to states to enact penal laws that are not covered by the federal legislature and the emergency power given to the center and states can also be considered as concurrent powers.”²⁹⁸ Although Article 80 talks about concurrent jurisdiction of courts, since the division of jurisdiction that has to exist between the center and State Courts is not is not clearly demarcated

²⁹⁵Ibid Art 50(3)

²⁹⁶Ibid Art.62cum Art.82 cum Art 84

²⁹⁷ Ibid Art.52

²⁹⁸See Solomon Nugussie: Fiscal Federalism in the Ethiopian Ethnic – based federal system 2008 p. ff

we cannot talk about the kinds of jurisdiction that exist as a concurrent power of the center and State courts.

According to Art 50/8/ of the Ethiopian Constitution, Ethiopian federalism is classified as coordinate federalism. The constitution states, “Federal and state powers are defined by this constitution. The States shall respect the powers of the federal government; the federal government shall likewise respect the powers of the State.”

The other power given to the States, similar to the Constitution of the USA, unlike India and some other federal countries, is that Article 52 of the Constitution vests member States with the power to enact and execute their own constitutions, as long as it does not violate the federal Constitution. Today, all nine regions have their own constitution, although they tend to be replica of the federal constitution, since there is no wide difference among the nine regional Constitutions.

The other important power given to member states is the right of the States to determine by law their respective working languages. Historically the official working language of the country which is Amharic was the working language of the country. States were deprived of using their mother tongue or any languages of their choice to use as their working language for those who do not know Amharic language were forced to use interpreters and this was a big challenge to those States who do not know Amharic. Now, Amharic is the working language of the federal government. The Constitution provides that “All Ethiopian languages shall enjoy equal state recognition.” In line with this, almost all regions have their own working languages today. For example, the working language of Tigray is Tigrigna, the working language of Oromia is Oromiffa, and the working language of Amhara is Amharic. Even if this has positive implications in promoting each state’s culture and identity, some believe that an official language

is necessary for smooth relations and transactions in the country. Amharic, as a language, had nothing to do with the domination of different languages and cultures; it was the ideology of the rulers that was problematic. The other point with regard to language is there are some scholars who argue that the languages of the large regions with large populations should be the official languages of the country, like that of some other federal countries of the world.²⁹⁹ According to the language principle of the Federal Constitution of Ethiopia the working language of the federal judiciary is Amharic and the working language of the State Courts is the working language of the States.

B.) MULTICULTURAL FEDERALISM

The constitution stipulates that: “The states shall be delimited on the basis of the settlement patterns, language, identity and consent of the peoples concerned.”³⁰⁰ The FDRE constitution is not based on territorial federalism; it is based on the nation’s nationalities and peoples. Also, Article 39 stipulates the right to self-determination, up to the point of secession. According to the drafters of the Constitution, unlike those in the USA, Australia, Canada and India, every nation, nationality and people in Ethiopia has the unconditional right to self-determination, including the right to secession.³⁰¹ Although it has been criticized, the founders of the Constitution believed that the right to self-determination guarantees and secures unity, peace and stability more than diversity. Diversity can only be dangerous to a system of unity within diversity when states lose confidence in the center, and when the center deprives them of their rights and subjugates them. This is a consequence of not having the guarantee of self-determination. This is a unique feature of the Ethiopian Constitution.³⁰² However, there are certain criticisms regarding the right to self-determination and the method applied in the division

²⁹⁹ Such as Oromiffa

³⁰⁰ FDRE Constitution Art 46/2/

³⁰¹ See Art.39 of the FDRE Constitution

³⁰² Ibid See also the debate of the constitutional assembly

of the units of the federal states. Since this is not the core issue of this paper, it is enough to highlight certain criticisms without going into detail.

One criticism bases its argument on the notion that secession under the principle of self-determination as envisioned in the U.N general assembly should apply only to those who are under the yoke of colonialism, subject to domination and exploitation, not to people of an independent country.³⁰³ AberaJemberre further argues against the principle of Art 39 enshrined in the 1995 FDRE constitution, which states that “Every nation, nationality and people in Ethiopia has an unconditional right to self-determination including the right to secession. “He said, “As long as all rights and freedoms are guaranteed to the people by the constitution and institutional protection of the same is provided there by, there is no justification for inclusion of an article in the constitution to provide for the so-called right of secession. A constitutional provision to this effect could serve as a pretext to disrupt the national unity and territorial integrity of the nation. It would also be a dangerous trend not only to Ethiopia but for other countries as well. No such provision is provided in the constitution of any democratic country.”³⁰⁴

The opponents of the criteria used for the division of units of the federal state argue that any territorial division, under either a unitary or federal state structure, should be based on considerations of economic development and administrative convenience rather than on ethnic and linguistic criteria. The criteria used to divide the territory of Ethiopia are ethnic origin and language. Even if the government claims that this division will ameliorate or prevent ethnic conflicts, many people feel that the actual effect will be to encourage ethnic chauvinism and tensions.

³⁰³ UN General Assembly Resolution 1514 (XV) of December 14,1960

³⁰⁴ Taken from an Article written by Abera Jemberre by the title called “The function and Development of Parliament in Ethiopia “p 79

Despite the above highlighted criticisms and others that are not mentioned here since it is not the core issue of this research, however, Ethiopian federalism has existed for more than twenty years except with minor conflicts that occur here and there. The country is operating smoothly, registering double-digit development. Although this is not the main concern of the dissertation, the assertions of AberaJemberre seem not to stand. The option chosen by the drafters of the Constitution seems fitting when evaluated with the history and circumstances in Ethiopia. To this point, this has not caused any major impact on the federal judicial structure of the nation.

C.) SUPREMACY OF THE CONSTITUTION AND ITS AMENDMENT

One of the essential elements of federalism is to have a written Constitution. It must be written, due to the fragile and explosive nature of disputes about the distribution of powers between the central government and state governments. An unwritten federal constitution will be the source of confusion and conflict, which can lead to disharmony and disintegration, unlike strong federalism, which accommodates and promotes diversity within unity. A federal constitution should not only be written, but there must be supremacy of the constitution. In this regard, K.C. Wheare has said a “Supreme constitution is essential, if the government is to be federal.”³⁰⁵

In the Ethiopian situation, the Constitution under Article 9(1)³⁰⁶ clearly states, “any law, customary practice, or decision of an agency of government or official that contravenes this constitution is null and void.” In Article 9(2), it further states, “all citizens, government bodies,

³⁰⁵ B.O.NWABUEZE: Constitutionalism in the Emergent States. (1973) P111ff

³⁰⁶ See the FDRE Constitution Art (1)

political parties, other association and their officials have the duty for respect the constitution and abide by it.”³⁰⁷

The above Articles show that the Constitution of Ethiopia, like that of the USA and India, is the supreme law of the country. An act by any organ of the government that goes against the Constitution of Ethiopia is invalid. The legislative, executive or judicial bodies cannot violate the Constitution. Thus, the Constitution of Ethiopia controls the acts of each organ of the government, so they do not transgress the letter or the spirit of the Constitution.

No citizen, governmental authority, political party or association is above the Constitution. Thus, any act of any citizen, government body, political party or association will be invalid and of no force if it contravenes the Constitution. Since judiciary is also one of the government bodies it has to respect and observe to the supremacy of the Constitution. The Constitution does not give direction on contradictions in the law passed by the federal legislation and state legislation, and with regard to these laws of the federal and state governments, which should prevail, so this needs to be answered.

The Constitution also doesn't indicate what 'law' and 'other authorities' mean. The Constitution should define the meaning of 'law', and the meanings of 'organs of state' and 'public official' to avoid controversies and arbitrary usage of the terms. In this regard, the Indian experience could be taken as a model for the Constitution of Ethiopia.³⁰⁸

With regard to the Supremacy Clause, in most federations the judiciary is the interpreter of the Constitution, making it the guardian and protector of the supremacy of the Constitution.³⁰⁹ In Ethiopia, this power is vested to the House of Federation, which is the second chamber of the House. There are many issues that are to be discussed in the independent chapter

³⁰⁷Ibid Art (2)

³⁰⁸ See the Indian Constitution

³⁰⁹ supra note 305

³¹⁰ See Art. 39 of the FDRE Constitution

which deals on the workings of the Ethiopian federal judiciary, how the judiciary must respect and protect the supremacy of the Constitution while discharging its judicial mandate.

3.4. ORGANIZATION OF COURTS IN THE ETHIOPIAN FEDERALISM

The federal Constitution of Ethiopia is an essential shift for Ethiopian People. It has created a parliamentary system with dual governments vested with three organs that are legislative, executive and judiciary in the center and the States. Independent judiciary is established with constitutional guarantee. It established two Houses. It guaranteed the right of self-determination for the nations, nationalities and peoples of Ethiopia, up to secession.³¹⁰ One third of the Constitution is devoted to fundamental rights and freedoms. The duty to respect and protect is imposed on all government organs, citizens and individuals.³¹¹ All the above achievements are the result of the peoples struggle for decades. However, although independence of the judiciary has got constitutional recognition the issue is how much is the judiciary strong to address the demand of the people for strong judiciary with a strong structure. The rights enshrined in the Constitution, as well as the Constitution itself, cannot be respected, protected and enforced without strong institutions and one of them is of course a strong judiciary with a strong judicial structure. Especially in a federal government where the division of power between the center and the states is fluid and delicate, the existence of a strong judicial structure, both at the center and at state-level, is vital for check and balance and rule of law that is very indispensable in a limited government. Furthermore, creating strong judiciary has the power and capacity to bring radical change to the evil and negative images of the previous courts that existed under previous governments. There for strong judiciary to exist in the Ethiopian federal system the structure that was existed in the previous regimes has to be restructured and organized

³¹¹ See Chapter Three of the FDRE Constitution

in a manner that makes it fit to play its role in maintaining the supremacy of the Constitution, as well as to address the constitutional rights of the people stipulated in Chapter Three.³¹² And this seems the FDRE Constitution as a structure has created courts in the center and the States in line with the division of power between the center and the States. The Constitution clearly stipulates that, “Judicial powers, both at Federal and State levels, are vested in the courts.” The Federal Supreme Court is part of the federal court system;³¹³ supreme federal judicial authority is vested in the Federal Supreme Court.³¹⁴ The Constitution provides that “unless and until lower federal courts are established federal high and first instance judicial powers are delegated to the States.”³¹⁵ The power to establish lower courts in the hierarchy of the federal judiciary is reserved to the House of Peoples’ Representatives.³¹⁶ The House of Peoples’ Representatives may establish Federal First Instance and High Courts nationwide or in some part of the country by a two-thirds majority vote.³¹⁷ The FDRE Constitution provides for the establishment of three levels of State courts:³¹⁸ the State Supreme Court (which also includes a cassation bench to review fundamental errors of law), High Courts, and First-Instance Courts. State Supreme Courts sit in the capital city of each respective State and have final judicial authority over matters of State law and jurisdiction. State High Courts sit in the zonal regions of States while State First Instance Courts sit at the lowest administrative levels of the States. The Constitution reserved the highest judicial power over State matters to State courts.

In order to guarantee the right of appeal of the parties in a case, decisions rendered by State high courts exercising the jurisdiction of the Federal First Instance Court are appealable to

³¹² See Art 37 of the FDRE Constitution which states that “Everyone has the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.

³¹³ See Art.78 and 79 Of the FDRE Constitution

³¹⁴Ibid Art.80(1)

³¹⁵Ibid Art.80(2)(4)

³¹⁶Ibid Art.78(2)

³¹⁷Ibid

³¹⁸ See Art 78(3)Art 80(2) (3) (b)

the State Supreme Court, while decisions rendered by a State Supreme Court on federal matters are appealable to the Federal Supreme Court.³¹⁹

The Federal Courts Proclamation allocates subject-matter jurisdiction to federal courts on the basis of three principles: *laws, parties* and *places*. It stipulates that federal courts shall have jurisdiction over, first, “cases arising under the Constitution, federal laws and international treaties;” second, over *parties* specified in federal laws.” Article 3(3) of the Federal Courts Proclamation states that federal courts shall have judicial power in places specified in the FDRE Constitution or in federal laws. Proclamation 25 of 1996 is the most important legislation regulating the federal judiciary and determining its powers. Under this legislation, federal courts are given original and appellate jurisdiction over cases arising under the Constitution, international treaties and federal laws.³²⁰ They also have jurisdiction over parties and places specified in the Constitution or federal laws.³²¹

In terms of the substantive laws, the federal courts settle cases based on the Constitution, federal laws and international treaties.³²² When they deal with regional matters, they also apply regional laws if they are consistent with the Constitution and international treaties. Article 4 of the Federal Courts Proclamation bestows upon federal courts criminal jurisdiction over: offenses against the national state, offenses against foreign states, offenses against the law of nations, offenses against the fiscal and economic interests of the federal government, offenses regarding counterfeit currency, offenses regarding forgery of instruments of the federal government, offenses regarding the security and freedom of communication services operating within more than one region or at international level, offenses against the safety of aviation, offenses of which foreigners are victims or defendants, offenses regarding illicit trafficking of dangerous drugs,

³¹⁹ See proclamation no 25/1996 Art (3)

³²⁰ Ibid

³²¹ Ibid

³²² Ibid

offenses falling under the jurisdiction of courts of different regions or under the jurisdiction of both the federal and regional courts, as well as concurrent offenses and offenses committed by officials and employees of the federal government in connection with their official responsibilities or duties.³²³

The Federal Supreme Court has a cassation division, which has power to review final decisions of any regular judiciary, and courts outside of the formal judicial system if there is any fundamental error of law. The Federal Supreme Court includes a cassation division, with the power to review and overturn decisions issued by lower federal courts and State Supreme Courts containing fundamental errors of law.³²⁴ Further, judicial decisions of the Cassation Division of the Federal Supreme Court on the interpretation of laws are binding on federal and State courts.³²⁵ The issue of cassation is highly controversial, and will be reviewed in depth in its subtopic about its role in creating strong Federal judiciary with strong structure. Although it will not be dealt in detail, there are other court structures outside of the formal court structure. For example, there are city courts in the two autonomous cities, Addis Ababa and Dire Dawa, with two tiers (trial and appellate) of city courts exercising municipal jurisdiction.³²⁶ The two courts have created cassation divisions within the appellate courts that review final decisions of the regular appellate divisions that contain fundamental errors of law. The city courts have also appellate jurisdiction over decisions of social courts.³²⁷ There are social courts throughout Ethiopia. Though their status under the Constitution is questionable, social courts exist in several states and federal cities. They are created by State constitutions and city charters, and their jurisdiction varies from State to State. In most States, they handle small claims. In some states,

³²³Ibid

³²⁴Ibid see also Art .80(3) of the FDRE Constitution.

³²⁵See Proclamation no 454/2010

³²⁶Federal Courts Establishment proclamation federal Negarit Gazeta Proc no 25/96 G.C Art 3/3

³²⁷Ibid Art 3/2

like Tigray, they are empowered to deal with serious issues like marriage, divorce and partition of property.³²⁸ The decisions of social courts are appealable either to State First Instance Courts (woreda courts) or to city trial courts.³²⁹ Hence there are also different administrative tribunals in the center and the States to settle different administrative disputes this will not be discussed in this research.³³⁰

In conclusion, the structure of Courts and their main jurisdictions in Ethiopian federalism has changed with the shift from a centralized court system to decentralized court system, which is constitutionally guaranteed. This judicial structure is based on the new form of government, i.e. federalism, which was introduced by the FDRE Constitution. Article 1 of the Constitution changed the country from a highly centralized unitary government to the current federal government. The current working of federal judiciary has existed for more than twenty years with all of its controversies and challenges,. Therefore, this research addresses whether the workings of the current federal judiciary and its structure enable the country to have a strong working judiciary which is the demand of the country and the people. Whether it needs transformational reform to restructuring or reorganizing the current judiciary to address the need for a strong judiciary and its strong structure, which the Ethiopian people and the nation lacked in the previous governments, is covered in depth in the section on the next chapter which discusses, challenges and impacts of the working of federal judiciary.

³²⁸ See Social Court proclamation of Tigray Proclamation no 93/2009 as amended by proclamation No.224/2012G.C

³²⁹ Ibid

³³⁰ Such as Tax appeal Commission, Civil Service Court, Court which entertain land Issues e.t.c

CHAPTER 4

4. THE WORKINGS OF THE FEDERAL JUDICIARY, ITS CHALLENGES AND IMPACTS

4.1 INTRODUCTION

In chapter three discussions is conducted on the concept of federal idea, its essential features, why countries opt for federalism and the idea of judicial federalism. Hence, Ethiopia is a federal country; the discussion is crucial as an overview to understand why Ethiopia opted for federalism, as well as essential and peculiar features and for the purpose of this research the organization of courts in different federal systems and in the Ethiopian federalism. This discussion in the third chapter serves as a background to the fourth chapter, which analyzes the challenges and impacts of the workings of the federal judiciary. The discussion in this chapter focuses on the challenges and impacts of the whole structure of the federal judiciary, especially the organization, human resources, budget, infrastructure, administration, training, coordination cooperation with other sectors and within the judiciary one by one.

4.2 ORGANIZATIONAL CHALLENGES AND IMPACTS

The FDRE Constitution states that an independent judiciary is established by the Constitution.³³¹ It also stipulates that judicial powers at both federal and state levels are vested in courts.³³² The Constitution also reveals that federal judicial authority is vested in the Federal Supreme Court.³³³ It further explains that states shall establish Supreme, High, and First Instance

³³¹ See Art.78/1/ of the FDRE Constitution

³³² See Art 79/1/ of the FDRE Constitution

³³³ See Art 78/2/ /3/ of the FDRE Constitution

Courts. The Constitution continues to say that the House of Peoples' Representatives may, by a two-thirds majority vote, establish Federal High Courts and First Instance Courts nationwide or in parts of the country as it deems necessary. Unless decided in this manner, the jurisdictions of the Federal High Court and of the First Instance Courts are delegated to state courts.³³⁴ However, with regard to the above stated structure, the Federal High Court Vice President and the two Vice Presidents of Federal First Instance³³⁵ reveal in their interview that the current judicial structure of Federal High Courts and First Instance Courts has its own challenges and impacts. The Vice President of the Federal High Court and the two Vice Presidents of the Federal First Instance Court argue that when the Constitution is vividly scrutinized, at the federal level it created the Federal Supreme Court very clearly, but it does not stipulate anything about the existence of federal High and First Instance Courts. Therefore, the federal judicial structure of Ethiopia is not fully established in all of its tiers, like the structure of the state courts. While the Constitution clearly specifies the existence of Supreme, High and First Instance Courts in the states, it does not clearly talk about the layers of federal courts. Had the intention of the drafters of the constitution been to establish three tiers of courts, similar to that of the courts of the states, they would have put it in clear terms. The establishment of federal courts in the states is left to the discretion of the President of the Federal Supreme Court, who must present his request to the House of Peoples' Representatives. If he does not present a demand to the House of Peoples' Representatives, those courts will not be established in the states.

The interviewees stress that the Constitution clearly instructs for the establishment of a Federal High Court and federal First Instance Court in the States, when the House of Peoples' Representatives decides so by a majority vote. However, it contains nothing about the

³³⁴ Ibid

³³⁵ Interview with the then Vice President of The Federal High Court on the date annexed in his office

establishment of a Federal High Court and federal First Instance Courts in Addis Ababa and Dire Dawa in the Constitution, but these courts are still in operation. Therefore, this is a serious gap of the federal judicial structure, which the Constitution failed to address. The above interviewees and the Head of the Office of the Federal Judicial Administration Council³³⁶ stated that even if Proclamation No 322 of 2003 G.C states that Federal High Courts be established in the States of Afar, Benshangul, Gambella, Somali, and the State of Southern Nations Nationalities and Peoples. Article 3 of the above proclamation also states that cases pending in the Supreme Courts of the states mentioned above shall be entertained by the Federal High Court or the Federal Supreme Court. Still, the above-listed states failed to establish their own First Instance and High Courts. Due to these structural deficiencies, a Circuit Bench of the Federal High Court hears cases about federal matters in those regions. Because of this, the current federal judicial structure cannot deliver speedy and accessible judgment, which has been the demand of the people for decades. The federal judicial structure is now highly centralized, as it is only found in Addis Ababa, the capital city of Ethiopia and in Dire Dawa, which is not a constitutional region. This contravenes the principle of accessible justice, which is enshrined in the Constitution.³³⁷ It is also against the principles of self-determination and self-rule that enable citizens of a nation to access the administrative organs, including the judiciary. These basic principles of federalism and democratic good governance were long demanded by the people. In states, the Supreme Court which is the apex court is situated in the capital city of each state, and it also has a Circuit Bench to go to the zonal capital cities of the states. Of course, there are many interruptions for appeals that emanate from the decisions of lower courts. There are state high courts in all capital cities, as well as benches of the High Court in certain remote areas with original jurisdiction and

³³⁶ Interview with the head of the office of federal judicial administrative council on the date annexed in his office

³³⁷ See Arc 37 of the FDRE constitution

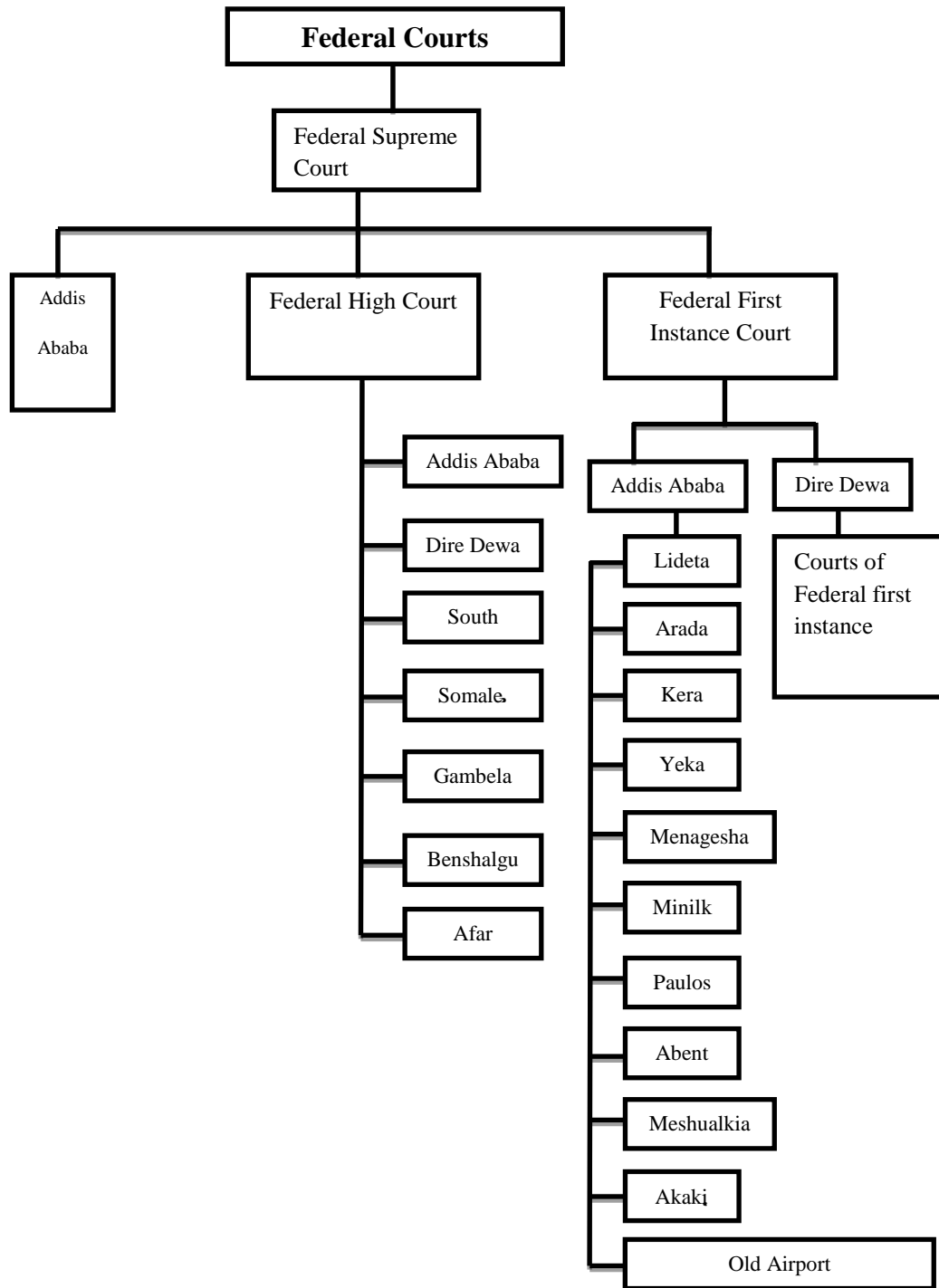
jurisdiction over appeals from Wereda Courts. Wereda Courts are in the capital cities of each Wereda, and other benches exist wherever necessary, in order to be accessible to the people of the locality. Besides Wereda Courts, there are social courts in each tabia (locality) to handle small claims of the locality. In the Tigray region, there are more than 750 social courts handling small claims for less than 10,000 birr. Family law is also handled at these courts, which is different from other states and a subject of debate. Of course, the decision of those social courts is subject to appeal to Wereda Courts and to the Cassation Bench if there is any basic error of law.³³⁸ When compared to the federal judicial structure, although judicial power is divided between the Center and States, the current structure makes state courts more accessible than the federal courts, except in Addis Ababa, where the courts are found in each KefleKetema of the city.³³⁹ This structural problem, paired with the demand of the people for a strong judicial structure in their locality can only be solved by the establishment of federal High and First Instance Courts in all states as soon as possible. The Constitution is not against this, it only demands adherence with its stated procedure of implementation. Therefore, this can be implemented easily, without amending the Constitution, in order to address the age-old demand of the society for an accessible judiciary with a strong judicial structure that can handle cases with federal matters emanating from the transactions of the society. See figure 4.1 for the current structure of courts at the federal level. (Annexed)

This structure shows that Federal High Courts are established in the states in the chart; however the study revealed that they are still not actually established, except in Addis Ababa and DireDawa, although these are not regions.

³³⁸ See the establishment proclamation of state of Tigray social courts Proclamation No 224/2012

³³⁹ Figure six

FIGURE 4.1 ORGANIZATIONAL STRUCTURES OF FEDERAL COURTS



Source: Federal Supreme Court Archive

First Instance and Federal High Courts currently present in Addis Ababa are also administered by delegation from the Federal Supreme Court, and they do not have the independent authority to administer their institution, including their budget and human resources. All the interviewees emphasized that the current federal judicial structure has made every power highly centralized by the President of the Supreme Court, though of course minor delegations are given to the High Court. The former president of the Federal High Court also stated that this has become a challenge for physical accessibility.

The Vice President of the Federal High Court in his interview stated that the administration of Federal High and First Instance Courts is established by simple order.³⁴⁰ This indicates that those administrations are established by delegation of the president of the Federal Supreme Court, which is against the Constitution. Had it been in line with the spirit of the constitution, they would be established with their own independent capacity, in line with the Establishment Proclamation of Courts. They continued their arguments by saying that because of this, the two courts administrators are by now working under the directive of the Federal Supreme Court President. The president can lift this delegation any time he desires. Therefore the minor administrative delegation of these two federal courts is at the mercy of the President of the Federal Supreme Court. They do not have the power to administer the judges, to hire and fire civil servants under them, or to handle any kind of relation and coordination between the two courts. This is again a big barrier for the two courts to discharge their mandates freely and independently. In his interview the former President of the Federal High court stated that³⁴¹ he has never received any letter of delegation in his seven years stay as a Federal High Court President. He was to wait, even for a minor thing, for the permission of the Federal Supreme

³⁴⁰ Supra Note at 348

³⁴¹The former president of the Federal High Court Federal High Court interview conducted on the date annexed in my office

Court President. Unless this current problem of structure is solved, the former President, the current Vice President and other judges of the Federal Supreme Court warn that the administrative delegation Federal High and First Instance Courts will face a challenge that can even contest their legal mandate to render administrative decisions of Federal High and First Instance Courts. This includes Dire Dawa, which is not known as a state in the Constitution. The idea of the Federal High Court Vice President was shared by the Vice Presidents of the Federal First Instance Courts in the interview conducted with each of them. The former President of the Federal High Court³⁴² in the interview conducted with him said that he never received any letter of delegation in his stay of seven years as a Federal High Court President to enable him to administer the Federal High Court. He was to wait, even for a minor thing, to get the permission of the Federal Supreme Court President. Unless this current problem of structure is solved, the former President, the current Vice President and other judges of the Federal Supreme Court warn that the administrative delegation Federal High and First Instance Courts will face a challenge that can even contest their independence and legal mandate to render administrative decisions of Federal High and First Instance Courts. This includes Dire Dawa, which is not known as a state in the Constitution. The idea of the Federal High Court Vice President was shared by the Vice Presidents of the Federal First Instance Courts in the interview conducted with each of them.³⁴³

The interviewees said that the structural problem of the federal judiciary does not end here. Although the Constitution stipulates that Federal High and First Instance Courts can be established in the regions by two third majority vote of the House of Peoples' Representatives where it deems necessary, the jurisdiction of the Federal High Court and of the First Instance Courts are delegated to the State courts. With the spirit of the FDRE Constitution, all State courts

³⁴² IBID annexed interview with the current president and vice president of the Federal First Instance Courts conducted in their office (annex)

³⁴³ Interview with the vice/president of federal first instance court conducted on the date annexed in his office.

have the power to dispose cases that are of federal nature as far as they are delegated. However, Proclamation Number 322 of 2010³⁴⁴ clearly states that Federal High Court is established in five states: The State of Somalia, The State of the Southern Nations, Nationalities and Peoples, The State of the Gambela People, The State of Afar and The State of Benshngul/ Gumuz. If this is the case, such delegation was already lifted and they are no longer empowered to deal with federal matters. When the power is gone from the above-mentioned five states, according to the Constitution, the House of Peoples' Representative is expected to vote to establish Federal High and First Instance Courts in those States. But still, those courts are not established.³⁴⁵ The reason why they are not established, according to the Vice President, is because it will be a waste of human resources and budget to establish courts in all five states, since there are not ample cases to be disposed by the judges. Here, the Vice President of the Supreme Court and the Proclamation do not concur. Second, the reason set forth by the Vice President of the Federal Supreme Court has no acceptance by the interviewees. For them, what should come first is addressing the question of the people, regardless of the number of cases. Third, the people of the states were to participate in the discussion and they were to give their consent. In any case, said the interviewees, the Circuit Bench of the Federal High Court hears all federal issues in those regions.³⁴⁶ Since the delegations of the State of Tigray, The State of Amhara, The State of Oromia, and the State of Harari are not lifted; all federal issues in these regions are disposed by State courts.³⁴⁷

The Federal High Court disposes the cases of federal nature that were previously handled by the five State courts before the delegation was raised. The Federal High Court manages this responsibility by forming one Circuit Bench of High Court Judges. The President of the High

³⁴⁴ See Proclamation 322/2010 which establishes the Federal High Court in five regions

³⁴⁵ Supra note at 349

³⁴⁶ Interview with Vice President of the federal First Instance and four Federal Supreme Court Judges on the date annexed

³⁴⁷ Ibid

Court assigns the judges by rotation for limited months.³⁴⁸ This has created additional workloads for the Federal High Court judges, while the Court is flooded by cases and backlogs. Also, it has caused unnecessary delay, which results in dissatisfaction of court users who lose confidence and trust in administrative justice.³⁴⁹

Because of this structural deficiency, the Federal High Court Circuit Bench judge said that the Federal High Court Circuit Bench goes to the five states normally once every two or three months, but rarely once a month.³⁵⁰ This prevents speedy trials, though they are right of the people. It is not convenient for witnesses who came from far areas with two and more days in a journey. After this tedious journey, there are situations where the bench is not in session for different reasons.³⁵¹ If anyone has to apply for any minor thing, he has to come to Addis Ababa only for that purpose. The Circuit Bench judges were using land transportation before the current air transportation. They were forced to drive for one or two days and only get one day of rest before hearing cases. Even now, the clerks of the court use land transport, which is highly cumbersome and which takes much of their time.

In any case, the current Circuit Bench that entertains disputes of federal nature in the five regions is not functioning as it is intended. It is not accessible, speedy, cost effective and predictable. This can be ascertained from some of the files. (Annex) One of these files is Plaintiff Ethiopian *Wengelawit Betechristian vs. Ethiopian Wengelawit Betekristian Betel*³⁵² This case was instituted first on February 21, 2004 and adjourned several times: May 7, 2004; May 23, 2004; June 6, 2004; June 7, 2004; June 29, 2004; June 22, 2004; June 23, 2004; July 13, 2004 and July

³⁴⁸ Ibid

³⁴⁹ Ibid

³⁵⁰ Interview With Federal High Court Circuit Bench Judge and court clerks of the bench in their office on the date annexed

³⁵¹ Some of the reason stated by Circuit Bench Judges are

- The absence of the Circuit Bench
- The sickness of Judges
- The lack of transport
- The work load of cases

The meeting of Judges etc

³⁵² Source the Archive of the Federal High Court Circuit Bench

23, 2004. After all of those adjournments, the court closed the file, stating that the court had no jurisdiction according to Article 9(2) of the Ethiopian Civil Procedure Code. The defendant took the case on appeal to the Federal Supreme Court, and the Court remanded the case to be seen by the Federal High Court. Again, the Federal High Court started and adjourned many times. The Court gave its final judgment on June 26, 2006. There are other cases that show the graveness of the problem.³⁵³ See the summary of similar cases with repeated and continued adjournments of hearings in the Annex part of this research. Those cases are *Public Prosecutor vs. TumaAyele and others 31 people* (File number 148523)³⁵⁴ and *Weizero Znay Abrha vs. Ato Yosef Mogos and other three people* (File number 134112).³⁵⁵

The sample cases show how the unsolved problem of the current federal judicial structure makes people unable to get speedy and accessible judgment, which they were lacking from the judiciary in the unitary system. The length of time of adjournment is very long and unpredictable. It is not consistent; sometimes they adjourn for consecutive days. This usually happens when they hear witnesses and sometimes it happens for three or more months. There are even situations where preliminary objection decisions take years. There are also files being closed because of non-appearance of witness. It is cumbersome to hear so many cases by a Circuit Bench that only hears cases twice in a month.³⁵⁶ The problems of the circuit court do not end here. Since the working language of the federal government is Amharic,³⁵⁷ the working language of the Circuit Bench is also Amharic. Due to this, the bench is facing language problem. The Circuit Bench conducts its proceedings in the State of the Southern Nations Nationalities Peoples' especially in Hawasa, MizanTeferi, Welkite, Butagira, Wlayetaand

³⁵³Ibid

³⁵⁴Ibid (see annex)

³⁵⁵ See the annex case

³⁵⁶ The case is terrorism case

³⁵⁷ See Art 5 of the FDRE Constitution

Arbaminch. Although the state is composed of at least fifty-two nations, nationalities and peoples with different languages, the working language is Amharic. According to the interview conducted with the two clerks of the Federal circuit court though the working language of the region is Amharic, there are residents of the region who do not understand Amharic and the court is forced to assign translators. Usually the judges invite someone to translate from those in the courtroom or the individual comes with a translator. In most cases it is difficult to get a translator even if the disputant parties live in one state.³⁵⁸

Because of the diversity of the languages, there are situations where one does not understand the other. Even the Federal High Court in Addis Ababa does not have its own permanent translators. The interviewees stated that although there are situations where the judges invite professional translators in some cases, (like when the parties are foreigners who speak English, French, Arabic languages, etc.) since the allowance is meager they will not be interested to return. Because of this, there are situations where the court adjourns the case for some time. The non-attractiveness of the payment for witnesses is also a serious problem in disposing cases. Even if there is a standard for the payment of witnesses at the federal level and some states, it is not comprehensive or satisfactory. The Civil Procedure Code gives direction on the payment allowance of witnesses, but courts do not apply the direction even today.³⁵⁹ Sometimes they apply the government scale, or sometimes they use their own scale. In this regard, there seems to be no uniformity either in state or federal courts.³⁶⁰

These problems are not only at the Federal High Court Circuit Bench, they are problems manifested in the whole current federal judicial structure. According to the Supreme Court

³⁵⁸ Interview with the two Federal High Court circuit court bench clerks on the date annexed in their office

³⁵⁹ See the Ethiopian Civil Procedure code Art262 ff

³⁶⁰ Supra note at 348, 363

President of Afar and other interviewees,³⁶¹ the other state that is covered by the Federal High Court Circuit Bench is the State of Afar. In State of Afar, in addition to the above problems, the language problem is very severe problem, especially when one of the parties is a foreigner who speaks English, French or something else. Although it is a serious problem in all federal and regional courts, it is again severe at the Federal High Court Circuit Bench. The judges adjourn the cases until they get translator or they will order the individual to come with translator. The other problem is of defense council in criminal cases.

The Afar Courts do not have that many criminal cases, because most of the criminal cases are handled by elders or traditional leaders through traditional justice, which they believe is a gift of Alah. The problems stated above are not problems that only occur in the above regions, they also occur in the State of Benshangul-Gumuz and in the State of Gambela. Especially in those two states, since they are adjacent to border areas, the language problem is severe with the influx of different foreigners to the regions. Because of the existence of the Federal High Court bench in Dire Dawa, this Court entertains federal cases of the Somali Region. This does not mean that there are no problems; all the problems that exist in the four States also exist in this court too.

All of the above problems manifest in the Federal High Court Circuit Bench, but to varying degrees they are all problems of the federal and state courts too. According to the study conducted in this research and the observation of the writer during his stay as a Supreme Court President of the State of Tigray, the problems emanate from the structural, human and infrastructure deficiency of the federal judiciary.³⁶² Some of them can be solved strictly by implementing what is stipulated in the Constitution, and some of them would be solved by

³⁶¹ Interview with the president of State of Afar On the date annexed

³⁶² Group Discussion conducted with the President of the Federal High Court and Vice Presidents of the Federal High Court on the challenges of the Federal High Court.

fulfilling the gaps by conducting judicial reform that brings transformational change on the problematic issues identified above.

The above structural problems of the federal courts have weakened the federal judiciary. This has made the perception of citizens' negative that invites loss of trust and confidence in the overall judiciary.

The above discussed problem of courts was evaluated in the meeting of Joined up Justice in the evaluation of the first Growth and Transformation Plan (GTP) and in the second GTP. Also, they looked at this in the courts five years strategic plan as well as in the peoples' forum conducted on the issue of good governance of the country.³⁶³ The Prime Minister addressed this in his speech on the problems of good governance, in forums conducted in different states on good governance and in the media. The Ethiopian Reporter Magazine in the article, "Judges Should Appear for Judgment", also addressed this problem.³⁶⁴ The problem still exists with no solution.

Unless this problem is resolved on time it will have an impact in attracting investors and foreign direct investment in the global market. This hampers the movement the country is currently experiencing; registering promising development in the process of eradicating poverty. According to Mr John Scharm, the former Ambassador of Canada to Ethiopia,³⁶⁵

...the existence of a modern efficient and just administration of justice in any country one of them is of course the judiciary is one of the basic requirements for a society to advance in the socio economic sector. It is hard to imagine that democracy and good governance flourish without the existence of an

³⁶³ Joined Up Justice form conducted at Hawassa on February 2016 and People's forum conducted on May2016 See also the first Growth and Transformation Plan (2011-2015) and Second GTP from (2016-2020)

³⁶⁴ This was done in different times especially the interview with the Ethiopian Broadcasting was done on February 2016. See also Reporter edition

³⁶⁵ Ethiopia is Registering Double Digits in a longer the past seven congruent Years. The evaluation of 2nd GTP by the Ethiopian government See the Opening Speech of H.E .Mr. John Scharm, the then Ambassador of Canada toEthiopia In the Proceedings of The Workshop Ethiopia's Justice System Reform 7-8 May 2002 Africa Hall, Addis Ababa P24`

institutionalized, modern and efficient justice system that obviously includes the judicial structure.

Here it seems wise to also quote what the democratic system building policy of Ethiopia stipulates about the importance of establishing a judicial structure with an independent judiciary.³⁶⁶

Establishing efficient and effective judiciary with strong judicial structure enables citizens to exercise their rights equally based on rule of law and to live peaceful life with smooth relation and by doing this it strengthens democracy. To implement judicial independence in correlation with transparency and accountability assures democratic judicial system to exist in a country. The existence of speedy, cost effective, efficient, effective, impartial and independent judicial structure plays a pivotal role in promoting free market economy, and enhances speedy and continuous economic growth.

The policy is clear, but the problem is converting the policy into reality, especially with regard to federal judiciary established under the federal system, which is full of problems. The weak capacity of the courts to handle contemporary issues in the economic sector and the criminal sector is evaluated in the meeting of the Joined up Justice Forum.³⁶⁷ The government has to ameliorate the current problems of the federal judiciary to achieve the goal set in the policy. Although there has been undeniable progress from the previous governments, the discussions and data reveals that still transformational reform is expected that can address the demand of the people for strong independent federal judiciary.

³⁶⁶ See the Document entitled Democratic System building policy of Ethiopia 2012

³⁶⁷ The Minute of Joined Up Justice meeting held at Hawasa in 2015 found in the JFE -PFE

Another main deficiency of the current federal judiciary that needs to be addressed is the dissatisfaction of prisoners who are accused of crimes that fall under federal jurisdiction.³⁶⁸ They raise several complaints about the Federal Circuit Bench. The issue they raised is that the Federal Circuit Bench is not accessible, speedy, and cost effective, witnesses cannot be heard on time and decisions are not timely rendered. Minor complaints that need urgent solutions from the court require prisoners to send relatives to Addis Ababa. This can be done only if they can afford the cost, obviously most of the prisoners cannot. Even for those who can afford it, they have to wait for weeks or sometimes months to get a response through the people they send to Addis Ababa. The only alternative they have is to wait for two or three months until the Circuit Bench comes to their state. Even after waiting, the Circuit Bench may fail to come for different reasons. All in all, the interviewees advised that the current structural arrangement of the Federal Circuit Bench has no constitutional basis. It is becoming a source of grievances due to the lack of accessible justice and good governance, which is a serious problem of the country, including the judiciary.

The Federal Supreme Court should insist that the House of Peoples Representatives establish Federal High Courts and First Instance Courts according to Article 78(2) of the FDRE Constitution of the Federation so citizens of these states can get accessible, fair and speedy justice that is cost effective and barrier free.³⁶⁹ Otherwise, the Federal High Court must render speedy judgment on the federal issues of the five regions, but it is highly flooded by the cases of Addis Ababa.³⁷⁰ See the table in the Annex, which indicates the performance of the Federal High and Supreme Court.

³⁶⁸ Interview with the Judges and court room clerks the Federal High Court and Circuit Bench

³⁶⁹ See article 78/2/ of the FDRE Constitution

³⁷⁰ See the annex for further clarity

4.3 INTERNAL CHALLENGES OF THE FEDERAL JUDICIARY

One of the internal challenges is the problem of infrastructure of the courts. In the discussion conducted with the President and Vice Presidents of the Federal High Court,³⁷¹ the building of the High Court was built in 1958 G.C and it was only renovated in 2015 G.C. Still, it doesn't have its own plan and map. Since the rooms were built when Addis Ababa had a population of less than one million it does not fit with the growth of the population, which is currently four million.³⁷² Therefore, all courtrooms that exist today cannot accommodate more than forty-five people on average, but there are certain cases where more than a thousand people come to the court. Because of the restriction of the rooms, those people cannot enter into the courtroom and follow the proceedings. This is against the principle of open court proceedings, which is a right of citizens enshrined in the Constitution.³⁷³ In those very narrow rooms, four judges sit in one office and they do not have shelves for files. They put them on the floor, which exposes the decision of the judges before they officially declare their judgments in the courtroom. The building of the offices of judges and civil bench courtrooms is in danger; it leaks rain and is highly cracked, it is close to falling. Experts recommended that this building to not be used and for judges to vacate from it, since it could take the lives of the judges and court users at an unexpected time.

However, the leadership of the court did not get any substitute to move the judges and the bench. This has impacted the timeliness of justice and access to justice, both constitutional principles of the country. Because of the shortage of rooms in this court, archive files are a severe problem. There are not enough shelves or enough rooms to keep all of the files. Disputant

³⁷¹ Group discussion Conducted with the president and Vice Presidents of the Federal High Court and clerks of the court on the date annexed in their office.

³⁷² Ibid

³⁷³ See art 20 of the FDRE Constitution which states that "Accused Persons have the right to a public trial by an ordinary court of law within a reasonable time after having been charged."

parties and other court users are not able to get their files on time and in a speedy manner. This invites additional costs and unnecessary delays, which leads to dissatisfaction and loss of public trust. This reality also applies to the Federal Supreme Court, except with minor changes. This is substantiated in the interview conducted with some of the judges, lawyers, customers and court employees.³⁷⁴

All the information reveals that although the FDRE Constitution establishes the federal judicial structure, because of the structural limitation stated above it cannot properly render accessible justice. Even if the independence of judiciary is a constitutional guarantee, this does not suffice unless it is backed by a strong working structure. Therefore, this challenge and its impact have to be averted if the country is to have an independent judiciary with a strong working federal judiciary that can address the demand of the people.

There are also internal challenges that need urgent solutions that are impediments of the current judiciary causing it not to work to its full capacity as mentioned by the Vice President of the Supreme Court of Oromia³⁷⁵ in the interview conducted with him, as well as with other judges.³⁷⁶ Those interviewees explained the Constitutional guarantee of the independence of the judiciary, is the result of the struggle of the people.³⁷⁷ They elucidate further on what they think are the internal challenges of the current federal judiciary. They emphasize that even though the Constitution clearly establishes the independent judiciary, it does not clearly indicate whether this embraces institutional independence.³⁷⁸ Because of the lack of clarity, Federal and State courts do not have institutional independence that would enable them to manage court clerks and other employees. They are administered by the Civil Service Proclamation, like all offices of

³⁷⁴ Interview with different judges' customers and employees indicated in the list of interviewees.

³⁷⁵ Interview with the State of Oromia Supreme Court and other Supreme Court Judges at different times indicated at annex

³⁷⁶ Ibid

³⁷⁷ IdO

³⁷⁸ See 78/1/2/ of the FDRE Constitution

Ministries. There is no uniform standard or directive in the administration of registrars, assistant judges and legal counsels in the courts of the nation. Due to this, the judiciary is unable to hire quality professionals that fit with the mission of the courts.³⁷⁹ This has caused the courts to have unqualified workers. Even if, as a matter of chance, a few quality employees are hired, they usually will not stay long. One of the highly visible reasons is low payment. That is why today there is serious turnover of workers in almost all courts of the nation.³⁸⁰ This is reported every year to the House of Peoples' Representatives and State Councils and is evaluated in the meetings of courts and Joined up Justice Forums. Still, there is no solution.³⁸¹ There was a plan to increase the salary of judges, but it went two years without any positive or negative response. Even if it seems there is positive response, it still does not match with the skyrocketing living standard of the country.³⁸²

Hence, this might not be the main cause; it contributes to the high turnover of judges every year. To solve the above problem, courts are forced to hire and train new employees. When things worsen and the complaints of litigants increase, there are situations where the leaders of the courts impose extra workloads to the existing judges and clerks. Unless this key problem, which has become a barrier to speedy and quality judgment, is alleviated, it is not possible to have a strong judiciary with a strong structure. The judiciary should be independent, accountable and transparent, rendering accessible, speedy, cost effective, and impartial judgment that satisfies the interest of justice of the society, especially with the long-standing problems of Ethiopia as a nation.

These assertions show that structure may be installed in any form fit to a country's situation. This structure should be able to provide the intended result the country wants to

³⁷⁹ See the 2015 report of the Federal Supreme Court and Federal High Court

³⁸⁰ Ibid

³⁸¹ See the report of Joined Up Justice meeting from the JFA- PFE library

³⁸² See Interview with the leaders of the federal Courts and judges of Different Courts.

achieve. Otherwise, constitutional or legal guarantees of the establishment of an independent judiciary will not address the issue of justice that the people demand from the judiciary. The government should show commitment to establish a well-organized federal judicial structure in all states with all necessary preconditions. In the Ethiopian judicial structure, even if the government is striving to reform the judiciary, the judicial structure lacks adequate human resources and infrastructure. This obviously impacts the whole operation of the federal judicial structure in dispensing timely and quality judgment. In order for the federal judicial structure to function effectively, the judicial system must not only have relevant and up-to-date laws, but also an efficient and effective institutional structure that enables it to administer the laws.

4.3.1 ALLOCATION AND ADMINISTRATION OF BUDGET IS THE OTHER INTERNAL CHALLENGE OF THE FEDERAL JUDICIAL STRUCTURE WHICH IS STRESSED BY THE INTERVIEWEES.

The Oromia Supreme Court Vice President, the two judges of the State of Tigray Supreme Court and other judges stressed that although the Constitution clearly indicates that the Federal Supreme Court must submit and approve its budget and administer after approval,³⁸³ this is not practical today, as the budget is decided by Ministry of Finance.³⁸⁴ This is against the spirit of the Constitution, as well against judicial independence.³⁸⁵ This has an impact on the judiciary, as it is not free to discharge its obligations; it makes it to fall at the mercy of the executive as it happens now.³⁸⁶ The main cause for this is the lack of committed leadership who fought for strict implementation according to the spirit of the Constitution. Therefore, this has to be solved if the judiciary is to be insulated from any internal or external interference in which it is observed

³⁸³ See Art 79/6/7/ of the FDRE Constitution

³⁸⁴ Supra note at 388

³⁸⁵ See Art 78/1/ of the FDRE Constitution

³⁸⁶ See Art 79/2//3/ of the FDRE Constitution

today.³⁸⁷ The budget of the federal courts is not only being decided by the Ministry of Finance, it is also administered by the Ministry of Finance, which buys the necessary equipment and materials for the courts. The courts are not allowed to buy any material, starting from small to that of larger materials. It is done by the pull system administered under the Ministry of Finance.

According to statements of the two Federal Supreme Court judges and the Director of the Office of the Judicial Administrative Council, judges of all courts do not get the necessary materials on time. Even the papers and other materials that are bought by this institution do not comply with the interests of the court. After all, the people who are assigned to buy the materials do not have knowledge about the institutional interests of the courts. They simply conduct an auction with all of the ministry offices, and buy the materials, and then disseminate the materials to all ministries. This is against the institutional independence of the judiciary. It makes the judicial structure fall under the mercy of the executive. This is against the Constitution, which guarantee the judiciary as independent, free from any kind of intervention. Since the materials that are bought by the Ministry of Finance do not comply with the interests of courts, they contribute to unnecessary delays and diminished performance. The interviewees and court leaders³⁸⁸ explained that besides the problems of allocation and administration of the budget allotted to all courts in the federal judiciary structure, without denying increases from time to time, it is still less than the demand of the courts. It has a great impact on the courts in delivering their mission and satisfying the interests of the court users. This budget cannot enable to build a strong independent federal judiciary, which is the demand of the people. (See annex tables of allocation of budget for further clarity)

³⁸⁷ Interview with the vice president of the High Court

³⁸⁸ the interview with the vice president of the Federal Supreme Court and group discussion with the leaders of the Federal High and First Instance Courts and the head of the office of Judicial Administration Council at different times indicated at annex

The Vice President of the FHC stated in his interview that for example the budget allocated to Federal Courts was 0.2%, or 178 million out of the 270 billion Birr allocated budget (from July 1, 2016 to July 1, 2017) of the country. This is meager compared to the problems of the judicial structure. For example, says the Vice President, the Federal High Court has only fulfilled three percent of its demand, which would enable it to render all of the services expected from a Federal High Court. The problem of the budget is a problem of all of the courts in the nation. There is no clear statement about the administration of budget of State courts in the Constitution. Each State Supreme Court administers the budget of all courts. Except in some states like Tigray, the budget of First Instance Courts is controlled by the pull system, which administers the budget in a centralized manner against the institutional independence of courts. The Supreme Court of each state administers the budgets of the High Court and the Supreme Court.

The other issue that was raised by the Vice President of the Oromia Supreme Court, the two Supreme Court judges of Tigray, the Director of the Federal Judicial Administrative Council and the financial head of the Federal Supreme Court is about the allocation of the compensatory budget to state courts by the federal judiciary. The interviewees suggest that although the FDRE Constitution³⁸⁹ clearly indicates that the House of Peoples' Representatives shall allocate a compensatory budget for states Supreme and High Courts concurrently exercise the jurisdiction of the federal courts, the budget is simply allocated by mere whim of the Federal Supreme Court, against the spirit of the Constitution. The two judges mentioned that with regard to the compensatory budget to the states for the discharge of cases with federal nature there has been confusion in the Federal Supreme Court between subsidies and the compensatory budget. The intention of the Constitution is to compensate the expenses states incur in discharging federal

³⁸⁹See Art 79/7/ of the FDRE Constitution

issues.³⁹⁰ The federal issues to be disposed in the states were to be estimated beforehand, taking into account previous experience and the accuracy of cases. Then, the cost was to be calculated according to the number of files, including other expenses in hearing the cases. After this, it was supposed to be simple to compensate state courts. Since states do not know the exact number of cases they dispose and the Federal Supreme Court also does not insist that they do so, they do not ask for the compensatory budget appropriate to the number of cases. They demand the budget they need from the Federal Supreme Court and the Federal Supreme Court sends them some amount according to its own interests.³⁹¹

According to the Head of Budget of the FSC,³⁹² states send their demands, which are seen by the Department of Finance of the Supreme Court.³⁹³ The Department submits its proposal to the President of the Supreme Court, then after approval it is sent to the federal Ministry of Finance, as part of the annual budget of the Supreme Court. After it gets the approval of the Ministry of Finance, the budget is allotted to the States by the Federal Supreme Court at the whim of the President.³⁹⁴ The intention of this compensatory budget is to compensate the Supreme and High Courts of the states concurrently, since they exercise the jurisdiction of the Federal High Court and Federal First Instance Court.

However, states are free to spend the money on what they think is their priority. For example, the State of Tigray Supreme Court spent the money from last year's compensatory budget to buy transcribers.³⁹⁵ The only thing demanded from the regions is to bring a report with

³⁹⁰ Interview with Federal Supreme Court judges

³⁹¹ See the demand of the compensatory budget and its allocation (Annex)

³⁹² Interview with the head of finance of the FSC and the head of the budget of the Federal Supreme Court at the date annex

³⁹³ See the allotment of the budget (annex)

³⁹⁴ Ibid

³⁹⁵ Ibid

official receipts. If they do not fulfill this, they will not receive the next budget. If they show any imbalance in their report, the imbalance will be deducted from the next budget.³⁹⁶

All of the interviewees explained that the constitutional intention of the compensatory budget is very clear, but its application goes against the Constitution. For example, the five regions where the Supreme Court has lifted its delegation and the Circuit Bench of the Federal High Court is doing the work were not mandated to get compensatory budget. However, they are still getting a compensatory budget from the Federal Supreme Court like the four regions whose delegation is still in place.³⁹⁷ This is against the Constitution and against the structural coordination that is expected between the Federal Supreme Court and state courts.³⁹⁸ The establishment of federal High and First Instance courts in each state could easily solve this by adhering to the principle of the Constitution. This has an impact on the structure of courts in discharging their delegated mandates, and also creates unfairness among the State courts. (See Tables below for further clarity)

TABLE 4.3.1.1: FEDERAL SUPREME COURT BUDGET

	Budget Type	Budget in Ethiopian Birr
2005	Recurrent	20,301,500.00
	Capital Budget	23,450,530.00
	Total	<u>43,752,030.00</u>
2006	Recurrent budget	105,918, 572.00
	Capital budget	35, 797,130.00

³⁹⁶Ibid

³⁹⁷Ibid

³⁹⁸ Interview with the then head of the office judicial administration council and other Supreme Court Judges and The vice president of State of Oromia

	Total	<u>141,715,702.00</u>
2007	Recurrent budget	122,473,990.00
	Capital budget	43,000,000.00
	Total	<u>165,473,990.00</u>
2008	Recurrent budget	151,000.00.00
	Capital budget	52,068,480.00
	Total	<u>203,068,480.00</u>
Out of this the	Supreme Court	41,762,246.00
budget of	High Court	48,237,754.00
	First Instance Court	60,742,980.00

Source: the Head of the budget team of the Supreme Court

TABLE 4.3.1.2: THE ALLOCATION OF COMPENSATORY BUDGET TO EACH STATE

2007 E.C

No.	State	Plan for 2007	The budget send in 2006	Remaining money	The budget send in 2007
1	State of Tigray Supreme Court	No plan	280.000.00	√	290.000.00
2	State of Oromia Supreme Court	2.636.926.06	280.000.00	√	290.000.00
3	State of Gambella Supreme Court	3.656.000.00	170.000.00	√	190.000.00
4	State of Harari Supreme Court	199.000.00	150.000.00	√	170.000.00
5	State of Afar Supreme Court	No plan	190.000.00	√	210.000.00
6	State of Amhara Supreme Court	840.000.00	280.000.00	√	290.000.00
7	State of Somalia Supreme Court	1.370.487.00	170.000.00	√	190.000.00
8	State of Benshangu/Gumuz	No plan	174.800.00	√	190.000.00

	Supreme Court				
9	State of Southern Nations Nationalities and Peoples	No Plan	128.699.50	√	170.921.00
Total			1.823.499.50		2.000.000.00

Source: the Head of the Budget Team of the Supreme Court

TABLE 4.3.1.3: THE ALLOCATION OF COMPENSATORY BUDGET TO EACH STATE

2008 E.C

No	State	Plan of the year 2008	Budget Transferred in 2007	Unbalanced budget	Budget transferred in 2008
1	State of Tigray Supreme Court	3,648,000	290 ,00	√	352,270.00
2	State of Oromia Supreme Court	3 ,636 ,500	290 ,000	√	352,270.00
3	State of Gambella Supreme Court	-	190 ,000	√	242,000.00
4	State of Harari Supreme Court	285 , 000	170 ,000	√	242,000.00
5	State of Afar Supreme Court	-	210 ,000	√	242,000.00
6	State of Amhara Supreme Court	761 ,500	290 ,000	√	352,270.00
7	State of Somali Supreme Court	1 ,436 ,067	190 ,000	√	234,282.00
8	State of Benshangul/Gumuz	451 ,380	190 ,000	√	242,000.00
	Supreme Court				
9	State of Southern Nations Nationalities and Peoples	4 ,203.620	170 ,921	119.079.68	233,190.00
TOTAL			1 ,999 ,921	119,079.68	2,500,000.00

Source: the Head of the Budget Team of the Supreme Court

This allocation of the budget clearly justifies what is stated in the research by the interviewees. It indicates that the allocation of the compensatory budget is simply done arbitrarily, outside of the intent of the FDRE Constitution and with no clear justification. The above stated problems of the federal judiciary justify that the federal judiciary is rendering in accessible and delayed services because of shortage of sufficient necessary budget. A strong independent judiciary without the necessary budget is impossible. This raises a question that the government is not committed to build a strong independent judiciary in the country, which is the long-standing demand of the people.

Although the problem of the budget is obvious, in the Ethiopian federal judiciary there is no structure in the system that enables the evaluation of the performance of the courts in relation to the budget allocated to each case. Because of this gap, it is not possible to evaluate the cases disposed of per year and the budget allocated for each case.

Since this is a big impediment, the courts report their performance to the House of Peoples' Representatives or State Councils by simply applying the formal way of reporting that simply indicates the total incoming and disposed cases within one year and the pending cases..³⁹⁹ This has its own deficiency in showing which court is utilizing its budget properly and which is not, in order to know which court to award and to which to criticize. The budget allocated to the judiciary is the taxpayers' money and they deserve to know how the court is spending this money.

Therefore, in the current federal judiciary there needs to be a mechanism where people can know and comment on the budget allocated to courts and spending in relation to their performance. This will enable the assessment of the utilization of the budget allocated to the

³⁹⁹ The performance of cases is not reported using a table that shows case disposed in a simple track and their time of deposition and medium track and their time of disposition Complex track and their time of disposition and the budget taken to dispose each case.

judiciary. This will also allow Parliament to allocate the budget of courts in an objective manner and avoid the current unfairness of the allocation of the budget.

4.3.2 THE NON-EXISTENCE OF UNIFORM STANDARDS IN DIFFERENT ASPECTS AND THE SCARCITY OF LEGAL DOCUMENTS AS CHALLENGE

The federal judicial problem, said one interviewee⁴⁰⁰ does not end here. Although the constitution has stipulated the mechanism of appointment, discipline and removal of judges, there is no set standard at a national level that serves for all in uniformity that leaves room for states to adopt it in relation to their actual situation. This has its own importance in creating uniformity, consistency, and predictability among the judges who work either at federal or state level. It also has contributed to the current huge turnover of judges. The lack of uniform standard is one of the reasons for the current serious problem of mobility both at the federal and regional levels.

Even if there are efforts to introduce certain reforms that can assist in evaluating the performance of the judiciary, there are still not uniform standards and mechanisms that can be applied throughout the nation to evaluate the overall performance of courts in order to be transparent to judges and clients.⁴⁰¹ Specifically, quality judgment is one of the crucial problems of all of the courts of Ethiopia. It is always raised in every report of the courts to the House of Peoples' Representatives and State Councils, as well as in the Joined up Justice Forums and in various public forums. However, it does not get any kind of resolution. It still remains a key problem of the judicial structure.⁴⁰² The current practice of evaluating the performance of courts is to calculate the number of disposed files without differentiating those that pass in a fast,

⁴⁰⁰Supra note at 388

⁴⁰¹ See Business Process Reengineering and Business Score Card Documents of the Federal Courts(Annexed)

⁴⁰² See the Report of federal Courts(Annexed)

medium and complex track.⁴⁰³ Not only that there are no set standards that enable evaluation of the performance of judges, the different yearly performances of the Federal Courts and the current format used to evaluate judges is very subjective and not scientific, and violates the personal independence of judges. (Annex)

According to the statements of the interviewees,⁴⁰⁴ an independent judiciary cannot exist without standards and reforms that can strengthen its process of rendering judgment. This means that there has to be uniform standards of judgment writing, bail, writing training modules, and interpretation of federal and regional laws, standards of payment scales, promotions and awards. However, there is no uniform theme in the above-stated issues. Therefore, there has to be court rules that are transparent to all judges and support staff as part and parcel of the federal judicial structure where it is not present now.

There has to be a mechanism where judges get training that can update their awareness on the legislations that are promulgated by the parliament.⁴⁰⁵ To date, there are no structural arrangements at either the federal or regional level where courts can easily access or get the proclamations of the House of Peoples' Representatives and regional councils or get training to update them. This is an especially serious problem to those judges who work in remote areas where they do not have any access to the internet. Because of the severity of the problem, there are situations where judges get proclamations and regulations from the disputant parties. Therefore, the current federal judiciary should arrange a mechanism to integrate itself with federal and state legislators to get access to legislations and parliamentary debates.

⁴⁰³ See the performance of federal Courts(Annexed)

⁴⁰⁴ Supra not at 388

⁴⁰⁵ Interview with Judges of the Supreme and High Courts, the vice President of the High Court and with the trainer and administrator of the legal professionals training center and interview with the foreign affairs legal study directorate of the legal research Institute.

4.3.3 THE CHALLENGE OF LANGUAGE, INTERPRETERS AND DEFENSE COUNCIL

The Constitution has changed the working language for the states, but has made it highly centralized at the federal level. Especially when it comes to litigants who come from state courts either by appeal or for cassation over cassation, this has a great impact. They are only allowed to use the working language of the federal government, which is Amharic. If the case disposed by a state is a federal case, the language of the state is expected to apply. Amharic is the Federal working language,⁴⁰⁶ whereas the working language varies from state to state.⁴⁰⁷ This has made it cumbersome to the parties from the States of Oromia, Tigray, Afar and Somalia, who are not able to speak Amharic. When it comes to language in the federal cases, it is almost like what occurred in the unitary system. Most states do not have permanent translators. This problem is aggravated in some grave criminal cases that need to assign public defenders.

However, in almost every state judiciary, it is not possible to assign public defenders when they need to assign defense Council.⁴⁰⁸ This is a severe problem in all courts of Ethiopia, and the country needs to focus to its mitigation. The FDRE Constitution clearly stipulates that accused persons have the right to be represented by the legal counsel of their choice, and if they do not have sufficient means to pay for it and a miscarriage of justice would result, it must be provided at state expense.⁴⁰⁹ Although there have been some efforts to have defense councils at the Supreme Courts of the nation where administration and accountability is still an issue, there has been no response. There is a chronic problem in having defense councils at High Court and First Instance Courts at federal and state level, where there is no structure for defense councils

⁴⁰⁶ Ibid

⁴⁰⁷ See Art 5 of the FDRE Constitution

⁴⁰⁸ For Instance the working language of Oromia State is Oromiffa as well as the working language of Tigray is Tigrigna.

⁴⁰⁹ Interview with judges and customers (annexed)

under these courts' administrations.⁴¹⁰ Especially for those who wait to hear their sentence in prisons, this problem is exacerbated and it could be fertile ground for miscarriage of justice. Ample legal aid centers in the country could mitigate the problem, but their number is few and they are not well organized, so it continues to be a problem of the judicial structure.⁴¹¹ Because of this shortage, there are situations where courts dispose of criminal cases without any defense council, they adjourn the case until defense council comes from the Supreme Court or the defendant hires his own defense council.⁴¹² I have seen this while I was working as a State of Tigray Supreme Court President. Two Supreme Court judges, the President of the Federal High Court and First Instance Courts and the circuit bench judges have also ascertained this.⁴¹³ This structural problem needs to be considered in the administration of criminal justice so that litigants can get fair, speedy and accessible judgment without any barrier, which satisfies their demand for justice as a constitutional right. This is what the people demand from a strong independent judiciary.

With regard to the language problem, the State of Tigray Supreme Court judge said that in the cases of Red Terror the bench used Amharic as a working language. This was because the issue was a federal case handled by state and federal courts and the parties were Derg officials who knew Amharic. Even if the court were to use Tigrigna as a working language, the Supreme Court did not have permanent translators. When the parties were those Tigrigans who did not understand Amharic, the court was forced to have translators even though their numbers were

⁴¹⁰ See Art 20/5/ FDRE Constitution

⁴¹¹ Interview with the judges lawyers and the then vice president of the Federal supreme Court

⁴¹² There are no legal aid centers in the Federal High and First Instance Court as well as in all State courts See the paper presented at joined up meeting at Hawassa the judges of the circuit bench has proved this in their interview

⁴¹³ This is almost the practice of all courts of the nation the witness by all judges in the interview and the leaders of the federal High and first Instance Courts.

very small. This inconsistency has contravened the right of the Tigrian litigants to use the working language of their state as guaranteed by the FDRE and their State Constitution.⁴¹⁴

The worst thing is that the State Supreme Court, which is deemed the guardian of the Constitution, violates this right. However the Supreme Court judge said that if the court did not take this measure the Red Terror cases could not have been heard in the short period of time. The Tigray Supreme Court was the one that finished the Red Terror cases first of all the State courts and Federal Courts.

The lesson from the statements of the two judges and others is that the rights of citizens, which are set in the constitution, cannot be guaranteed without out a well-organized and adequately equipped institutional structure. The weaker the institutional structure is, the more the implementation of rights of citizens set in the constitution or other proclamations and regulations will also be weakened over time. This is the reality that is found in the current working of the federal judiciary FDRE.

4.3.4 WEAK LEGAL RECOGNITION OF TRADITIONAL JUSTICE AS CHALLENGE

The traditional dispute resolution mechanism has a long history in Ethiopia. It has been widely applied even before the current formal justice system existed. Because of this, there are views that say that the traditional dispute resolution is not an alternative for Ethiopia. It was the indigenous system built into the Ethiopian culture, which is why it is widely implemented by Ethiopians.⁴¹⁵ Studies also reveal that eighty percent of the cases of the society are disposed through different means of traditional dispute resolution.⁴¹⁶ However, these systems still do not

⁴¹⁴ Interview with the then State of Tigray Supreme Court and currently the judge of the Federal Supreme Court Cassation Bench

⁴¹⁵ See Ato Garedew Assefa and Ato Haile Abraha "The Place of Traditional Justice in the Ethiopian Formal justice System the case of Amhara and Afar Regions" June 2013 it is an original work with all interviews of different individuals of different sectors. Some of them are mentioned in the annex See also AberraJembere, "An introduction to the Legal History of Ethiopia" 1434-1974 Pp 41ff Interview with the then Deputy Minister of Justice and currently the the head of Justice bureau of the State of Tigray

⁴¹⁶ Ibid

have any formal institutional structure like that of a court such as court annexed mediation and that dispose cases as alternative dispute resolution mechanism similar to that of many countries judiciaries although there are few articles that talk about different mechanisms of alternative dispute resolution mechanism.⁴¹⁷ Before June 2016, there was a plan to introduce court-annexed mediation in the current federal judicial structure that was initiated before eight years by Justice for All Prison Fellowship (JFE PFE) which is a local NGO. Different seminars and trainings were given to all judges of the federal Courts and consensus was reached on its value and advantages.⁴¹⁸

Some of the justifications for its introduction as court annexed mediation were its advantage in the reducing the court work load and to play a role in the accessibility of courts.⁴¹⁹ However, this structure cannot be introduced for different reasons. Because of this long-standing problem, the federal courts cannot benefit from the advantage of court-annexed mediation, which is of paramount importance to courts themselves and to litigants. At this juncture, it is advisable that the federal courts introduce court-annexed mediation in their structure. Doing this will give them advantages so that the formal courts are able to focus on basic and complex disputes that emanate from the nature of federalism and from the dynamic growth and interaction of the society in a global world.

4.3.5 CHALLENGES ON CO-ORDINATION CO-OPERATION AND PUBLIC PERCEPTION

There are basic problems in the coordination, cooperation and public perception of courts within the judicial structure. When the Ethiopian federal judiciary is evaluated, it has many

⁴¹⁷ See Art 3347 Civil Code of 1960 and Art 273,274,275,276 of the civil Procedure Code

⁴¹⁸ Discussion Conducted with 200 judges of all federal Courts at Washington Hotel in Addis Ababa the capital city of Ethiopia on may 2016 and with leaders of all State supreme courts and federal Courts at Adama which is Oromia on February 2016

⁴¹⁹Ibid

problems that need urgent solutions. All interviewees suggested that for all federal and state courts to be strong there has to be coordination and cooperation between the federal judicial structure and state judicial structures, as well as among all State courts. That kind of earnest coordination and cooperation does not currently exist. Courts cannot share experiences and perceptions of the citizens of the nation concerning the overall performance of the courts about whether they are satisfying the intended mission of the Constitution and the expectations from the courts.

However, there has to be a structural mechanism with legal backup that enables to the federal courts and state courts (and state courts within themselves) to be coordinated, in order to evaluate their methods of dispensing justice and how they are working in the process of building strong independent federal judiciary which is not addressed yet. If this is not fulfilled, it will be difficult to assure in full confidence whether the entire structure of courts found in the federal system is addressing the demands of the people that they were lacking in the unitary system. Therefore, to evaluate public perception there has to be a system where the FSC President and the regional Supreme Court Presidents meet together and share their experiences on how they are working to satisfy the public at large, what weaknesses they encounter and how to purge themselves of those weaknesses.⁴²⁰ There should be a joint meeting of all judges to evaluate their work whether they are delivering uniform, consistent and predictable judgments being fair and impartial which is expected from an independent and strong judiciary. There has to be a set standard that is transparent to the public and to all court users that enable them to assess the performance of courts at federal and regional levels.⁴²¹ In its report to Parliament and at different public forums, the government states that there is rent seeking, corruption and a lack of

⁴²⁰ Supra note at 388 Interview with the Head of The Justice bureau of the State of Tigray

⁴²¹ Ibid

good governance in the judiciary. It appears that the government and the public at large are losing confidence and trust in the judiciary.

The courts should have their own standards to report to the House of Peoples' Representatives at the federal level, as well as to the regional councils at the state level.⁴²² Since those are absent, there is no set standard and mechanism to evaluate the working of courts whether they are delivering fair, impartial, cost effective, accessible, speedy, predictable and consistent judgments in conformity with all laws of the country. In the interviews conducted with court users, they respond that they do not trust the current performance of the courts; the executive influence is very high especially in criminal cases where the public prosecutor is a party. Where the case is a governmental issue the court tends to favor the government or they push it back with long adjournments.⁴²³

This implies that if the country does not have a well-organized and strong judiciary that addresses these problems, it will have an impact on the whole political, economy, and social and development of the country. Thus an independent and impartial judiciary with a speedy and efficient judicial structure is the very essence of civilization.⁴²⁴ This to be addressed sufficient funding to enable the judiciary to perform its functions to the highest standard should be provided. Appropriate salaries, support staff, resources and equipment are essential to the judiciary to function properly.⁴²⁵ Those are the challenges of the current working of the Federal judiciary that impacted strong Independent judiciary not to exist in the federal system which the country introduced as a means of transforming the country from all the challenges that were encountering during the unitary system.

⁴²² Supra note at 417

⁴²³ Interview with Customers at Federal High Court their names annexed

⁴²⁴ Ibid

⁴²⁵ Latmir house guidelines for the Common wealth preserving judicial Independence 1998 Paragraph 11(2)

All the above facts reveal that the federal judiciary, though it has got constitutional guarantee as a third organ of the government, to adequately discharge its constitutional mandate the government should show commitment in the process of establishing an effective and efficient judiciary with a strong independent judicial structure, fulfilling all of the necessary prerequisites that an independent judiciary should have. The requirement for independent judiciary is discussed in fifth chapter as a subtopic.

4.3.6 JUDICIAL ADMINISTRATION COUNCIL AND ITS CHALLENGES

The other issue brought up by all of the interviewees is of the working of the judicial administrative council. All suggest that matters of professional conduct and discipline as well as transfer of judges of any court of the nation should be determined by the Judicial Administration Councils.⁴²⁶The federal government and all regions have Judicial Administration Councils, but their number and functions vary from region to region and from that of the federal.⁴²⁷ This difference emanates from the lack of set national standards for federal and state governments to apply, in line with their circumstances. This has created a discrepancy in the promotion and discipline of judges. Even if federalism allows for autonomy of states, this autonomy should not be at the cost of the uniformity and sustainability of the judicial structure, which strengthens the unity of the country. Federalism is not supposed to widen diversity; rather it lessens and accommodates diversity to strengthen unity.

The other problem raised by the Director of the Office of the Council is that the structural existence of the Federal Judicial Administration Council in the federal judicial structure was expected to have its own independent office, according to the Establishment Proclamation. However, it still does not have its own office or well-organized structure, because of its

⁴²⁶ Interview with the then head of the office of Federal Administrative Council and judges

⁴²⁷ Ibid

dependence on the Supreme Court. There is no set standard concerning the selection, accountability and transparency of the commission. It does not even have procedures that enable it to conduct its proceedings and its day-to-day activities. It is not clear how any judge or any individual can submit a grievance upon any member of the commission. The provision of the Proclamation states that members are to assemble once a month, but they do not actually meet within the stated time. There is no mechanism where they can meet with the judges and hear their positive or negative feedback on the working of the commission, including on their decisions. They do not have any means to communicate with Parliament about their performance. Their performance is presented to Parliament with presence the President of the Supreme Court not present, because the Supreme Court President is also the head of the Commission. When any judge has a complaint on their disciplinary measures, there is no mechanism of appeal that can review their disciplinary measures. The only chance the judges have is to hear the response of Parliament. Other disciplinary measures less than dismissal are automatically implemented after the decision of the commission. The judges do not have the chance to appeal those disciplinary measures that are passed by the Commission. This totally violates the right of appeal as outlined in the FDRE Constitution.

Another controversial power given to this Commission is the power stated in Proclamation Number 454 of 2005 G.C, which amended the Federal Court Proclamation Number 25 of 1996. This Proclamation in Article 3(b) states that the Federal Judicial Administration Council may issue directives for cases to be heard by three judges that otherwise could have been heard by a single judge. How often this power of the commission has come into practice was not evaluated. This power opposes the power clearly given to the council in the constitution.⁴²⁸ The power of the council is indicated in the constitution in Article 81(4-5). This give the power to

⁴²⁸ See Proclamation 454/2013 and Art 81/4/5/ of the FDRE Constitution

select and recommend federal judges for appointment; to look after the violation of disciplinary rules, gross incompetence, or inefficiency; or on accounts of illness to recommend its opinion to the house of Peoples' representatives.

Since all laws of the country are derived from the constitution, the legislation that gave power to the Commission should also follow this principle. Hence, this power should no longer be given to the council by the Constitution and should be void according to Article 9(1-2) of the Constitution. Although Parliament has the power to legislate laws, it is duty bound to respect and binds itself by the Constitution. Once a proclamation is promulgated by the parliament, all members of parliament are duty bound by the legislation. This is the basic principle of the rule of law, which holds that the law is above all and specifically the Constitution is the supreme law of the land.⁴²⁹

The connection of the judicial structure to different sectors is one of the critical issues of the federal judicial structure that needs clarification. In the federal and state judiciaries, the House of Peoples' Representatives enact most of the laws and codes that are applied.⁴³⁰The Labor Code, Commercial Code, Penal Code, Civil Code, tax laws, investment laws, patent laws, and other civil laws that the House of the Federation deems necessary to establish and sustain economic community are examples of this.⁴³¹There should be a mechanism to determine whether the federal or state judges are working in conformity with those laws other than appeal and cassation.⁴³² This could be a judicial forum; a national justice organs forum; a discussion forum with members of the parliament, judges and universities forum or judicial trainings based on the laws and their application in the judiciary, excluding the evaluation of each individual judgment.

⁴²⁹See Art 9/1/of the FDRE Constitution

⁴³⁰See Art 51 of the FDRE Constitution

⁴³¹Ibid

⁴³² There is no mechanism of cooperation in the constitution or establishment Proclamation of the federal and state government courts

The Constitution does not say what kind of cooperation should exist between the different organs of the government or between the center and the states, including the judiciary.

4.3.7 THE NON-EXISTENCE OF JUDICIAL POLICY AS CHALLENGE

The other serious problem of the current federal judicial structure is that in Federal or States Courts there is no judicial policy to serve as the foundation for the implementation of the federal or state judicial structure. Without evaluating the judicial policy of the country, it is unclear whether the structure actually conforms to the vision and aspiration of the people stipulated in the Constitution. Without clearly stated policy on judicial appointment, judicial discipline, judicial education and training, access to justice, case flow management, judicial administration, court management, judicial independence, and coordination and cooperation, it is not possible to deliver the expected performance from courts. This weakens the workings of the federal and state judicial structures. Addressing this issue is not something that can be delayed.⁴³³ A judicial structure without judicial policy cannot exist in a federal government. After twenty-five years, the government cannot boldly say that the long-standing demands of the people for a strong judiciary are being addressed.

Many efforts have been made to reform the judiciary and its structure as a whole in different areas since 2002, and obviously undeniable results have been shown.⁴³⁴ However, it has not enabled the judiciary to gain public trust and confidence. The Ministry of Justice and the current Attorney General noted in the Joined Up Justice meeting that even though there has been undeniable progress in the judiciary, it is not transformative. Inefficiency and rent-seeking continue to be reasons for public grievances.⁴³⁵

⁴³³ See for example the Philippines Judicial Policy

⁴³⁴ For instance in speedy trial, in Court management in pre Service and post service training in reduction of back logs. In introducing IT though limited only in the FSC and partially in other federal courts.

⁴³⁵ See the speech of the ministry of justice in the joined up of Justice Meeting held at Hawassa in 2015

Therefore, one way to bring about efficiency is to have a judicial training policy that enhances the capacity of judges through short-term and long-term trainings. If judicial training is to be fruitful, there should be regulations that oblige judges to take continuous training to have the ability to render quality judgment. This is not currently present in the Ethiopian judiciary.⁴³⁶ The training should focus on enhancing the knowledge gap and skills of judges with special emphasis to skills which they lack in the formal education.⁴³⁷ It has to empower the judges to be familiar with the new dimensions of laws promulgated by Parliament, including issues related to gender equality, human rights, free market economy, patent law, competition law, and others. These new laws are sometimes complicated. The judges who were trained at their time of entry into service cannot keep abreast with the latest developments in the field of law because of an excess workload.⁴³⁸ Therefore, there has to be a training policy in the judiciary that promotes judicial training under the supervision and monitoring of the Supreme Courts in all states and in the center that are established by federal and state governments.⁴³⁹ If the current judicial structure is to be operated by competent judges, they have to have their own well-organized, independent judicial training center under the FSC. This should be changed from the current federal justice training center, which mixes together all members of the justice sectors and is not well organized. These judicial training centers have to be designed to do research in the fields of court administration, management and other judicial issues that are barriers to an efficient and

⁴³⁶ Ibid Interview with Ato Tesfaye Gebreyesus trainer and Administrator of the Justice Sectors Training Center.

⁴³⁷ Although justice sector training center is there but trainings are not mandatory and Judges are not obliged to take these trainings except pre Judge training which is mandatory before someone is appointed for judgeship

⁴³⁸ See information extracted from the judges at the time of Interview

Since I have been a trainer for some years I am also a witness. It is full of redundancy and the trainers are not permanent with a good knowledge of skill.

⁴³⁹ There is no set standard how many files is a Judge to decide within a year it is determined by the flow of incoming cases transferred and adjourned cases in a year. This works to the FSC too where in USA the cases to be entertained by the Supreme Court are limited in number.

effective judiciary. Because of these shortcomings, the current federal justice training center does not uphold public trust.⁴⁴⁰

In short, there is no substitute for organized and appropriate training on a continuing basis, which requires attention in the judicial reform agenda if the strong working federal judicial structure is to exist in the whole nation.

Considering the above reality, the federal judiciary is attempting to train judges in a capacity building program through the Justice Sectors Training Center.⁴⁴¹ This center was established ten years ago and still has a lot of problems.⁴⁴² The justice training program embraces in-service, post-judicial appointment trainings, short term workshops and seminars.⁴⁴³ However, in the Joined up Justice meeting conducted at the end of 2015, it was determined that trainings, workshops and seminars are conducted, but not all of the trainings were properly organized and they did not adequately address the gap in knowledge, skills and attitudes of judges.⁴⁴⁴ The curriculum was not effectively crafted to augment the knowledge, skills and attitudes of judges and it was unable to produce the intended result.⁴⁴⁵ Therefore, it was suggested that reforms be implemented on all training of the judiciary. This idea was supported by two judges of the State of Tigray Supreme Court, more recently by the judges of Federal Supreme Court, and by the staff of the Justice Sectors Training Center.⁴⁴⁶ They specifically mention that although justice training centers are established in four regions, they lack uniformity. One area of difference is the duration period that trainees stay in training. For example, the agreement was for the trainees to have two years of training in the pre-judicial program but the State of Amhara training center

⁴⁴⁰ Supra note at 436

⁴⁴¹ In the current Justice organs training center even if there are minor initiatives to conduct research they do not have continuity and they are not mission oriented besides not well coordinated and organized See the report of Joined Up Justice

⁴⁴² See Proclamation no. 364 the establishment of Justice Organs Training center.

⁴⁴³ Problem of trainers, organized curriculum, infrastructure, poor administration See the report of Joined Up Justice

⁴⁴⁴ See proclamation 364/ 2003

⁴⁴⁵ Supra note at 388 and Supra note at 436

⁴⁴⁶ Ibid

teaches for only nine months, while the State of Tigray teaches for a year and three months.⁴⁴⁷

Even the in-service programs and the short-term workshops and seminars are full of redundancy and they are not related to the actual problems of the judges.⁴⁴⁸

The other issue raised is that the training centers were expected to equip the trainees with knowledge gap and skills but it is highly based on theory.⁴⁴⁹ Therefore, after graduation, there is not much difference from those judges who do not take the training. Beside the curriculum problems, in some regions training is prepared in the language of the state, and in others it is in Amharic.⁴⁵⁰ These shortcomings do not allow the judicial structure to be manned by competent judges, which is a chronic problem of the whole nation's judiciary. The training must be reorganized and restructured for the nation to have competent judges within its judicial structure, making it capable of addressing the demands of the society (See annex on the number of judges who got training).

4.3.8 THE NON-FUNCTIONALITY OF CERTAIN STRUCTURES AND THEIR IMPACT

The Federal Judicial Establishment Proclamation 25 of 1996 Article 3 states that the Federal Supreme Court shall have a Federal Supreme Court Plenum.⁴⁵¹ One interviewee said that he had not observed this Plenum function in ten years of service. According to the former Head of the Office of Federal Judicial Administrative Council, if some relevant structures were established and implemented, the federal judiciary could not take advantage of those structures. I have observed how true this statement of is. For example, even if the Establishment Proclamation of

⁴⁴⁷ Interview with the then State of Tigray Supreme Court Judges

⁴⁴⁸ Ibid

⁴⁴⁹ Ibid

⁴⁵⁰ Ibid

⁴⁵¹ Proclamation 25/96 Art 3

Courts of all states permitted the Supreme Court Judicial Plenum to be established,⁴⁵² during my stay as a Supreme Court President of the State of Tigrayit was not established and it is still not functional due to different problems.⁴⁵³

There are controversial rules and research about those rules that could not be conducted. This is a result of the failure to establish this, and debates and other discourses also cannot be researched now. This structure was present in the Supreme Court until 1996. The Vice President of the Supreme Court in the meeting to reestablish this plenum said that it did not continue for some unknown reason.⁴⁵⁴ This is not, of course, a problem of structure. The structure is there, it is a problem of implementation. Some of the current challenges of the federal judiciary emanate from the lack of well-organized structure, from a totally non-existent structure, or from the lack of adequate implementation and execution. The federal administrative council head says that there are different projects in the federal judicial structure that were established under the Federal Supreme Court. Those projects, however, do not have a legal basis and they are not well-equipped with human resources and materials. With all of their deficiencies (such as the Youth and Women's Project and the Court Reform Project), they had better performance in the beginning but now have become weak. This has had, and will continue to have an undeniable impact on creating a strong judicial structure unless it is resolved in a timely manner.

4.3.9 THE CHALLENGE OF ACCOUNTABILITY

Another serious problem of the federal judicial structure is how the judiciary can make itself accountable and transparent to the public. This is not clearly set in the constitution.

The FDRE Constitution clearly states that the conduct of the affairs of government shall be transparent and any public official or elected representative is accountable for any failure in

⁴⁵² Interview with the then head of the office of federal judicial administration council

⁴⁵³ The view of the researcher

⁴⁵⁴ Supra note 452 This meeting was conducted on June 2016 at Debrezeit for the first time to discuss on the establishment of this plenum

official duties.⁴⁵⁵The Ethiopian Democratic System Building Policy Document also states that although the judiciary has to be independent, this does not mean the judiciary is free from accountability.⁴⁵⁶ How to make the judiciary accountable and transparent is a grey area that needs clarity. At the end of the day, the outcome of the judiciary is to be evaluated by the justice it renders to society. This can only be successful by the establishment of strong judiciary. Courts are government organs working with a government budget, which is taxpayers' money. Although the judiciary has its own peculiar nature, the method of conducting affairs has to be accountable and transparent to the people. Although there is no clear provision in the Constitution, (except the general principle enshrined under Article 12 there is no legal provision holding the judiciary accountable to Parliament like the executive. According to the current practice, they are accountable to Parliament but they must submit an annual report to it. Since this is not sufficient, there has to be a mechanism where they can have a public forum that enables them to get feedback. In each court, there are suggestion boxes where court users put their suggestions. From the report of Parliament and from the suggestions, there are lessons to be learned.

However, there has to be structural arrangement such as public forums with various stakeholders that would enable the courts to receive a variety of suggestions and feedback to assist them in enhancing their accountability and performance. In order for it to be strong, there should be a formal standard on how to initiate and conduct the public forum. I was one of the participants the first time the public forum was conducted. I had several observations: the number of participants was very small; the time given was very short, the composition of the participants was not inclusive, and the discussion document was not distributed beforehand, instead it was presented at the beginning of the forum. In addition to my observations, there were

⁴⁵⁵ See Art 12 of the Constitution

⁴⁵⁶ see the capacity building policy of Ethiopia 2002 The above statement was stated at the a public forum meeting with stake holders which was conducted on February 2016 at the hall of Radio Fanna Broad casting.

other suggestions forwarded by the participants at that time. There has to be a legal frame work on how and to whom courts are accountable. There also has to be a procedure and standards for the way they are to conduct public forums and the way they are to be accountable and transparent to the public and other stakeholders. This has to be clearly stated in the structure of the judiciary so that there is an accountable and transparent judiciary with a well-organized judicial structure that responds to the demands of the people.

4.3.10 JOINEDUP JUSTICE FORUM AND ITS CHALLENGES

There is a Joined up Justice Forum (hereinafter called Forum) where Federal and State courts, represented by their Supreme Court Presidents, gather twice a year for discussions on different issues of the Federal and State justice sectors. The Forum was conducted fifteen times in ten years.⁴⁵⁷ This forum has discussed and passed resolutions on different issues, such as community service, restorative justice, criminal justice policy, justice reform, and others. Despite those positive achievements, it is deteriorating over time.⁴⁵⁸ Especially for the last four years, except when it discusses some minor problems of the sectors,⁴⁵⁹ it has been unable to come up with basic standards to bring about transformational changes for the delivery of quality justice in the justice sectors. The country, in the twenty-five years of its journey, has recorded undeniable improvements. However, it has not been able to come up with systemic standards, based on researched and scientific methods that are transparent to court users and to the judges themselves. There continues to be a lot of complaints about the clarity and transparency of federal and state court decisions and procedures that contribute to the quality of judgments. This was evaluated at all forums of Joined up Justice, but it was still not addressed.⁴⁶⁰ The Forum still

⁴⁵⁷ Interview with then president of the Federal High Court who attend the meeting of joined up justice for more than 12 years

⁴⁵⁸ Ibid

⁴⁵⁹ Ibid See also the Minute of the proceeding of Joined up justice meeting at the office of JFA PFE unpublished

⁴⁶⁰ Ibid

does not have fixed rules of conduct and procedures for its meetings, and it has not come up with systemic solutions that can curb the existing structural problems. Other members of the justice sectors and the judiciary agree with the Forum.

There are no set standards to describe the basis for cooperation and coordination of the justice sectors at federal and state levels. What are the issues, problems and resolution? How are the resolutions to be implemented? Will it bind all justice sectors including federal courts and all courts of the nation, or will it be left to the discretion of all justice sectors to implement it according to their situation and interests?

There are different issues of structure, knowledge, skill and attitude that are raised and mentioned in every meeting of the Joined up Justice. Still, these issues have not gotten any relevant remedy except minor improvements. In the meeting of the justice sectors at the end of 2015 E.C. (the fourteenth meeting), the performance of the justice sectors was evaluated.⁴⁶¹ It was determined that the judiciary did not have the public trust of the whole nation, with such serious problems of rent-seeking and good governance.⁴⁶²

4.3.11 THE CHALLENGE OF HUMAN RESOURCES AS BIG IMPACT

Human Resources in the federal judicial structure is a challenging problem. In this regard, the Federal High Court Vice President stated that there are only ninety-seven judges out of the two hundred and fifteen judges that are expected to sit on the Federal High Court.⁴⁶³ This means that less than half of the expected judges have been appointed. Each judge is expected to dispose of seven hundred cases per year, but in actuality each judge disposes half of that. The same problem exists in the Federal First Instance Court, too. The Vice President explains that for a judicial

⁴⁶¹ See the minutes of The meeting of Joined Up Justice at the library of JFA PFE and the Ministry of Justice

⁴⁶² Ibid

⁴⁶³ Interview with the current Vice President of the Federal High Court

structure with this kind of problem it is difficult to dispense accessible, speedy, cost effective, efficient and effective judgment and to gain public trust.

The constitutionally guaranteed independent judiciary cannot be sufficiently established unless the government shows a full-fledged commitment to allocating an ample budget that fulfills all of the necessary human resources and infrastructure expected from a well-organized, strong court structure. This has created an additional work load on the judges, so in March of 2016 the judges were forced to adjourn all new cases until March of 2017 or later.

The court has received a lot of complaints about the adjourned cases from the disputant parties, since it is beyond its capacity and cannot address the complaints of the parties. According to the Vice President of the High Court, the Federal High Court has only fulfilled three percent of its cases without all the necessary materials and equipment that should exist.⁴⁶⁴ This structural problem has become a serious impediment to the courts ability to deliver speedy and accessible justice to the public at large. Therefore, without the necessary human resources and infrastructure, a strong federal judicial structure that enforces and protects the constitutional rights of the public at large and renders speedy and accessible judgment cannot exist. All of those ideals were the demands of the people, which they were expecting from the federal judicial structure.

4.3.12 THE PROBLEM OF COMPETENT LEADERSHIP AS CHALLENGE

Competent and vibrant leadership is vital to any organization for its success and the fulfillment of its vision, mission and objective. Especially due to its unique nature from the legislative and executive organs, assigning leaders of courts is extremely important. The FDRE

⁴⁶⁴ Interview with the Vice President of the Federal High Court and Supra note 438 and 388

Constitution has vested the power to nominate the President and Vice President of the Federal Supreme Court to the Prime Minister of the House of Peoples Representatives’.

Since the majority of the members of the House of Peoples’ Representatives are most likely members of the ruling party, and the Prime Minister is also a member, it is assumed that the person nominated by the Prime Minister will be approved. Especially in the fifth-term election where all members of Parliament become members of one party, whoever the Prime Minister nominates will be appointed by Parliament. Because of this simple procedure, those who become leaders of the Federal Supreme Court come to power without any rigorous procedures. This has opened the door for incompetent leaders to become Presidents and Vice Presidents of the Federal Supreme Court. Due to this, even after twenty-five years, the citizens of the nation do not trust the judiciary. The government is criticized for its lack of good governance, corruption and rent-seeking. Additionally, there are no clear procedures where Presidents and Vice Presidents lose their power. The Constitution has stipulated how judges are to be disciplined and dismissed, but it does not state the same for the Presidents and Vice Presidents. Since they are not embraced under the administration of the judicial council, the judicial council has no say in the discipline and dismissal of those leaders. Therefore, in the federal government it is left to the Prime Minister, and in states it is left to the Head of the Executive Council to dismiss those leaders at the time when that person believes they are not fit. This happens sometimes with the approval of Parliament and sometimes without approval. This is substantiated by the experiences of all States Supreme Court Presidents including the current researcher. Unless this is replaced by an accountable and transparent system, it is impossible to expect competent leaders that can lead a strong judiciary with a strong judicial structure to prevail and be sustainable. Unless this is

replaced by an accountable and transparent system, it is impossible to expect competent leaders that can lead a strong judiciary with a strong judicial structure to prevail and be sustainable.

4.3.13 PROBLEM OF INFORMATION TECHNOLOGY AND ITS IMPACT

Currently, except for some promising efforts in the Federal Supreme Court, the problem of IT is a serious problem in the federal judiciary. The existence of IT could easily enable access to all proclamations and regulations of the federal government and regional governments so that the judges can have access to them wherever they are assigned. They would be able to connect to all courts and encode their decisions so that any interested party, institutions and universities could access them very easily. In April 2016, the participants in a discussion forum coordinated by Fanna Broadcasting on the topic of the federal judicial structure and its progress and challenges shared the above suggestions.

In conclusion, all interviewees recommend that to alleviate the barriers of the federal judiciary, the Federal Supreme Court should take the initiative to collaborate with the leadership of the federal and state judicial structures to create a well-organized judicial structure at federal and state levels that is effective and efficient.⁴⁶⁵ The interviews suggested that for a clear structure of courts at federal level, it would be wise to establish Federal High and First Instance Courts in line with the spirit of the Constitution in all the states. In order to strengthen the institutional independence of the structure, courts should submit their own budget directly to Parliament and use the pull system, which administers the budget of the judiciary equal to that of all ministries. Federal and State courts should work to have institutional independence that enables them to administer their budget and human resources as the judicial structure necessitates. To strengthen the cooperation of courts and to further different structural and

⁴⁶⁵ Interview conducted with judges lawyers court clerks court leaders and others indicated in the annex

reform issues, a strong mechanism should be established for the courts at federal and state level as well as among the courts of different states to meet once or twice each year. These meetings should evaluate their performance and share experiences in order to handle their constitutional obligations at the same pace and gain public trust by the citizens of the nation. It is also wise to arrange a mechanism where they can discuss the barriers created by different justice sectors that hamper the judiciary's ability to deliver accessible, speedy, fair, impartial and quality judgment.

In addition, a structural mechanism should be established where the judges of federal and state courts can evaluate the performance of judicial councils and the federal and state judges can meet with members of the judicial councils to discuss the problems and pave the way forward. In addition, the interviewees stated that there has to be a mechanism of appeal for the federal and state judicial administrative council structure. Also, there needs to be an established guideline for the Supreme Court Plenum, although this has not been practical to date. There has to be an independent office of the judicial administrative council that is accessible to all judges, and it should be networked with all offices of the judicial administrative councils within the entire country. The compensatory budget should be allocated in line with the Constitution, with ample justification based on the workload of the courts. The judicial structure should accommodate court-annexed mediation so that litigants can have formal and informal adjudicatory mechanisms. There has to be clear standards of selection, appointment, promotion and certain privileges of the judiciary. Conducting research on identified issues and framing a viable project that enables the courts to enhance the efficiency and effectiveness of the judiciary is also crucial in order to have strong judiciary.

Introducing IT can enable judges across the country to easily access all proclamations and regulations of the federal and regional governments. It is urgent to connect all established

courts and their decisions with IT so that interested parties, institutions and universities can access them very easily. The research discussion conducted with some lawyers and clients share some of the same suggestions of the interviewees. The solutions of the interviewees also coincide with the solutions forwarded in the Joined Up Justice Forum conducted in 2015 G.C at Hawassa.⁴⁶⁶

If this structural gap is not narrowed by one of the above mechanisms or by other possible means, individual and group rights will be in danger. This will lead to society losing hope in getting appropriate judgments from the judiciary and losing hope in the whole administration of the country. It will have its own impact on hampering the extensive investment and development of the nation. Chief Justice Ma noted that, “legal frame works and judicial decisions that affirm the dignity and rights of individuals help to ensure a sound foundation for long term investment.”⁴⁶⁷ This implies that strong and independent judiciary is vital to current Ethiopia where it is striving to attract foreign investors to achieve its goal of 2nd GTP, which aims at citizens’ reaching a median income of two dollar per day in 2020.⁴⁶⁸ Especially for a poor country like Ethiopia striving to alleviate poverty, having a strong judiciary is crucial.

In a parliamentary system where the parliament and the executive are fused, a strong judiciary with a strong judicial structure with checks and balances is of paramount importance.⁴⁶⁹

Otherwise, its impact on the whole administration of justice and good governance will be profound, and can cast a negative image on the political, economic, social and cultural efforts of the country, which can challenge the federal system. With all of the above challenges, the country cannot address the demand of the people for a strong judiciary, which the society and the nation struggled with for decades under the unitary system.

⁴⁶⁶ See the minutes of Joined Up Justice at the Library of the Ministry of Justice currently Attorney General Office

⁴⁶⁷ Stephen Haggard ,Andrew Mocolyntare and LydioTiede, The rule of law and economic development 2008

⁴⁶⁸ Look at the 2nd GTP of the government

⁴⁶⁹ See Art 46 of the FDRE Constitution

CHAPTER 5

5. THE ROLE OF CASSETION IN PROMOTING STRONG JUDICIARY IN THE ABSENCE OF JUDICIAL REVIEW AND THE CHALLENGES OF INDEPENDENCE

5.1 INTRODUCTION

In Chapter four the major challenges and impacts of the working of the Ethiopian federal judiciary are discussed. Without indulging in their detailed concepts and philosophies, only for the purpose of this paper this chapter discusses the challenges and impacts of the Federal Supreme Court, State Supreme Court Cassation Benches in the process of building strong independent judiciary, the non-existence of judicial review and its impact in building public trust and strengthening the working of the federal judiciary and the challenges that are facing the Ethiopian federal judiciary in its independence as sub topics.

5.2 THE FDRE SUPREME COURT CASSATION BENCH AND ITS ORGANIZATION

As communicated in the previous chapters, in the evolution of the Ethiopian court system Cassation as a system in the structure of courts received constitutional acknowledgment for the first time by the FDRE Constitution. The Constitution states, “The Federal Supreme Court has the power of cassation over any final court decision containing a basic error of law”. Particulars shall be determined by law.”⁴⁷⁰ “The State Supreme Court has power of cassation over any final court decision on State matters which contains a basic error of law.” Particulars shall be determined by law”.⁴⁷¹ After receiving constitutional recognition, the Federal Supreme Court

⁴⁷⁰ See Art. 80(3)(a) of the FDRE Constitution

⁴⁷¹ See Art.80(3)(b) of the FDRE Constitution

Cassation Bench was established by Proclamation Number 25 of 1996. Cassation benches in most of the States were established under the State Courts establishment proclamations of States.⁴⁷²

After someone files a case in a court that has original jurisdiction and after he receives a final decision in the court that has an original material jurisdiction, he has the right to say appeal to the upper court that has the jurisdiction to entertain the appeal.

Once the Appellate Court upheld the decision of the lower court if the aggrieved party believes that there is basic error of law in the judgment rendered by the courts, the claimant can file a petition for cassation. This is the overall requirements for petition to cassation benches of the FSCCB and To SSCCB.

However, in State Supreme Court Cassation Benches, the case has to be a State matter containing a basic error of law and it has to be the final decision of a State courts. The Federal Supreme Court Cassation Bench has the power to entertain any final decision of any federal court of the nation. This includes the decisions of the federal Supreme Court and any final court decisions of State Courts which contain basic errors of law.

⁴⁷² See Federal Courts Establishment proclamation Pro .no. 25/ 96

This is clearly stated in Proclamation Number 25 of 1996 and other amended proclamations, as well as in the state court establishment proclamations.⁴⁷³ There are justifications by different scholars as to why the cassation benches are included in the federal and state judicial structures.⁴⁷⁴ The first justification that is mentioned is to fill the gap that is missed because of the lack of competence of judges. Even if they do maximum effort to develop their knowledge of the law, it is natural variation to exist in their overall competence and because of this it is obvious to exist certain basic errors of law made by judges. Therefore before it affects the right of parties and before it created loss of trust on the whole administration of justice it has to be corrected beforehand. Hence a possible solution for correcting the basic error of law is cassation.

Second justification is since the Preamble of the Constitution anticipates one political and economic community. The goal of the federal judiciary has to be geared towards maintaining this vision. This can only be achieved when the judiciary renders speedy, fair, predictable, consistence, and uniform decisions. Especially trade and business, tax and investment issues when they are raised as a dispute in different courts of the country to have equal understanding of the law upon the same cases among the judges of the center and the States the existence of strong judiciary is indispensable. Therefore, the establishment of the Federal Cassation Bench is believed to play a significant role in developing and enhancing judicial jurisprudence in the Ethiopian legal system. Third, why cassation power is vested to states is to create uniformity consistency and predictability in the judgments of State courts on State matters. This will have contribution to minimize the workload and reduce the flow of cases that flood to the Federal

⁴⁷³ See for example State courts Establishment Proclamation Pro. No. ----- of the State of Tigray

⁴⁷⁴ See Murado Abdo , Some Issues Related to the Cassation Power of the Federal Supreme Court of Ethiopia Law Faculty AAU,1998 Unpublished and Ali Mohammed “Error of law” in cassation” Journal of federal legal professionals training Center. See Also Bililign Mandefro The cassation System in Ethiopia ,1989 See also the Minutes of The Constitutional Assembly(vol. 1-6);1987 EC Addis Ababa

Supreme Court Cassation Bench. It will also serve for the State judges for reference when they face some problem in understanding the laws.

The justification that are given as a reason for the existence of cassation in the Ethiopian federal judicial system are not too far for the justification given by other countries for their incorporation of cassation in their legal system coincides with other countries' justifications of introducing cassation:⁴⁷⁵ Some of the justification are to narrow the disparity of interpretation of laws in all courts of the country and bring uniformity of interpretation as much as possible. To serve the disputant parties in accordance with the law, so that their rights are enforced with the same law and the same interpretation that creates consistency and predictability as well as to dispose cases efficiently and effectively. As a result to maintain quality judgments that serves as input for public trust and quality administration of justice in the country.

In addition to the above stated justifications for cassation, the FDRE Constitution in the document of the constitutional assembly⁴⁷⁶ states that the existence of cassation is important for uniformity and consistency and predictability in the application of the laws of the country. This principle directly relates to that of the vision set in the Constitution which states in the preamble to build one political and economic community in order to live in a lasting peace, sustainable development, democracy, and rule of law.⁴⁷⁷

This of course cannot be practical unless it is founded on rule of law and be capable of ensuring lasting peace, guaranteeing a stable democratic order and advancing economic and social development.⁴⁷⁸ In order this vision of the FDRE Constitution to be converted into reality, there has to be a strong and committed government with a strong judiciary. The meaning of government in the Federal Democratic Republic Ethiopia is defined under the FDRE

⁴⁷⁵ See the Experience of France, Italy, Belgium

⁴⁷⁶ See the Minute of the Constitutional Assembly Vol 1-6 1987 EC

⁴⁷⁷ See the preamble of the FDRE Constitution

⁴⁷⁸ See the preamble of FDRE Constitution

Constitution.⁴⁷⁹ The term ‘government’ here means federal or State government, as the case may be.⁴⁸⁰ The kinds of organizations that are to exist in both governments are also clearly indicated in Article 46(2).⁴⁸¹ The Federal Government and the States have legislative, executive and judicial powers. Therefore, those organs of the government have to be strong and committed with the intention of fulfilling the vision of the people enshrined in the Constitution.

The topic of this paper concerns the working of the federal judiciary, which is one organ of the government. This judicial organ has to have a strong judiciary with strong structure in order to be fair and impartial, so that it can play its role in achieving the vision of the people. The vision is uniform, consistent, predictable, fair and impartial judgment, with quality administrative justice prevailing in the nation as a whole.⁴⁸² Therefore, the role and purpose of cassation is evaluated in its contribution in creating strong federal judiciary which is unaddressed demand of the nations, nationalities and peoples of Ethiopia.

It is obvious cassation benches are established to dispose disputes of litigants that claim the existence of fundamental error of law in the final decision of courts. However, there are certain issues that are raised by court users, lawyers, judges, university scholars and others about some of the challenges that are manifested in the performance of the Federal Cassation Bench.⁴⁸³ Some of the challenges are also the challenges of The SSCCB. The challenges that are mentioned by the above interviewees are presented in a summary.

The Cassation Bench of the Federal Supreme Court is exercising like that of an appellate court, which is against its core mission of its establishment. It does not have its own separate procedure from those of the formal courts. Still, it is applying what the formal courts are

⁴⁷⁹ See the FDRE Constitution Art.45 and 46

⁴⁸⁰ Ibid

⁴⁸¹ See The FDRE Constitution

⁴⁸² See the preamble the objectives of the FDRE Constitution and the Establishment proclamations of Courts

⁴⁸³ See the response of interviewees

applying. There is no different criterion for those judges that are to be assigned to the benches. The judgment they render is not based on adequate analysis and thus cannot be taken as references by lower judges.

The other argument that is raised in relation to the FSCCB is with regard to the proclamation that empowers the Decision of the FCCCB to be binding in all Courts of the nation. Even if this proclamation vests the Federal Supreme Court Cassation Bench its decisions to be binding in all courts of the country it is against the federal judicial structure. The Constitution clearly demarcates the division of power of the federal and State courts.⁴⁸⁴ Besides this, Ethiopia predominantly follows the civil law system; this proclamation is introducing in the civil law system Precedent which was historically not existed in the legal system of Ethiopia. Historically precedent is found in the common law system. Therefore, this invites contradiction to the whole legal system of the nation.⁴⁸⁵ The other serious questions that are raised with regard to the decision of the FSCCB to be precedent in all courts of the nation is Does the issue of the FSCCB to be binding as precedents in all courts of the nation have got constitutional base and national consensus by all the members of the federation? Is it discussed by different stakeholders who have a stake in it? Do all judges of the nation discussed on it? Do all State councils discussed and of decided on it?

These questions arise because precedent is a common law practice it is a paradigm shift in the judicial history of the country that dominantly follows the civil law legal system. Since Ethiopia is a country that only recently introduced federalism, when a new shift is introduced it is then mandatory that this to be discussed with all concerned bodies and a consensus to be reached in the new system. Since it is not discussed properly as it is revealed today it is creating

⁴⁸⁴ See proclamation 454 which makes cassation decisions to be binding in all courts of the nation

⁴⁸⁵ Aberra Jemberre., An Introduction to the Legal History of Ethiopia 1434- 1974

a negative impact on the States judiciary and it will have also its own impact on the whole federal judicial system. This again will contribute negatively in the process of building a strong working federal judiciary. Therefore, this proclamation has to be revisited again by Parliament. Even though the existence of FSCCB in the judicial structure has its own advantages and disadvantages, there are certain scholars who contend cassation over cassation is against the spirit of federal judicial structure. In practice, it is becoming source of additional workload to the Federal Supreme Court Cassation Bench creating visible and invisible costs to all litigants who come from different states. This can be substantiated by the five years performance of the Federal Supreme Court Cassation Bench with regard to cassation over cassation. See the annexed chart.

The strong support for cassation over cassation is promoted by one of the drafters of the Constitution, Dr. Fassil.⁴⁸⁶

Dr. Fassil states that the reason for establishing cassation over cassation is to safeguard fundamental rights and freedoms, guaranteeing lasting peace and democratic order and contributing to the socioeconomic development of the nation. Without evaluating all of the details of the working of the cassation bench, there are writers who are in favor of Dr. Fassil. However the current practice doesn't conform to the above reality. Therefore, the cassation power of the federal Supreme Court should be limited to federal matters that fall under the jurisdiction of federal courts and those delegated to State High and Supreme Courts if needed to serve its purpose.⁴⁸⁷ Consequently, State matters should be left to State Supreme Courts. The intention of the Constitution is to establish the Cassation Bench under the federal judicial structure is not to create cassation over cassation and create redundancy so that to overload the

⁴⁸⁶ Fassil Nahom., Constitution for a nation of nations, The Ethiopian Prospect, the Red Sea press, Inc.1997.

⁴⁸⁷ See Art.80/1/2/ of the FDRE Constitution

Federal Cassation Bench as what is envisaged today. The FSCCB should be confined to federal matters disposed by federal courts and to those federal matters delegated to State High and Supreme Courts.

Therefore, the crux of the argument for cassation over cassation shows confusion in the understanding of the constitutional spirit. The objective of the establishment of cassation power as a bench of State supreme courts is to entertain cases of basic errors of law within the states with the regulations legislated by State councils and this to be final without petition to FSCCB. There are also other advantages that can be gained from the cassation benches in the states.⁴⁸⁸ First, the cassation power of States is associated with the power of any State to determine State matters within its court structure since State courts are organized by the State. This works to ensure the right of self-determination of the states as well as uniformity, consistency, predictability and accessibility of the judiciary that exist in the judicial structure within the States.⁴⁸⁹

Second, parties in the State will be able to dispose their cases in a speedy, cost effective and accessible system with a structure reaching their locality without being deprived of their day-to-day business.

Third, it is of advantage to a poor society, like that of Ethiopia, to have easily accessible courts so people cannot obtain speedy judgment without being exposed to visible and invisible costs. Fourth, the establishment of such a court structure contributes to the society of the state to build public trust and confidence in the judiciary as a whole.

Fifth, the litigants who have exhausted their case of a State matter can file a petition to their State Supreme Court Cassation Bench if they are not satisfied with the final decision based

⁴⁸⁸ The view of the writer

⁴⁸⁹ See Art.39 of the FDRE Constitution

on what they believe is a basic error of law. The petition may be in the state's language without any barriers, since the working language of the state is the working language of the courts. This avoids the issue of translation and interpretation costs at the time of filing to the FSCCB.

Sixth, since State councils appoint the judges who are assigned to the SSCCB, they are accountable to those councils. Therefore, if the public loses confidence in the judges they can hold them accountable. The State Supreme Court Cassation Benches enable litigants to hold judges accountable in considering cases of basic errors of law. This is substantiated by the questionnaire conducted concerning the cassation over cassation power of the Federal Supreme Court.⁴⁹⁰ Over all the challenges of FSCCB is demonstrated by respondents of different States that are mentioned here.

It is not easily accessible to State litigants. They have to spend their time and money to file their cases and to appear in adjournments to follow their cases. It could be cumbersome for someone who comes from a remote area of the countryside to come to Addis Ababa for the petition of cassation over cassation. The litigants of most States face language barriers to file their petition. They have to pay money for someone to translate the final decision of the lower courts and the decision of the State Supreme Court Cassation Bench. In the cases that are filed with decisions reversed by the Federal Supreme Court cassation bench, the litigants are spending their time and money for nothing.

Therefore, this has to be solved and State matters should only be entertained in the State Supreme Court Cassation Benches, while federal matters should be entertained by the Federal Supreme Court Cassation Bench. Besides the problem of inaccessibility to State litigants, respondents have mentioned other challenges of the Federal Supreme Court Cassation

⁴⁹⁰ Information collected from questionnaire informants

Bench.⁴⁹¹ It has no any guidance to determine basic error of law. It has no procedures of its own, it has no format for judgment writing, It has no format for petitions, Previous judgments of the cassation bench are often repealed by the bench with no reason or explanation, There is no system of selecting judges for the cassation bench from the appointed judges of the Supreme Court. The files it considers are beyond the capacity of the judges, since the number of judges and the number of files doesn't match, some of the decisions are brief and do not state the relevant laws and justifications. It is difficult to identify which decisions will serve as precedent. There are unnecessary delays in rendering decisions. The existence of precedent was expected to decrease back-log but does not, there is no uniformity in the interpretation of the laws, the decisions of the bench are not published in a timely manner. In a questionnaire concerning the continuity of the current cassation structure, four out of sixteen prisoners agree with the current cassation structure, while twelve of them suggested that the current FSCB structure needs reform. This implies that seventy-five percent of prisoners are not satisfied with the current structure of FSCCB and its performance. The other questionnaire was administered to five lawyers about the continuity of the current structure and all five of them said it needs reform. This means one hundred percent of them do not support the current FSCCB structure. Sixteen teachers, students and justice sector trainees were asked if they agreed that the current FSCCB is performing well. Out of those, eight responded that they do not agree and eight of them agreed. This indicates that fifty percent of the respondents do not believe the current FSCCB structure is performing well. This question was also given to thirteen public Prosecutors, four of them agreed that the current FSCCB is performing well and seven of them gave a negative response while two of them abstained. This implies that eighty-four percent do not agree the current FSCCB is performing as it is intended and needs reform.

⁴⁹¹ Ibid

The statistical data of the FSC also indicates that from the end of 2005, when FSCCB decisions became precedent to all courts of the country up to June 30, 2015, the bench has entertained 91, 300 files.⁴⁹² Out of those files, 81, 875 of them were confirmed, 3,447 were modified, 5,763 were reversed and 215 of them were remanded to the lower courts. Those decisions were published in indexes 1-16, and their total number is above 1800. Volumes 17 and 18 are recently published.

A questionnaire was presented to about two hundred court users in total. Seventy-four of them suggested that the current cassation bench needs serious reform, sixty-two of them said it needs minor improvement, and twenty-six of them suggested it should remain as it is. This question was asked to one hundred and five judges. Forty-four of them said it should continue as it is, fifty-one of them said it needs reformed, two of them said it has a lot of problems and eight of them did not give a response.

This question was presented to eighty-four police and public prosecutors in total. Twenty-three of them responded it has lot of problems, three of them said it has serious problems, forty-two of them said it has minor problems; nine of them said it has no problem and eight of them did not respond.⁴⁹³ From all the above respondents it is simple to reach into an agreement the current cassation of Ethiopia needs transformational Change if it is to contribute in the process of building strong independent judiciary which is a long dream of the country and the people which is not still addressed.

To conclude, if the FSCCB and the SSCCB to have significant contribution in addressing the demand of strong judiciary with strong structure that is still not addressed even in the current federal judiciary the above stated problems must be alleviated conducting serious

⁴⁹² Data of the FSC

⁴⁹³See also the study conducted by Ato Haile Abraha the writer of this paper and The former President of the Federal High Court Ato Woubshet Shiferaw on the topic performance of cassation and its challenges which is sponsored by JFA- PFE with the collaboration of the FSC from 2014- 2015 unpublished found in the JFA- PFE library and in the FSC library.

transformational reform. State matters that have got final decision with basic error of law should be left to SSCB. The FSCCB should also be authorized to entertain federal matters that have got final decision by federal courts and those federal matters delegated to State High and Supreme Courts with basic error of law. The FSCCB, in order to deliver efficient and effective service and to serve as an excellent example of jurisprudence, it should correct the above internal deficiencies and find radical solutions based on scientific research. Otherwise with all the above challenges having the current position its role in addressing the question of strong judiciary that is an age old demand of the society is impossible. Its role in strengthening the current working of the federal judiciary will remain insignificant. Further recommendations are forwarded in this dissertation.

5.3 THE CHALLENGES AND IMPACTS OF NON-EXISTENCE OF JUDICIAL REVIEW

This sub topic is limited to discuss on why the current FDRE judiciary is not vested by the FDRE Constitution the power of judicial review to declare legislations, decisions, acts of government that contravene with the constitution null and void in brief. The questions that are raised in this subtopic for discussions are doing Ethiopia like the other federal countries; (The USA, Germany and India etc.) vested this power to the judiciary? If this power is not vested to the judiciary why and what is its impact in addressing the question of strong judiciary where the country is dreaming to have? As mentioned in the previous chapters, the main focus of this research is to discuss issues related to the working of the federal judiciary and its structure.

Therefore in this sub topic the aim is not to deal with philosophical details or the working of the current institution vested with the power of constitutional review, it is limited to indicate

the challenges and impacts of not vesting the judiciary with judicial review in the process of building strong and independent judiciary.

Why Judicial Review

Issues such as the Doctrine of Supremacy of the Constitution; the federal structure of the government; the separation of power and check and balances; human rights and other objectives, policies, and thoughts, are enshrined in the Federal Constitution. These issues are prone to conflict and contradiction, and there needs to be strong institutions to deal with conflicts that emanate from the above issues. Since federal constitutions are living documents subject to amendment it is normative to face them many challenges and controversies due to multifarious interests of the society. Therefore to address the dynamics of the people they need strong institutions.

Hence without a set of guarantees the idea of shared sovereignty would not be practical. Therefore one of the solutions is to establish an independent institution to uphold the Constitution and declare any act contrary to the Constitution void.⁴⁹⁴

The power of constitutional review varies from country to country because of different historical, political, economic and cultural reasons. In this regard Cappellati says that “in today’s world there are two patterns regarding the institutions empowered to adjudicate constitutional issues.”⁴⁹⁵ Many federal systems have vested this important power either in their ordinary court systems or in separate constitutional courts. Accordingly, these courts not only have the power to interpret the constitution, but also are even more importantly, entitled to decide on the conformity of the laws with their Constitution. Hence, what is common in all of these is that there is a

⁴⁹⁴ Mauro Cappellati, *The Judicial Process in Comparative Perspective* (Oxford: Clarendon Press, 1989)pp 312-313 see also Thomas O. Huglen and Alan Fenna : *Comparative Federalism* P.275

⁴⁹⁵ Supra note at 50

commitment to a supreme law that reflects fundamental values, and any law that contravenes this Supreme law should cease to exist by some kind of procedure.⁴⁹⁶

“Montesquieu characterized the power as, null” and official Alexander Hamilton expressed a commonly held assumption when he wrote in Federalist 78 that the judiciary would be the least “dangerous of the three branch of Government, Hamilton argued the courts neither have neither will nor force unlike the legislature they do not make laws or hold the power of the purse and unlike the executive, they do not hold the power of the sword”⁴⁹⁷.

In the case of *Marbury vs. Madison* Chief Justice Marshal, writing for a unanimous Supreme Court, ruled that “the federal judiciary may review the constitutionality of actions taken by the legislative and executive branches of the national government.”⁴⁹⁸ As a result, this became the cornerstone of American constitutionalism. It is this opinion and the arguments therefrom that are now called the classical theory of judicial review.⁴⁹⁹

5.3.1 THE PURPOSE OF CONSTITUTIONAL REVIEW

Different countries of the world accept the review of constitutionality today, though there are differences in r organization and jurisdiction that are vested with this power. This implies that all are of interest to maintain the supremacy of their Constitution and remain sustainable,⁵⁰⁰ The supremacy of the Constitution can have an enduring existence when laws are passed, interpreted or applied, and decisions are made or actions are taken in conformity with the spirit of the Constitution and the nation’s overall legal system, institutions, procedures, processes and

⁴⁹⁶ Mauro Cappelletti, *Judicial review in the contemporary world* (1971), P.15

⁴⁹⁷ Thomas O.Hueglin AND Alan Fenna *Comparative Federation* P.280

⁴⁹⁸ Ibid

⁴⁹⁹ Supra note 497 P.280ff

⁵⁰⁰ I. Currie and J.de Waal, ‘Application of the Bill of Rights’ in I. Currie and J.de Waal (eds.) .*The Bill of Rights Hand Book*, 5thedn. Juta (2005) ,p 32

substantive principles work perform in line with the frame work of the Constitution.⁵⁰¹The above objective to be practical a Constitution should provide a yardstick against which the legal validity of legislations and governmental actions are measured.⁵⁰² If so the constitution will serve its purpose and accomplish its intended result. Scholars do suggest the main reason for having judicial review. First and foremost Constitutional interpretation enables there to exist uniformity of application of laws.”⁵⁰³

The second purpose of constitutional interpretation is to ensure and safeguard individual rights from being violated by the executive or legislative branches of government. This can happen during the enactment of laws and implementation. In such instance it is the role of the interpreter to make null and void the unconstitutional legislations and those executive exercises that are against the spirit of the constitution.⁵⁰⁴ For example, at the time of emergency and crisis there are situations legislatures might pass legislation that deliberately infringes the right individuals and executives to take unproportional measures because of the above reason.⁵⁰⁵ Thus, in such kind of occurrence constitutional review serves as a remedy to avert the violation of individual rights by rendering interpretations that fit to the spirit of the constitution.⁵⁰⁶

Third, constitutional review by strengthening the supremacy of the constitution it gives life to the Constitution to have a long enduring life keeping the will of the people.⁵⁰⁷ Although review of constitutionality has its own importance in different systems, it is of paramount

⁵⁰¹ E .McWhinney (ed.) Supreme Courts and Judicial Law-Making : Constitutional Tribunals and Constitutional Review , 5thed n, MartinusNijhoff (1986)p 114

⁵⁰² W.K. Geck, Judicial Review of Statutes: A Cooperative Survey of Present Institutions and Practices, 51 Cornell law Quarterly 250 (1996)

⁵⁰³ Philip Zylberberg “The Problem of a majoritarian in Constitutional A Symbolic Perspective”37 McGill L.J.27, (1992).P61

⁵⁰⁴ Phillip Zylberbeg, “The problem of a majoritarian in constitutional law, A symbolic perspective” Mccill law Journal 37 (April, 1992) P. 61.

⁵⁰⁵Ibid

⁵⁰⁶Ibid

⁵⁰⁷CrattfriedDietze, “Judicial Review in Europe” Michigan Law Review, (February 1957) P.542

importance in a federal system that has a federal Constitution which is a living document. It assures the effective and smooth functioning of the whole federal system.⁵⁰⁸

Burges asserts since a federal constitution is a living document this constitutions to address the demand of its citizens and to have a stable implementation one of the strong institution that can assist is to have an independent organ that interprets constitutional conflicts and this is the judiciary. Here one can easily understand that in the federal system powers are shared between federal and regional governments and both of them are sovereign within the spheres given to them by the Constitution.⁵⁰⁹ This kind of division of power to work smoothly and to address the dynamic questions of its people judicial review serves as a means keeping balance the separation of powers among different organs by strengthening check and balance. The above assertion indicates that it is necessary to bestow the power of constitutional control over every action of the federal and state governments by vesting the power of constitutional review to impartial and independent institution that can declare the government acts that contravene the void. In effect, this means that the system that gives the power of review to the judiciary allows the courts to decide whether the federal government and the state governments have held themselves to the principle of federal loyalty and have remained within the boundaries of federal self-restraint. As a result, the court has become more or less the supreme arbiter of the whole federal system.⁵¹⁰ Last but not least judicial review will enable to keep the separation of power by strengthening check and balance that limits the power of different organs of the government.⁵¹¹

Review of constitutionality is paramount if a Constitution is to have a consistent, predictable, uniform and enduring application with all of its spirits, aspirations, and

⁵⁰⁸ Micheal Burges Comparative Federalism p. 156

⁵⁰⁹ ibid C.F strong, A history of modern political constitution, (New York: Petnam 1963), P.105

⁵¹⁰ Edward Mcwhinney, Constitutionalism in Germany and the federal constitutional court, 1962 P.16

⁵¹¹ ibid

constitutional values and norms throughout the nation.⁵¹² The organ or organs that are empowered to judge the constitutionality of laws can be a nation's regular court or a specifically created constitutional court. For further clarity, some of the world's experiences are described below.

5.3.2. ORGANS EMPOWERED TO INTERPRET THE CONSTITUTION (COMPARATIVE)

For governmental actions and laws to be constitutional and therefore valid, they must be consistent with the basic principles, stipulations and provisions of the constitution. If they are in conflict with the constitution, they will be declared unconstitutional and therefore invalid. The purpose is to ensure and safeguard the supreme position of a constitution in a given legal system. But who is to decide if conflict exists? There is no uniform answer among countries. There is no uniform organ vested with the power to interpret the Constitution and to declare any law or action repugnant to the Constitution invalid. Watt states that;

Two Types of courts for ultimate constitutional jurisdiction may be found among federations. One is the Supreme Court empowered as final adjudicator in relation to all laws including the Constitution. Examples are Supreme Court of the U.S.A, Canada, Australia, India, Malaysia, Nigeria, Pakistan, Comoros, the other is constitutional court specializing in constitutional interpretation which is the Pattern followed in Germany, Austria, Russia, The United Arab Emirates, Belgium and Spain. A third approach is that found in Switzerland involving a limited tribunal. Under the unique Swiss arrangement the federal tribunal may rule on the validity of cantonal laws but not of federal laws. The validity of

⁵¹² Supra note 535

federal laws is determined instead through the instrument of the legislative referendum.⁵¹³

The U.S. Model of constitutional review is classified as the decentralized type of judicial review.⁵¹⁴ The decentralized system practiced in the United States is followed by a number of countries, such as Brazil, Argentina, Canada, Columbia, Denmark, India, Norway, Mexico and Japan.⁵¹⁵ However in all those countries the ultimate power rests on the Supreme Court of the nation⁵¹⁶

The other model of Judicial Review is the Germany Model this system is called a concentrated system of constitutional review. For instance, Germany and Italy have special constitutional tribunals. Such tribunals are outside of the ordinary court structure. The federal Constitutional Court of Germany has exclusive power to determine constitutionality of law.⁵¹⁷ Germany, Austria, Italy, Turkey, Yugoslavia and some other countries have a centralized system of judicial review through their constitutional courts. Specifically Germany, Italy and Austria have empowered their special constitutional courts to guard against infringement of their constitutions by legislation and other governmental actions.⁵¹⁸

Constitutional courts, besides having the power to declare both national and regional laws unconstitutional, also serve as arbiters in disputes between organs of government at the national level.⁵¹⁹

⁵¹³Ibid

⁵¹⁴ Ibid

⁵¹⁵ I. Currie and J.de Waal, 'Application of the Bill of Rights' in I. Currie and J.de Waal (eds.) .The Bill of Rights Hand Book, 5th edn. Juta (2005) .p 32

⁵¹⁶ E .Mc Whinney (ed.) Supreme Courts and Judicial Law-Making : Constitutional Tribunals and Constitutional Review , 5th ed n, Martinus Nijhoff (1986)p 114

⁵¹⁷ W.K. Geck, Judicial Review of Statutes: A Cooperative Survey of Present Institutions and Practices, 51 Cornell law Quarterly 250 (1996)

⁵¹⁸Philip Zylberberg "The Problem of a majoritarian in Constitutional A Symbolic Perspective"37 McGill L.J.27, (1992).P61

⁵¹⁹Ibid

In France, A body other than a court exercises constitutional review there. It is the Counsel Constitutional, a political body that exercises constitutional review.⁵²⁰The counsel Constitutional challenges the constitutionality of a law only before it is passed by Parliament.. The system of constitutional review adopted by various African countries appears to be broadly based on these models of the American or Germany, with some modifications or adjustments. There is no an original African system of review.

In Nigeria, the Constitution confers the provisional authority on the High Court, Court of Appeals and the Supreme Court to interpret and enforce the provisions of the Constitution. The courts are also vested with the power to rule on all matters relating to the constitutionality of legislation with the power to make final decision resting on the Supreme Court.⁵²¹ Botswana, Gambia, Guinea, Malawi, Ghana, Seychelles, Sierra Leone, Tanzania and Swaziland have also adopted a similar system of review. In South Africa, the Constitutional Court is the court of final instance on constitutional matters. Benin has adopted the concentrated system of constitutional review. Its unique Constitutional Court has the power to define the constitutionality of laws in general before their promulgation. It also has the power to rule on the constitutionality of treaties and international agreements. Interestingly, this court can act on its own motion to determine the constitutionality of laws and regulations that threaten the fundamental rights of people and public liberties.⁵²²

Similarly, Angola, Benin, Burundi, the Central African Republic, Equatorial Guinea, Gabon, Madagascar, Mali and Togo have established specialized courts (such as the Constitutional Court) to exclusively deal with constitutional matters. Countries like Burkina

⁵²⁰ See J. Bell, French Constitutional Law(2001) P .1-27

⁵²¹ see Constitution of Nigeria (1999),

⁵²² A.Mavic A tabular presentation of constitutional/judicial review around the world available on [www. Concourts.net/net/ tab/ index.htm](http://www.Concourts.net/net/tab/index.htm) accessed on June 16/2016 see also Gemberu Genene Applicability and enforceability of international human rights treaties in Ethiopia Federal Courts Thesis 2013 Unpublished Addis Ababa University

Faso, Cameron, Chad, Niger, Sudan and Zaire, on the other hand, vested the power of constitutional review either in the high courts or in their specialized chambers. Political and preventive review like that of the French Model was adopted by Algeria, Comoros, Djibouti, Ivory Coast and Mozambique. Today, close to one hundred countries have some form of constitutional review?⁵²³

There is also a hybrid system with both the specialized court and the Supreme Court having constitutional jurisdiction in South Africa.⁵²⁴

From the above discussion what can be inferred is the practices of different countries differ from country to country where does the Ethiopian practice fall is evaluated in line with the above theories and practices. There are some reasons forwarded for why countries opt the judiciary for the Constitutional Review. Some of the Justifications is Constitution is law and it has to be reviewed by those who are competent with the knowledge of the law and the appropriate organ is the judiciary which is impartial and independent.⁵²⁵

The supremacy of the constitution can be well-protected by the courts when they have the competence to decide whether other organs of the state have acted constitutionally by applying the constitution as the superior of two laws, as opposed to an ordinary legislation or administrative regulation.⁵²⁶

The proponents of a constitutional court interpreting the constitution agree with those in favor of ordinary courts, that a court should interpret the constitution. They differ on the type of the court. In order to assure the separation of powers, these proponents believe the court should be outside of the structure of the judiciary.

⁵²³Ibid see MI. Abour- Enein, The Emergency of Constitutional Courts The protection of Individual and Human Rights (1997)P 314

⁵²⁴Basson, Dion, South Africa's Interim constitution – Text and notes, (south Africa (1995)) P.148-151

⁵²⁵ See Mauro Capellati and John clarxe Adams, “Judicial review of legislation: European Antecedents and Adaptation,” Harvard law review, V.79 (1965 – 66), P.1214.

⁵²⁶Henry J. Abraham, The judicial process, 6th ed. (New York; oxford university press, 1993), P.272

This is based on the belief that constitutional review is a political act.⁵²⁷ Because the constitution is a political document, it should be given to a separate court outside of the ordinary court so as not to infringe upon the separation of power doctrine.

The other reasons are the absence of the principle of stare decisis and the lawyer's tradition of applying the law that has been duly enacted without questioning and determining its validity.⁵²⁸

On the other hand, critics argue that the Constitution is the supreme law because it emanates from the people. Therefore, "the most politically accountable and responsible agency, parliament, has more of a claim to interpret the constitution than does the least politically accountable and exposed agency, the courts."⁵²⁹ Taking into consideration the above assertions with regard to constitutional review, this research will examine the place of constitutional review in the FDRE judicial structure.

5.3.3. CONSTITUTIONAL REVIEW AND ITS PLACE UNDER THE FDRE JUDICIAL STRUCTURE

The FDRE Constitution clearly declares in Article 8(1) that, "All sovereign power resides in the Nations, Nationalities and peoples of Ethiopia." In addition to this, "the Constitution is an expression of the sovereignty of the people and the sovereignty of the peoples shall be expressed through their representatives elected in accordance with this constitution and through their direct democratic participation".⁵³⁰ In other words, this happens by election of their representatives,⁵³¹ by participation in a referendum,⁵³² or through their representatives in the

⁵²⁷ Kommers, Donald P. *The constitutional jurisprudence of the federal republic of Germany* 2nd ed. (Durham and London: Duke University Press, 1997), P. 4-7.

⁵²⁸ *Supra* note at 28 P. 1207 - 1224

⁵²⁹ Peltason, J.W. *Corwin and peltason's understanding the constitution*, 8th ed. (New York Holt, Rinehart and Winston, 1979), P.28

⁵³⁰ Art 8(3) of the FDRE constitution.

⁵³¹ Art 38(1), Art 54(1) and Art 61(3) *Ibid*

⁵³² Art 39(4) (b) and Art 47 (3) (b) I

House of Representatives.⁵³³ The House of Peoples' Representatives is vested with legislative power over all of federal matters,⁵³⁴ and it is the highest authority of the federal government accountable to the people.⁵³⁵

The 1995 Constitution of the Federal Democratic Republic of Ethiopia established two parliamentary houses, the House of Peoples Representatives and the House of Federation.⁵³⁶ The House of Federation is composed of representatives who are elected for a term of five years. In this house, each Nation, Nationality and People is represented by at least one member with one additional representative for each one million people by population.⁵³⁷

Members of the House of Federation may be elected directly by the people when state councils hold elections or they may be elected indirectly, in which case the State councils themselves make the decisions.⁵³⁸ The members of the House of Federation are political representatives of the States, and it is the upper organ of the government.

As previously discussed, the 1995 FDRE Constitution established an independent judiciary.⁵³⁹ It also established federal and State courts in Article 79. Article 79 states that, "Judicial powers both at federal and State levels are vested in the courts."

The constitution also prohibits ad hoc courts, stating that special or ad hoc courts that take judicial powers away from the regular courts and institutions that are legally empowered to exercise judicial functions and which do not follow legally prescribed procedures shall not be established.⁵⁴⁰

⁵³³ Art 53 Ibid

⁵³⁴ Art 55(1)

⁵³⁵ Art 50 (3)

⁵³⁶ Art 50 and Art 62

⁵³⁷ Art 50

⁵³⁸ Art 62

⁵³⁹ Art 78

⁵⁴⁰ Art 78/4

The Constitution also stipulates that the Federal Supreme Court shall have the highest and final judicial power over federal matters and the State Supreme Courts shall have the highest and final judicial power over State matters.⁵⁴¹ When the independent judiciary was established, Ethiopia did not opt to vest constitutional review on the judiciary as a system. It was not vested like in most countries of the world, like the U.S. in a decentralized manner or like Germany in an independent constitutional court in a concentrated manner. This power is vested to the House of Federation which is very unique.⁵⁴² Why this system is opted is as explained by Dr. Fasil Nahum, because it is, “consistent with the overriding supremacy of the Nations, Nationalities and People whose sovereignty the Constitution expresses.”⁵⁴³

He further elaborates, “The House of Federation, as the champion of Nations, Nationalities and Peoples of Ethiopia, whose equality it promotes and whose self-determination right it enforces and whose misunderstandings it seeks to solve, it is precisely this political institution that is vested with the power to interpret the Constitution.”⁵⁴⁴ The views and the reasons to vest the constitutional review to the House of Federation rather than the judiciary are stated in brief.

At the inception of the Constitution, there was an argument in the constituent assembly as to who is to exercise the power of interpreting the constitution. The argument that was accepted and thus enshrined in the Constitution is to entrust this power to the House of Federation, as the Constitution is essentially a political contract of Nations, Nationalities and Peoples.⁵⁴⁵ Since the House of the Federation is composed of representatives of the different Nations, Nationalities

⁵⁴¹ Art 80/1/2

⁵⁴² Art 62 cum Art 84 see also Watt Comparative Federal Systems P 159

⁵⁴³ Fasil Nahum, Constitution for a Nation of Nations; The Ethiopian Prospect.(Asmara : The Red Sea Press inc.1997) p.59

⁵⁴⁴ Ibid

⁵⁴⁵ See preamble of the FDRE Constitution

and Peoples, it is the direct representative of the contracting parties and should do the work of interpreting the Constitution.⁵⁴⁶

The drafters of the Constitution and the majority of the members of the constitutional assembly argued that the Constitution should be understood as embracing a political character.⁵⁴⁷ They also said that since the core objective of the FDRE Constitution is to safeguard the aspirations and desires of the Nations, Nationalities and People of Ethiopia,(whose sovereignty has been recognized,) the issues and dispute over the rights of nations and nationalities could not be adjudicated by a few professionals randomly selected to form a constitutional court. Therefore, they found the House of Federation to be the proper organ for constitutional review, with the assistance of a body of legal professionals known as the Council of Constitutional Inquiry. The main function of this constitutional inquiry is technically to assist the House of Federation to fill the legal gap, but the group is without the power to make decisions on constitutional disputes. Article 84 of the FDRE Constitution and Article 3 of Proclamation Number 798 of 2005 were enacted to strengthen the powers and duties of the Council of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia. It was empowered to review any decision on the constitutionality of a legislative act, the decision of any organ or official act of the government and the interpretation in the message of the provisions of the Constitution.⁵⁴⁸

It is understood that three fundamental instances fall within the scope of constitutional interpretation in Ethiopia. First, is the determination of annulling or overriding any legislative act whether at federal or State level if it is found to be unconstitutional. This is clearly indicated in Article 84(2), which states, “Where any federal or State law is contested as being

⁵⁴⁶See Minutes of the Constituent Assembly October 29 .1995 No.26 The interview with Ato Kiflesion Mamo the then drafter of the Constitution

⁵⁴⁷Ibid

⁵⁴⁸ See FDRE Constitution Art. 84

unconstitutional and such a dispute is submitted to it by any court or interested party, the council shall consider the matter and submit it to the House of Federation.”⁵⁴⁹ Article 3 of the Proclamation of the Council of Constitutional Inquiry strengthens the above assertion, saying, “When the constitutionality of any law ... is submitted in writing to the council, it shall consider the matter.” The phrase “any law” means every law enacted or promulgated both the federal and State legislatures, including international treaties. The House of Federation is empowered to declare all legislative acts null and void whenever such acts are contrary to the Constitution. In determining the constitutionality of a legislative act, the C.C.I may develop and implement the rule of procedure that it believes is useful to investigate and decide on constitutional matters.⁵⁵⁰

The second instance is an act or decision of a government organ or a public official or any custom that is contrary to the Constitution is a legal issue that demands constitutional interpretation through the appropriately mandated organ under the law.⁵⁵¹ This means that any person who alleges that his fundamental rights and freedoms have been violated by the final decision of a government institution or official may present his case to the interpreting organ for constitutional interpretation.⁵⁵² However, notice should be taken that any party to the case can make a claim for constitutional interpretation only after he has exhausted all other means. This must be done before the organ will consider the validity of an order or the action of a public body.⁵⁵³

The third mandate is interpretation of constitutional provisions. This means that the interpreter of the Constitution is authorized to entertain the provision of the Constitution whenever there is a misunderstanding and misapplication of constitutional provisions. However,

⁵⁴⁹ Proclamation to re-enact for the strengthening and specifying the power of Constitutional Inquiry of the Federal Democratic Republic of Ethiopia, Proclamation No,798/2013,Art 4(2)

⁵⁵⁰ Ibid

⁵⁵¹ FDRE Constitution Art 9(1) (annexed)

⁵⁵² Supra note at 549

⁵⁵³ Ibid Art 5

pursuant to Articles 4 and 5 of the proclamation of C.C.I it is specifically enumerated as it could happen both in and out of the court litigation.⁵⁵⁴

The above assertion shows how the power to review constitutional issue is vested in the House of Federation, which is the political and second chamber of Parliament. Accordingly, the FDRE judiciary is not vested with the power of constitutional review. So, what does it mean that the FDRE judiciary has no mandate to review issues of constitutionality? Does this mean that the court is totally precluded from interpreting the constitutional provisions while rendering judgment or can it interpret constitutional provisions while disposing cases before it? What are the reasons the judiciary established under the FDRE Constitution is precluded the power of judicial review? What is the impact of depriving judicial review to the federal judiciary in creating strong Federal judiciary in the whole nation? The above questions are addressed in the following subtopic.

5.3.4. THE REASONS FOR REJECTION OF CONSTITUTIONAL REVIEW TO THE JUDICIARY

There are many reasons why the FDRE judiciary does not have the power of constitutional review. Some of these reasons are avowed below.

While drafting the Constitution, the Secretary of the Constitution Commission at the time, who was one of the drafters, argued, "... how can a Constitution that has been ratified by people's assembly be allowed to be changed by professionals, who have not been elected by the people? To allow the courts to do the interpretation is to invite subversion of the democratization process."⁵⁵⁵

⁵⁵⁴Ibid Art 4 and 5

⁵⁵⁵Ato Dawit Yohannes Minutes of the Constituent Assembly No 26

The drafters Accordingly, they formulated the political structures “...to be totally dependent on the will and supremacy of the people.”⁵⁵⁶ The best guarantee, according to the drafters, is to make sure that decisions would be based on the supremacy of the people.⁵⁵⁷ That seems the reason why the concept of recall of representatives is included in the Constitution.⁵⁵⁸ The drafters consider elected officials as they would represent the interests of the people because they are elected.⁵⁵⁹ They do not take into consideration whether those elected officials are fit to interpret the constitution and make any act of the government invalid.⁵⁶⁰ If they do not have the professional capabilities, then experts can be called in as staff to assist them. This keeps the accountability of elected officials, but in the case of judges, “the public cannot control the decisions and the process of judging.”⁵⁶¹ By accepting this view, the constituent assembly gave the power to interpret the constitution to the HOF in Article 62(1), thus introducing a unique system of review of constitutionality.

After the power of interpretation of the Constitution was given to the House of Federation, the chairman of the constituent assembly said, We could learn a lot from the western democratic system of constitution which strictly separate powers but we should not make a direct copy of their check and balance ... by giving power of constitutional interpretation to the House of Federation we are creating a new model in which case we can be exemplary to the world.⁵⁶²

Some of the reasons that are propounded for the distrust of the judiciary by the drafters is since the judges are not elected on the will of the people; their interpretation of the Constitution

⁵⁵⁶Ibid

⁵⁵⁷Ibid

⁵⁵⁸Ibid

⁵⁵⁹ Ibid

⁵⁶⁰Ibid

⁵⁶¹Ibid

⁵⁶²Ibid Negasso Gidada (Dr) the chairman of the drafters of the FDRE Constitution

would be very conservative that did not keep the dynamism of the society.⁵⁶³ They might be influenced by special interest and the way recalling them is highly rigorous⁵⁶⁴ Therefore, taking the above reasons and others the drafters reached in to conclusion that since the constitution is the result of the extended struggle of the Nations Nationalities and Peoples of Ethiopia the power of constitutional interpretation to be vested on the House of Federation which is very unique from that of other federal countries.”⁵⁶⁵

Thus, the rights will be better protected if the task of constitutional interpretation is left to the representatives of the people, rather than to a judiciary.

Therefore, the House of Federation fully trusted as an institution to protect and safeguard the human and democratic rights of the people as enshrined in the FDRE Constitution. Distrust of the judiciary does not end in depriving the power of judicial review to the judiciary. the last couple of years, there has been an increased tendency to establish by law administrative agencies and tribunals outside of the regular judiciary, with some adjudicatory powers that take away the power of the courts, despite the constitutional clause which stipulates, “Special or ad hoc courts which take judicial powers away from regular courts or institutions legally empowered to exercise judicial functions and which doesn’t follow legally prescribed procedures shall not be established.”⁵⁶⁶

The trend in Ethiopia is to increase the power of the executive to exercise political interests rather than limiting it by due process of law. All justifications imply that the FDRE government does not seem to trust the judiciary enough to vest the power of interpretation to the judiciary. Some believe that this lack of trust emanates from the nature of the government. They provoke that even if the government promotes revolutionary democracy this is simply cover.

⁵⁶³Ibid

⁵⁶⁴Ibid

⁵⁶⁵Ibid

⁵⁶⁶ See Art 17, 18 and 19 of Proclamation No. 272/2002

Since it has been promoting Leninism and Marxism while it was fighting with the Dergue still by the cover of revolutionary democracy it is promoting Marxism and that is why it does not have trust on the judiciary and that is why it does not have significant role in strengthening the judiciary so that to be strong and instrumental in check and balance of the system. The current government places no trust in judicial independence. It only included the constitutional guarantee to pretend to international communities that it is a democratic government, but otherwise it is totally against an independent judiciary. Rather, it wants to centralize everything, so it can be decided not in the eyes of the law but in the eyes of politics.⁵⁶⁷ With the power of the Ministers during the era of Menelik in 1908, the Minister of Justice was also the Chief Justice. The court structure reflected the traditional practice of combining judicial and executive functions in the person of the local chiefs and provincial governors under Emperor Haile Selassie until 1992. The Emperor rendered judgment in the Zulfan Chilot (Crown Court) where he administered justice until 1974.

It was no surprise to see every new regime in Ethiopia organize judicial structure that suited its mission. In Ethiopian history, salaries paid to the judges were relatively low. Under the Emperor, judges were appointed by the Emperor on the advice of the Ministry of Justice and could be removed at any time. Judges were perceived as corrupt and were stained by nepotism. The Dergue ruled the country for thirteen years with no constitution by establishing so many ad hoc courts that the jurisdiction of courts was totally wiped out. The judiciary was deprived of power and they remained only as a mere symbol of the military regime.⁵⁶⁸

The judiciary in Ethiopia during the previous regimes, and even in the current regime, has not yet received the trust of the ordinary citizens or the government. To gain public trust the

⁵⁶⁷ This idea is highly propagated by almost all the opposition parties found in Ethiopia

⁵⁶⁸ Supra note at 146

judiciary should perform certain vital functions for the public to view the judiciary as an impartial and independent institution. Especially in Ethiopia, where the federal system exists in a country with a diversified multiethnic and multilingual society, an impartial and independent judiciary that embraces the representation of all sections of society without compromising the quality and integrity of the courts is extremely vital. For this to be reality, the current perception of the government would need to shift from distrust of the judiciary to trust. This would strengthen the whole judiciary to be efficient, effective and able to render quality judgment which gains public trust and the confidence of the public-at-large. The other issue that needs to be addressed is what it means for the courts of Ethiopia to not be vested with the power of the interpretation of the Constitution.

Even though it is obvious that judges cannot dispose of cases without interpreting the Constitution, especially those enshrined in Chapter Three, (which deals with fundamental rights and freedoms that comprises one third of the provisions of the FDRE Constitution,) there is confusion among all judges at every tier of the courts. Judges at federal and regional levels think that they have little or no role in interpreting the provisions on human rights enshrined in the Constitution. Article 13(1) of the FDRE Constitution clearly stipulates that all federal and State legislative, executive and judicial organs at all levels have the responsibility and duty to respect and enforce the provisions of chapter three.

Indeed, the judiciary's role or duty in respecting and enforcing the rights and freedoms cannot be meaningful unless it is involved in interpreting the scope and limitation of those rights. Currently, there is a trend where courts base their judgment on an interpretation of the spirit of the human rights enshrined in the FDRE Constitution.⁵⁶⁹ However, there are misunderstandings

⁵⁶⁹ See Cassation files file no 26953 Ato Bizuneh CherkosvsweizeroMaazaEngda, FILE NO.22930 WeizeroTadelee Abate vs weizero Alemgebreyesu file no.46490 Weizero Bogalechvs MeseretBelete

from judges about whether they have a mandate to render decisions interpreting the human rights enshrined in the Constitution.

In general, the discussion concludes that the FDRE Constitution vests the power of review of constitutionality to the House of Federation. The HOF has the final say on interpretation of the Constitution and all constitutional disputes with the assistance of the Council of Constitutional Inquiry, which studies constitutional issues brought before the House of Federation in order to give legal and expert opinions on resolutions. Thus, the FDRE Constitution has rejected judicial review and denied the regular courts the power to declare legislative actions un constitutional. The courts are precluded from interpreting the Constitution. Article 83 of the Constitution seems to preclude the regular courts, the Federal Supreme Court and all lower courts from giving any decisions in constitutional matters, because it says that all constitutional disputes shall be decided by the House of the Federation.

Article 79 of the constitution provides for, “judicial powers both at federal and state levels are vested in the courts.” The general jurisdiction of courts to hear justifiable cases is granted by Article 37, which states, “everyone has the right to bring a justifiable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power.” There is no reason why constitutional issues cannot be justifiable like any other matter. Taking the above constitutional provisions, one can reach a conclusion that courts are not precluded from interpreting the Constitution. Articles 9(2) and 13(1) of the Constitution state that, “all citizens, organs of State ... as well as their officials have the duty to ensure the observance of the Constitution and to obey it” and, “all federal and state legislative, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter” respectively, strengthen this argument.

This leads to the conclusion that courts can interpret the Constitution, but the ultimate authoritative interpreter of the Constitution is the House of the Federation. Getachew and Assefa propound that “Courts in Ethiopia are excluded from constitutional interpretation only when the unconstitutionality of laws by State and federal legislative bodies is questioned. In all other cases, it is not the intention of the Constitution to preclude courts from constitutional interpretation”.⁵⁷⁰ Therefore, the House of Federation has a monopoly position in that it alone can decide whether legislation is unconstitutional, hence, invalid”.

To conclude, the purposes of the constitution, the concept of constitutional review, the need for it and the experiences of some countries with constitutional review have been explored. The discussion has shown that for historical, economic, cultural and philosophical reasons, different countries have vested the power of constitutional review to different organs of the government. Even with all of the differences, there seems to be consensus that there has to be a separate body to review the constitutionality of the acts of the legislative and the executive. Ethiopia has vested the power of constitutional review to the House of Federation, which is the political organ rejecting the right of the judiciary to have the power of constitutional review for different reasons as previously mentioned.

However, this does not mean that courts are rejected or precluded from interpreting the Constitution in disposing day to day cases. . This can be seen by strict scrutiny of Article 83 of the Constitution paired with the spirit of Articles 13(1), 37 and 79 of the Constitution. The confusion of the judges and other scholars comes from looking only at Article 83 of the

⁵⁷⁰ Getachew Assefa, all about words; discovering the intention of the makers of the Ethiopian constitution on the scope and meaning of constitutional interpretation (journal of Ethiopian Laws (Dec.2010) at166-167 see also Assefa Fisha, The concept of Separation of powers and its impact on the role of judiciary in Ethiopia and see Assefa Fisha and Getachew Assefa, (eds.) Institutionalizing Constitutionalism and the rule of law: Towards a constitutional practice in Ethiopia , 9 Ethiopian constitutional law series ,67(2010)P139-175

Constitution, without the other provisions. Additionally, this confusion has been exaggerated by Proclamations Number 251 of 2001 which state:

“According to the new laws, a ‘law’ that is subject to investigation for its constitutionality by the House of Federation shall mean proclamations issued by the federal or state legislature organs, and regulations and directives issued by the federal and state governments institutions and it shall also include international agreements that have been ratified by Ethiopia. (See Art 2(2) and art 2(5) of proc. No 251)

Dr. Assefa argues, “Thus by defining ‘the law’ to broadly to include all conceivable acts of the legislature and the executive the drafters of the new laws that are supposed to define the role of the HOF and the CCI have themselves apparently come up with unconstitutional law.”

The FDRE Constitution seems clear in this regard. Where it concerns the constitutionality of laws to be investigated by the HOF, the Constitution does not include regulations, directives and decisions of administrative bodies, and thus wipeout the jurisdiction of the courts.

The structure of the HOF means that it sits twice a year. This does not enable it to look at and dispose of the daily disputes that emanate from the activities of the executive. It is confined to a few complex and sensitive political issues that endanger the whole system and the federation at large, such as the issues of self-determination and conflicts among the states of the federation. To avoid confusion and in order for judges to have a clear understanding of their power and jurisdiction, an urgent amendment of the above provision should be made, and there should be a forum with the judges, lawyers and the public for a clear understanding on the power of the HOF and the courts.

Besides this, the judges of every tier of courts at both federal and state levels should strive to make a profound commitment to curb the current negative image of the courts and build

public confidence. They have to work for a better and stronger independent and accountable judiciary free from external and internal influences otherwise it is difficult to see in Ethiopia a strong Judiciary which is age old dream of the people that address the question of the people for impartial and Independent Judiciary. The next subtopic discusses about the independence of judiciary.

5.4 JUDICIAL INDEPENDENCE AND IN THE ETHIOPIAN FEDERAL JUDICIARY

5.4.1 DEFINITION OF JUDICIAL INDEPENDENCE

Here as I mentioned in the introduction of this chapter the focus of this subtopic is not to discuss the whole theories principles and conventions, and international elements that deal about judicial independence. For the purpose of this paper it is attempted to indicate some basic elements that enable us to evaluate the existence of judicial independence in a country's judicial structure and to summarize the challenges and impacts of the current working of the Ethiopian federal judiciary.

In today's contemporary world, many scholars strive to define judicial independence in different ways. For example: Tom Bingham states,

The principle of independence of the judiciary is directly derived from the theory of separation of power, one of the theoretical conclusions of which is that the legislative and executive branches of government will exercise self-restraint in their interference with the activity of the judicial branch.⁵⁷¹

From Bingham's point of view, one can deduce that in order for there to be an independent judiciary there has to be a separation of power among the three branches of the government. The legislative and executive branches should exercise self-restraint in the activity

⁵⁷¹ Tom Bingham, *The business of judging*, 2000, p.55

⁵⁷² Christopher M.Larkins, *Judicial independence and democratization, a theoretical and conceptual analysis*; *The American journal of comparative law*. (Vol. of 4,1996), p.607

of the judiciary. This definition is important, even though it lacks clarity on the degree of self-restraint of the two organs and it failed to mention the internal and institutional independence of the judiciary.

Larkins' definition says:

Judicial independence refers to existence of judges who are not manipulated for political gain, who are impartial to the parties to a dispute and who from a judicial branch which has the power as an institution to regulate the legality of government behavior enact neutral justice and determine significant constitutional and legal values.⁵⁷²

Larkins seems to give a broader definition than Tom Bingham. According to Larkins, in order for there to be judicial independence, judges have to be free from political pressure and be impartial to the parties and the judiciary, and the institution should have the power to regulate government behavior.

Another broad definition of judicial independence is provided in the 1985 Convention of the Independence of the Judiciary by the United Nations General Assembly, which states:

The independence of the judiciary is a principle to be guaranteed by the state and to be enshrined in the national constitution or law. It should be the judiciary comprising of ordinary courts established by or under law to determine whether they have jurisdiction in matters before them ... the state to provide adequate resources to enable the judiciary perform its functions ...⁵⁷³.

The basic Principle on the independence of Judiciary all in all encompasses many ingredients that satisfy the existence of judicial independence in a country. First and foremost, it

⁵⁷³ Adopted by the Seventh Crime Congress, Milan, 26 August-6 September 1985, and endorsed by the General Assembly in resolution 40 /32.

has to be recognized by the constitution or other law of the country, because this will serve as the safeguard and legal guarantee to the judiciary. It enables the judiciary to be respected and protected by the government officials and the public at large. Corresponding to the constitutional guarantee, there has to be decisional independence, personal independence, and institutional and collective independence of the judiciary. Focus is also given to the adequacy of resources. Resources include finance, emphasizing that without adequate resources there cannot be an independent judiciary. Appointment, promotion and removal of judges have to be governed by law. This definition is even broad and constitutes the important elements of judicial independence,

Even with all the variations, all seem to agree on the importance of an independent judiciary as a pillar of a democratic government, playing an indispensable role in the prevailing rule of law and quality justice. Therefore the question that needs an answer in this research is, is the current working of federal judiciary playing its role in maintaining democracy, rule of law and in prevailing quality judgment that contributes to quality justice. The following is a discussion on the concept of judicial independence.

5.4.2 THE CONCEPT OF JUDICIAL INDEPENDENCE

Judicial independence is often associated with the separation of powers theory.⁵⁷⁴ Although the idea of the judiciary as a separate branch of government developed independent of and subsequent to the development of judicial independence,⁵⁷⁵ the perception of the judiciary as a separate branch of government and the call for its independence are an inherent part of the current view of the doctrine of separation of powers.⁵⁷⁶

⁵⁷⁴ Eli M. Salzberger, The essential elements of judicial independence and the experience of pre-soviet off Russia, International review of law and economics; 9th EALE conference (1992), p.349

⁵⁷⁵ Ibid

⁵⁷⁶ Ibid

Thus, it has been recognized as axiomatic that if the judiciary were placed under the authority of or encroached by the legislative or executive branches of the government, the administration of the law might no longer be impartial. Impartiality is essential if justice is to prevail.⁵⁷⁷ The separation of the judiciary from the other two organs of the state and its independence from their control and influence are the foundation of judicial independence.⁵⁷⁸

Finally, although the independence of the judiciary might appear to be a worn out subject, it must constantly be affirmed, defended and bolstered, as it is important to the separation of powers.⁵⁷⁹

The above notion is clearly described by James Madison and Alexander Hamilton, who said,⁵⁸⁰ “There can be no liberty where the legislative and executive powers are United in the same person, or body of magistrates or if the power of judging be no separated from the legislative and executive powers.”

From the point of view of Madison, it is neither possible nor necessary to make a clear distinction between the functions of the three branches of government. It is conceptually imperative that each has partial agency in the acts of the other. Without this partial agency, each branch can abuse its authority and the liberty of the individual can be exposed to danger. Hamilton emphasized the need to provide constitutional guarantees for the independence of the courts. He graphically showed that the judiciary is the weakest of the three branches, because it controls neither the national purse nor the national sword. Its judicial function brings it into constant confrontation with the other branches.⁵⁸¹

⁵⁷⁷ Alemayehu Haile, The judiciary in Ethiopia (1991, unpublished), P.47.

⁵⁷⁸ Ibid P.S

⁵⁷⁹ Sir Ninian M. Stephen, judicial independence, the contemporary debate, 1985, p.529.

⁵⁸⁰ The federalist papers No. 47

⁵⁸¹ Ibid

According to the above statements, there will not be an independent judiciary where the courts collectively (or the judges individually) are subject to administrative control of the legislature and the executive. However, there may be a difference in practice. There should not be in principle. The United States Constitution created three branches of federal government: the legislative, executive and judicial.⁵⁸² The legislative branch enacts laws to regulate areas such as taxation, interstate commerce and civil rights. The executive branch enforces those laws. The federal judiciary interprets and applies the laws to resolve disputes. Through judicial ruling, the federal courts protect rights and liberties guaranteed by the Constitution.

To protect each branch from domination by other branches of government, the Constitution established a system of checks and balances. These protections help an independent judiciary to decide cases, free from popular passions and political influence.⁵⁸³ These propositions have been endorsed by the emerging transnational jurisprudence on the independence of the judiciary, including the Montreal declaration.⁵⁸⁴ For a strong judiciary, the separation of powers among the three organs should be clearly delineated with the principle of checks and balances. Specific emphasis should be given to the judiciary, in order to continue being independent from unnecessary and unwarranted influences that could break the whole institution if the judges were of subject and subordinate to the executive. Having looked at the concept of judicial independence, the need for judicial independence will be discussed next.

5.4.3 WHY AN INDEPENDENT JUDICIARY?

The discussion of an independent judiciary has value and is of paramount importance in promoting peace, stability, democracy and economic growth in a country. An independent judiciary is an essential element for safeguarding fundamental liberties and human rights and is

⁵⁸² Article 1, Art 2, Art 3 of the United States constitution

⁵⁸³ Supra note 525

⁵⁸⁴ Montreal declaration Arts 2, 40-2, 43 and the standard of the international bar association, section 2, 5, 8 and 9

expressed and implied from various international and regional instruments, beginning with the Universal Declaration of Human Rights.

Article 10 provides:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him.⁵⁸⁵

Further, Article 14 of the International Covenant on Civil and Political Rights provides:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him or of his rights and obligations in a suit at law, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal.⁵⁸⁶

This principle was reiterated with greater emphasis in the Vienna Declaration and Program for Action in 1993 in paragraph 27:

Every state should provide an effective frame work of remedies to redress human rights grievances of violations. The administration of justice including law enforcement and prosecutorial agencies and especially and independence judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the full and non-discriminatory realization of human rights and indispensable to the process of democracy and sustainable development.⁵⁸⁷

⁵⁸⁵ See the Universal Declaration of Human Rights

⁵⁸⁶ See the international covenant on civil and political rights

⁵⁸⁷ See the Vienna declaration and program for action 1993

In a leading and landmark judgment on judicial independence by the Supreme Court of Canada, Antonio Lamer, C.J., said,

Judicial independence is valued because it serves important societal goals it is a means to secure those goals. One of these goals is the maintenance of public confidence in the importability of the judiciary which is essential to the effectiveness of the court system. Independence contributes to the perception that justice will be done in individual cases. Another social goal served by judicial independence is the maintenance of the rule of law, one aspect of which is the constitutional principle that the exercise of all public power must find its ultimate source in a legal rule.⁵⁸⁸

Dato Param Cuaraswamy, in his paper, stated that the right to an independent judiciary is that of the consumers of justice, not a privilege of judges and lawyers. It is often understood as judges having the right to be independent, but the right to an independent judge is that of the consumers. Revocation of this basic right will result in the abrogation of all other human rights in a given country. In countries where human rights are denied or suppressed, wholly or partly, the judicial institution may become weak, compliant or subservient.⁵⁸⁹

Shimon Shetreet also strengthened the above notion by saying:

Judges are the central and most significant figures in the administration of justice in the course of adjudicating cases judges often establish new legal principles and shape the life of the community. Hence they must be professionally qualified persons of high integrity and good character in order for the justice they administer to be of superior quality likewise where they are

⁵⁸⁸ Reference Re: remuneration of judges of the provincial court of prince Edward Islands and others, 1997 as quoted by DatoParamcumaraswamy United nations special reporter on independence of judges and lawyers a paper presented A global view on the independence of the judiciary, Attacks, dangers and today's status for the Norwegian association of judges on the triennial conference of judges June 4-6, 1998 Trondheim Norway.

⁵⁸⁹Ibid.

courageous, independent and maintain high moral standards justice will be administered fairly and justly and the parties to any case will enjoy adequate protection under the laws of the society which they live.⁵⁹⁰

Peter H. Russell and David M.O Brien also suggest:

Written guarantees of judicial independence alone do not ensure the actual implementation and maintenance of an independent judiciary. The method of appointing remunerating and removal of judges, as well as the procedure for promotion, transfer, evaluation, discipline, training and continuing education all potentially affect the courts actual autonomy.⁵⁹¹

Last not least, Gerand Brennan says with regard to the principle of the independent judiciary:

The courts are an organ of government separate from and independent of the political organs. The courts are an important element in the system of checks and balances that preserve our societies from a concentration of official power that might otherwise oppress the people and restrict their freedom under the law. The courts are an organ of government but they are not part of the executive government of that country---⁵⁹².

From the above discussion, it is obvious that judicial independence is indispensable in order to have a stable society ruled by the rule of law. In order to be sustainable and to gain public confidence, this principle needs the rigorous commitment of governments and political parties to create an atmosphere for its proper implementation and to curb its challenges.

⁵⁹⁰ Shimon Shtreet, justice in Israel: A study of the Israel judiciary, 1994 P.257

⁵⁹¹ Peter H. Russell and David M.O'Brien: Judicial independence in the age of democracy critical perspectives from around the world 2001. P.14

⁵⁹² G.Brennan, "Declaration of principles on judicial independence" Australian Bar review 15 (1969-97):175

In order to have a strong, independent and impartial judiciary, there needs to be a great endeavor from the government, the public at large and the judiciary itself. Each country should respect and strictly apply the following standards in order to have a strong judiciary that stands for peace, stability, democracy, rule of law and sustainable development of the country. Subsequently, in order for there to be an independent judiciary, the following prerequisites must be fulfilled:⁵⁹³

First: it is the duty of the government to respect and observe the independence of the judiciary.

Second: it is the duty of the judiciary to decide matters impartially.

Third: it is the duty of the government to provide adequate resources to enable the judiciary to properly perform its function although adequate refers to the capacity of each nation.

Fourth: Judges must not be subjected to or accept restrictions, improper influences, inducements, pressures, threats or inferences of any kind with the judicial process.

Fifth: Judges should have the exclusive authority to decide all issues that come before them.

Sixth: Judges should be properly trained and selected without any discrimination.

Seventh: The appointment of judges should be guaranteed up to a fixed retirement age or the end of their term of office.

Eighth: Judges may only be removed for incapacity or behavior that makes them unfit to discharge their duty.

5.4.4 JUDICIAL COMMISSION AND JUDICIAL INDEPENDENCE:

The United Nations' basic principle on the independence of the judiciary does not explicitly mention the creation and role of judicial councils, although it clearly states that there must be guarantees of judicial independence by the state.⁵⁹⁴ It also recommends that the selection

⁵⁹³ The Beijing Statement of Principles of the Independence of the Judiciary in the law Asia region (1995) 6th Conference of Asia and the Pacific

⁵⁹⁴ Universal charter of the judge, 1999, international association of judges, Art 9 and 11.

of judges and court administration and the judicial discipline process, “Be carried out by an independent body that includes substantial judicial representation.”

The Beijing Statement of Principles and the Latimer House Guidelines both mention judicial councils, their membership and their potential role in regional instruments. In the Beijing Statement of Principles, the Chief Justice of Asia and the Pacific recognized the use of judicial councils in the appointment of judges and called for membership by “representatives of the higher judiciary and the independent legal profession.”⁵⁹⁵ In the commonwealth, the Latimer House Guidelines suggested that appointments should be made at least on the advice of a judicial council, “established by the Constitution or by statute with a majority of members drawn from the senior judiciary.”⁵⁹⁶

It is the Council of Europe that has made the most comprehensive efforts to draft minimum standards regarding the creation, membership and role of the judicial council. In its recommendation on judicial independence of 1994, the Council of Europe recommends that the responsibility for the selection and management of judges be assigned to an authority independent from the government and the administration and whose members the judiciary selects.⁵⁹⁷

The European Charter has designed regional judicial independence guidelines that would supplement the Council of Europe’s recommendation, culminating with the 1998 adoption of the Charter on the statute for judges, which provides that:

In respect of every decision affecting the election recruitment, appointment, career progress or termination of office of a judge, the statutes envisages the intervention of an authority independent from the executive and legislative

⁵⁹⁵ Beijing statement of principles of the independence of the judiciary in the law Asia region, 1995 6th conference of Asia and the Pacific, Beijing, China, Art 15.

⁵⁹⁶ Latimer house guidelines for the common wealth, preserving judicial independence, 1998.

⁵⁹⁷ Recommendation 12 of committee of ministers to member states on the independence, efficiency and role of judges, 1994.

powers within which of least one half of these who sit are judges elected by their peers following methods guarantying the widest representation of the judiciary.⁵⁹⁸

The above information illustrates how the creation of the judicial council, either by the constitution or by other laws, is of paramount important to safeguard and promote the independence of judiciary. It is not, however, a panacea for every problem that the judiciary encounters. Serious attention should be given to its composition, its duties and responsibilities so that it does not erode the independence of the judiciary with undue influence by being the mouthpiece of the executive. With regard to membership, there seems to be a great variation from country to country depending on each general situation. There are countries with three members, while the largest number is thirty-five.⁵⁹⁹ The general consensus seems to be that the majority should be judges. The rationale is that in case of a difference of ideas, the winning viewpoint would be that of the judges. Even this has problems in institutional bias of the judges. It is believed that it is better to tolerate this bias than to encroach on the independence of the judiciary. International and regional groups refer to the membership of judicial councils,⁶⁰⁰ to include substantial representation of the higher judiciary and the independent legal profession.⁶⁰¹ There is no consensus, however, as to the levels of the “majority of members drawn from the senior judiciary”⁶⁰² should selected by the judiciary or judges elected by their peers

- Members of the political branch of government (Executive and legislative)
- Members of the legal community, often bar association representatives, legal scholars or eminent lawyers.

⁵⁹⁸ European charter on the statute for judges 1998, council of Europe, Art 1,3

⁵⁹⁹ Sandra Elena, Global best practices judicial councils lessons learned from Europe and Latin America (April, 2004)

⁶⁰⁰ Ibid

⁶⁰¹ Universal charter of the judge, 1999, international association of judges, Art 9 and 11

⁶⁰² Beijing statement of principles of the independence of the judiciary in the law Asia region, 1995, 6th conference of Asia and the pacific, Beijing, China, Art 15

- Members of civil society and eminent public figures.⁶⁰³

Again, there seems to be no consensus with regard to the duties and responsibilities of the judicial council.

Thus far, the definition, concept and need for judicial independence have been discussed, as well as the judicial administration commission and its role in safeguarding judicial independence. This served as a background to examine judicial independence with the FDRE judicial structure. Next, the exploration of the independence of judiciary with the FDRE judicial structure in line with the aforementioned principles will be discussed.

5.4.5 JUDICIAL INDEPENDENCE UNDER THE FDRE JUDICIARY

The 1995 FDRE Constitution in Chapter 9 Article 78(1) clearly stipulates, “An independent judiciary is established by this constitution”⁶⁰⁴

Judicial independence has a constitutional guarantee in the FDRE Constitution. However it has Shimon Shetreet notes that even if it is good for the protection of judicial independence to take place at the constitutional level⁶⁰⁵ However, according to him, proper constitutional protection requires that certain principles be entrenched in the law to protect such a basic norm. The first principle should be a prohibition against special tribunals to hear specific disputes. In the absence of such a prohibition, it is possible to circumvent the judiciary by creating a whole system of special tribunals.⁶⁰⁶

He adds that the second principle requiring constitutional protection is that of proper execution following the rendering of the legal decisions. He strictly warns that even if a country

⁶⁰³ Supra note at 599

⁶⁰⁴ See article 78(1) of the FDRE constitution.

⁶⁰⁵ Shimon Shetreet the critical challenge of judicial independence in Israel.

⁶⁰⁶ Ibid

has a tradition of obedience to legal decisions, this is not enough to ensure adequate protection.⁶⁰⁷

The third principle that he mentions is the issue of strict separation between the judiciary, the other organs and the public service.⁶⁰⁸ He states that,

This separation ought to apply at the personal level, that is judicial officials may not serve in any political capacity or occupy any position in the public service. It should also apply at the institutional level that is the status of the judges must be clearly defined in terms absolutely distinct from those of public service employees.⁶⁰⁹

The fourth principle, according to Shetreet, is the prohibition on detrimental changes in the term of office of judges. He further explains the danger.

Changing judicial terms of office might be used by the political branches of the state as a means of indicating to the judges that their decisions are not politically acceptable. It might also be used as a means of attempting to influence actual legal decisions.

Again Shetreet clarifies that every aspect of judicial terms of office must be entrusted to the judiciary, because any other situation would disregard the doctrine of checks and balances.⁶¹⁰

The fifth and final principle, according to Shetreet, is that of the '*natural judge*'. Shetreet briefly explains the natural judge requirements.

The principle of natural judge requires that courts be constituted before trials are announced so that in judicial assignments there is no possibility of one judge being preferred over another to produce a desired outcome. He emphasizes that the application of the principle ensures absolute neutrality and randomness with respect to the composition of the judicial panel

⁶⁰⁷Ibid

⁶⁰⁸Ibid

⁶⁰⁹Ibid

⁶¹⁰Ibid

in any particular case. He continues to give solutions in the case of bias by a natural judge. He states that if, by pure chance, a judge who is suspected of being biased is selected, and then there are always provisions for his or her removal from the case in a well-defined procedure.⁶¹¹

In order to protect the independence of judiciary, according to Shetreet, there have to be other provisions that enforce and strengthen the independence of judiciary.⁶¹² For example, the South African Constitution outlines the following with regard to courts under judicial authority:⁶¹³

1. The judicial authority of the republic is vested in the courts.
2. The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favor or preference. No person or organ of the state may interfere with the functioning of the courts.
3. Organs of the state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality dignity, accessibility and effectiveness of the courts.
4. An order or decision issued by a court binds all persons and organs of the state to which it applies.

Taking the principles stated by Shetreet when we evaluate the independence of the federal judiciary generally speaking it can be argued the FDRE Constitution, among the above stated principles it has dominantly incorporated the principles. An independent judiciary is established by the Constitution and Special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions and which do not

⁶¹¹Ibid

⁶¹²Ibid

⁶¹³South Arica constitution chapter 8 Article 165

follow legally prescribed procedures shall not be established.”⁶¹⁴ It permits religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution to be organized on the basis of recognition accorded to them by the Constitution. It also provides that courts of any level shall be free from any interference of influence of any governmental body, government official or from any other source.

Judges shall exercise their function in full independence and shall be directed solely by the law. Besides this, the method of removal and their retirement are not to be extended beyond the retirement age.

Great focus has also been given to the budget approval and administration, which states that the Federal Supreme Court shall draw up and submit to the House of Peoples’ Representatives the budget of the federal courts for approval and upon approval, administer the budget. The state council shall determine the budget of the respective state courts. It also lets the House of Peoples’ Representatives allocate compensatory budgets to states with supreme and high courts concurrently exercising the jurisdiction of the Federal High Court and Federal First Instance Courts.⁶¹⁵

It goes on, stating that the federal Supreme Court shall have the highest and final judicial power over federal matters, and state Supreme Courts shall have the highest and final judicial power over state matters.⁶¹⁶

The Constitution clearly stipulates the mode of appointment of Presidents and Vice Presidents and other federal judges. The role of the federal judicial council as an organ is to select the judges for appointment. In the federal case, it is submitted to the Prime Minister, so that they will be appointed by the House of Peoples’ Representatives through the presentation of

⁶¹⁴ See articles 78(1)(2), 79(1)(2)(3)(4)(5)(6)(7) of the FDRE constitution.

⁶¹⁵ See Articles 78(2), 80(2) (4)

⁶¹⁶ See Articles 80(1), 80(2)

the Prime Minister. In the states, the state judicial administrative council selects candidates and the chairperson of the council submits to the regional council for appointment. The Presidents and the Vice Presidents of the federal Supreme Court are selected by the Prime Minister and submitted to the House of Peoples' Representatives for appointment. The Presidents and Vice Presidents of state supreme courts are to be selected by the chief executive of the state and submitted for appointment to the state council.⁶¹⁷

Of course, matters of the Code of Professional Conduct, discipline and the transfer of judges of any court shall be determined by the concerned Judicial Administration Council⁶¹⁸ although the composition of members and their number differ from time to time. Currently Members of the federal judicial council are:⁶¹⁹

- A.) The President of the federal Supreme Court, who is the Chairperson
- B.) The Vice President of the federal Supreme Court
- C.) Three members of the House of Peoples' Representatives
- D.) The Minister of the Federal Ministry of Justice
- E.) The President of the Federal High Court
- F.) The President of the Federal First Instance Court
- G.) A judge selected by all of the federal judges
- H.) A lawyer appointed by the council from those practicing in the federal courts
- I.) A law academic appointed by the council from a recognized higher-education institution
- J.) A distinguished citizen appointed by the council

⁶¹⁷ For further detail see Article 81 of the FDRE Constitution

⁶¹⁸ See Article 81(6) of the FDRE Constitution

⁶¹⁹ Amended federal Judicial Administration Council establishment proclamation, Proclamation No. 684 of 2010 Article 5

Looking at the provisions of the Constitution, there are greater protections that can safeguard and strengthen the judiciary. Most of the principles stated by Shetreet and others are incorporated. However, there are still a lot of problems in implementation as identified in chapter four.

In conclusion, it can be argued the current FDRE judiciary has a full constitutional guarantee of its independence. The main problem is in the proper execution of the principles of judicial independence. Of course, for the existence of the independent judiciary, a constitutional guarantee only by itself is not sufficient. The commitment of the government is very vital. The current Ethiopian government should work towards the existence of strong and independent judiciary that is fully empowered with decisional independence and Institutional independence that is manned by competent judges and leadership which is the demand of the people that is still not yet addressed. This is of course witnessed by all the interviewees which is discussed in the next chapter and by the government itself in different forums. Otherwise, it will make it impossible to address all those multifarious judicial problems of Ethiopia in getting accessible, speedy, fair, impartial and independent judgment from a strong judiciary which is independent, accountable and transparent.

CHAPTER 6

6. FINDINGS, CONCLUSION AND RECOMMENDATIONS

6.1 INTRODUCTION

In chapter One, judicial background, the theory applied, different issues, a statement of the problem and the research question are discussed. In chapters two and three, traditional justice, the evolution of formal courts in the unitary system, their challenges and impacts in addressing the questions of the people and the need for a strong judiciary are described. Ethiopia has undergone a paradigm shift from the unitary system to that of a federal system. Chapter three explains this shift, in order to give a vivid understanding of the concepts of federalism, judicial federalism and how these work in the Ethiopian judiciary. Chapter four covers the current federal judiciary and addresses the long-standing demand of the people and the nation for a strong judiciary, which they lacked in the unitary System. It also addresses what its challenges are and the impacts presented. The fifth chapter is an extension of Chapter Four, focusing on specific issues. Those issues have vast literatures and experiences. Without exaggerating, each issue could stand alone as the topic of a dissertation. Here it is limited, only indicating the challenges and impacts of those issues with regard to the strong judiciary. Overall, an attempt has been made to analyze the operation of the Ethiopian judiciary, with special emphasis on the federal judiciary. From the above discussions, the following findings, conclusions, and vital and feasible recommendations are extracted.

6.2 KEY FINDINGS ON THE WORKING OF FEDERAL JUDICIARY

6.2.1 WITH REGARD TO ORGANIZATION OF JUDICIARY

One of the basic findings with regard to the FDRE judicial organization is that the structure is established at the center, with the states having a constitutional guarantee. Behind the constitutional guarantee the classification of the structure. Whether it is dual, like the federalism of the U.S., or unitary like Indian federalism is unclear. Because of this, in today's federal judicial structure no one observe federal courts in the states and even the current administration of Federal High and First Instance Court is administered by mere delegation of the FSC President. Not only are these federal cases handled by the delegation of state courts in some regions and by the circuit court of the Federal High Court in other regions, this leads to a lot of challenges that are discussed in Chapter Four of this research.

The FDRE Constitution is not clear as to whether it will have three tiers of courts in the federal judiciary like the states (where the existence of three tiers of courts is clearly indicated) or if it will have another arrangement. Since this is not clearly stipulated in the Constitution, the people of different states are not able to get speedy and accessible judgment in cases of a federal nature, because they have to wait for a long period of time for the federal circuit court to come to their state, as discussed in the research.

Although federal courts have jurisdiction over federal matters and state courts have jurisdiction over state matters, states dispose criminal, labor, commercial, patent, copyright, and tax cases on state matters by applying the laws of the House of Peoples' Representatives. The reason for this is that states do not have the power to pass such laws. Even if the case is a state matter and the parties are residents of the state that fall under the jurisdiction of state courts, they are obliged to dispose those cases by applying the federal proclamations established by the

House of Peoples' Representatives. Conversely, in the USA, all federal matters are entertained by federal courts applying federal laws, while state matters are disposed of by applying state laws.

In the FDRE judicial organization, there is no law in either the Constitution or the Establishment Proclamation that defines what kind of coordination and cooperation should exist within the state courts and federal courts. This has created a gap, meaning the judges of the center and the states need to meet together and share experiences every six months to a year to identify their strengths, gaps, overall challenges, impacts and solutions. This obviously is needed to have an effect on a strong judiciary that strengthens the whole federal system.

Of course, there is the Joined up Justice Forum, where the federal and state courts are represented by their presidents to discuss the reform of the whole justice system. It has recorded undeniable changes, however, it has no legal standing, and judges and lawyers claim these conflicts with the independence of the judiciary. Because of this legal gap of cooperation, there is no mutual understanding or mutual consensus among all courts in the nation. Except for the assessment conducted on an individual basis at the federal and state levels, there is no mechanism to evaluate whether courts of the nation are addressing the long-standing demand for strong judiciary with a strong judicial structure, as stated in the research.

Within the FDRE judicial organization there is a Constructional Provision which declares the existence of cassation over cassation that centralizes the whole performance of courts by the name of error of law to one Bench that is the FSCCB. Examining Constitutional Provisions with regard to the establishment of courts shows that a coordinated and independent judicial structure exists within the entire set up of the government. This is one of the basic principles of federalism. However, this principle is eroded by the provision of the Constitution

that states that the Federal Supreme Court has the power of cassation over any final decision containing a basic error of law.

The state supreme courts have the power of cassation over any final court decision on state matters that contains a basic error of law. As stated in chapter five, this constitutional provision provides the power of cassation to the federal Supreme Court without any differentiation as to the nature of the case. This defeats the principle of federalism in the Constitution, which declares that state supreme courts shall have the highest and final judicial power over state matters.

Additionally, it overrides the principle stipulated in Article 39(3) of the Constitution, which states that, “Every Nation, Nationality and People in Ethiopia has the right to a full measure of self-government including the right to establish institutions of government in the territory that they inhabit.” This includes establishing the judiciary and getting accessible and final decisions over state matters. However, Article 80(3)(a) of the Constitution clearly infringes on this principle, stating that even if the case is a state matter and has received a final decision by state courts, any party who has a claim on the final decision can file a petition to the SSCCB. If the claimant is not satisfied with the decision, s/he can file a petition to the FSCCB, which is situated in Addis Ababa, the capital city of Ethiopia. Of course, this is highly cumbersome to someone who comes from a remote area of the country, and this highly irritates the people of Ethiopia. This structure also requires people of different states to speak Amharic, because Amharic is the working language of the federal government and the federal courts. Conversely, the Constitution clearly stipulates that the working language of states is the working language of their courts. It is the right of the people to have access to justice, which is difficult for the poor. In Ethiopia eighty-five percent of the population lives in rural areas and more than 20 million

live below the poverty line. Because of those hierarchies, there are situations where the person who is the judgment creditor (having the decision of the lower courts in hand) is forced to wait until the judgment debtor exhausts all other courts before the execution of the decision. Even after exhausting the hierarchies and filing for execution, the creditor may have to wait years for the execution to be performed. As discussed in the research, this can be highly devastating to the judgment creditor, other creditors and to the whole judicial system.

According to the findings of the research, the issue of precedent is also controversial. Precedent is not a familiar process to the Ethiopian legal system. When the decision for the FSCCB to make precedent that is binding in all courts of the nation was made, it was not discussed by all regional councils, judges and other justice organs of the states, including other stakeholders such as lawyers, advocates and law schools. It was simply imposed by the federal government through a proclamation of the House of Peoples' Representatives. The Constitution does not give the House of Peoples' Representatives the power to legislate this and impose it on the states. The only power it has, under Article 55(6) of the constitution, is to enact civil laws that the House of the Federation deem necessary to establish and sustain one economic community.

Although cassation power is vested to the state Supreme Court on the final decisions of state matters, the decisions are not binding in all state courts. State matters decided by the FSCCB are binding to state courts. This is a paradoxical, because state courts usurp their right to be administered by their establishment proclamations of courts which are promulgated by their regional councils. This obligation is not in the establishment proclamations of the state courts. Even after the federal proclamation imposing this obligation; state courts do not amend their

establishment proclamations and incorporate this obligation. It also does not have any constitutional basis, except for the establishment of the cassation bench under the FSC and SCC. The power of constitutional review is one of the points discussed in the research. This power is unlike the decentralized system of constitutional review, where the power to uphold the constitution is vested to courts with the ultimate power at a supreme court like that of the USA. It is also unlike Germany, where constitutional review is vested to a centralized system and one specialized court. In Ethiopia, this power is vested to the House of Federation of which the upper chamber is unique from other classical federations. The specific reasons are stated in chapter five. When it is said courts that do not have the power of constitutional review; it does not mean that courts do not have the power of interpretation of constitutional provisions while rendering judgment. What they do not have is the ultimate power to decide issues of constitutionality. This triggers the question of how committed the government is to the existence of a strong judiciary. This can be substantiated because it entrusts power to federal and state courts but also centralizes the power through different legislations and administrative tribunals. This reality is reflected in state courts.

The intention of the Constitution is for state courts to be administered independently and to direct the issues that demand coordination. In reality, they are centralized and administered by state supreme courts, accountable to their state supreme court and to the Wereda Council, which is not in the Constitution or the Establishment Proclamation. There was a debate on the amendment of state constitutions that makes Wereda judges appointed by the Wereda Council. Since the provision of the constitution is not very clear, the idea did not hold water and it was rejected. However, Wereda Courts are accountable to Wereda Councils and the Supreme Court. They do not have an independent budget from the regional council, as stated in the

Constitution, except the budget is administered in the pool system of the Wereda; like all executive organs. This erodes the constitutional spirit and forces the Wereda judges to be subordinate to the Wereda Executive, which erodes their independence. Because of this, it is difficult to have a strong judiciary that can address the long-standing question of the people that went unanswered in the unitary system.

Because of the lack of constitutional clarity, all courts cannot manage their court employees with their rules and regulations. They administer them with civil service proclamations. This has created a lot of impediments to federal and state courts to hire, promote and fire their employees. It has become one cause of employee turnover, and courts do not have skilled and competent professionals that meet the requirements for the demanding qualifications required by the designated courts. This concern has been raised by courts at different times, but there is still no solution. Even though it was raised as a serious issue in the organizational research conducted by the courts themselves, it did not get a proper solution. This problem is a barrier to a strong judiciary, and it needs urgent solutions.

Another serious problem of the current courts is the way that different presidents are dismissed from power. Unlike other country's Supreme Court presidents, there is no system of appointment or impeachment to discipline the President of the Supreme Court in Ethiopia. Although there is Judicial Administration Council to look after the discipline, promotion and transfer of judges, Supreme Court Presidents and Vice presidents are not governed by the Judicial Administration Council. Because of this, the overall future of federal and state Supreme Court presidents is left to the Prime Minister at the federal level and to the president for the states. The President can nominate a judge, present the nominee for approval to the HOR and make that judge stay in power until he wants to fire him. This also works to the presidents of the

Federal Supreme Court. Even those presidents who ask to resign, the response they get has its own variation. Some of them get a response from the Judicial Administrative Council and some of them hear from the Prime Minister. The cases of Ato Tegene and Ato Menberetsehay are a good example. As a result, the country needs a strong judiciary. A strong judiciary cannot be expected without strong leadership. Therefore, there has to be a clear and transparent system where leaders of both the federal and state supreme courts are selected, appointed and disciplined.

Additionally, their current power should be minimized. For instance, the Supreme Court presidents at federal and state level head their judicial council. He selects and presents the nominees to become judges to the Council of Judicial Administration. He presents those judges to be promoted to the Judicial Administration Council and the Presidents and Vice Presidents of the High and First instance Courts are accountable to him. They have to discharge his orders and report their implementation. He is the administrator of all employees. He is the presiding judge when he sits on three or five judge benches. All of this power frightens the lower judges, especially those below the Supreme Court at the federal level. His nomination by the Prime Minister puts their future at his (the President's) mercy. This system erodes the internal independence of the judiciary both in the Federal or State courts.

The current federal judiciary, especially FSC, has no limit on the number of judges assigned to it. In the case of the U.S. Supreme Court, the number of judges is limited, and this limitation has legal backing. The number has grown from six to the current number of nine. In the Ethiopian judicial system, the number of federal Supreme Court judges has grown from time to time and is now thirty-eight; it has no specific limit in the Constitution or the Establishment Proclamation. The number of cases the Supreme Court is expected to hear within a year is not

limited like the United States Supreme Court. The Ethiopian federal Supreme Court has no limit on the number of cases to be disposed in a year. It is expected to hear as many cases as possible, which compromises the quality of its judgments, because the judges do not have time to read and enhance their capacity with the cases they confront. This also impacts the lower judges, because they do not learn from the decisions of the Supreme Court. This does not mean that the Ethiopian judiciary has to copy the American experience, but this serious finding needs a solution. For further clarity look at Tables 1- 9 that indicate the annual number of judges (Annex).

There has to be a clear legal backing to which courts are accountable in the Establishment Proclamation. The Parliament that hears their report also has to render quick responses to the issues they raised. The High Court President said that in his seven years as President, Parliament heard their report but did not pass any solutions to the issues raised.

6.2.2 KEY FINDINGS RELATED TO INTERNAL PROBLEMS OF THE FEDERAL JUDICIARY

Countries may establish an independent judiciary and judicial structure by a constitutional guarantee. However, the main problem lies in the internal strength of the structure, including the allotment of budget, human resources, infrastructure and the assignment of competent leadership. Since this paper has discussed the organizational problems as stated above, this section will identify the internal problems of the federal judiciary based on the findings that are ascertained from the five previous chapters.

There are three major findings with regard to budget. The first is the issue of allocating the budget. Article 79(7) of the Constitution states that “The Federal Supreme Court shall draw up and submit to the House of the Peoples’ Representatives for approval the budget of the Federal Courts and upon approval administer the budget” However, in the current practice the

Ministry of Finance approves the budget. In addition, it is administered partially by the courts themselves and partially by the Ministry of Finance. With regard to purchasing, it is the responsibility of Ministry of Finance. Other budget administration is the responsibility of the courts, specifically the Supreme Court. This is against the constitutional principle and the independence of the judiciary. This kind of budget administration is a barrier to a strong judiciary free of extraneous influence.

As discussed in the research, the allocation of the compensatory budget to state courts is totally against the Constitution. Currently, the delegation power of the five State Courts is lifted by proclamation, but they still receive the same compensatory budget as other state courts. The issue of the allocation of the compensatory budget is totally against the knowledge of the state council and the state audit bureau, meaning that it is subject to abuse. This contributes to unfair and unequal distribution of wealth and erodes the overall principle of the Constitution. (See the Allotment of Budget (Annex))

Although the federal judiciary has constitutional guarantees, there is no clarity on the concept of the independence of judiciary, the judges, the legislative and the executive branches, or the public at large. Therefore, courts are expected to make awareness creation forums. This is not currently happening often, due to a lack of awareness by the executive. The public-at-large does not have a clear understanding of the independence of the judiciary. They believe that the executive controls the judiciary. Even after their cases received final decisions, many of them apply to the executive to reverse the decision of courts. Many people knocking at the doors of executive is typical in the Ethiopian situation. The society as a whole is more linked to the executive than that of the judiciary. At the time of the Emperor, he was viewed as a fountain of justice and he had the power to reverse decisions of the courts. It is a difficult to ensure that the

judges, the legislative, the executive and the public at large have a clear understanding of the independence of judiciary, so that an independent judiciary with a strong judicial structure will be of greater value to the country.

One of the basic elements for the existence of a strong judiciary is framing the judicial policy that enables the judges and the judicial structure to discharge its function based on policy. However, in the current situation, the federal and the state judiciaries do not have a judicial policy that governs the whole judicial structure. A judiciary without any judicial policy framework works without proper direction and guidelines. Additionally, it is impossible to reach a convincing conclusion on whether the country has a strong judiciary that discharges rulings according to the set policy. Even though there has been a beginning in the last few years, there is no well-articulated selection, evaluation and promotion that is accepted by all of the judges found in the structure. This gap has to be addressed through scientific research.

There is an institution called the Federal Justice Organs Training Center, established more than ten years ago, but according to the finding of the research its training is not focused and problem-oriented as it should be. It also is not led strategically and does not have a well-organized and updated curriculum. The training it delivers is full of redundancy. It does not have permanent trainers with adequate knowledge, skills and training qualifications. Although there is an attempt to conduct assessments on the outcome and impact of the trainings, it is not done in a timely and consistent manner. The building itself is not fit for training. Some of the rooms are occupied by the judges and their family who work in different tiers of courts for residence. In total, trainees are not satisfied with the center or the training and facilities it delivers. As a result, this has to be controlled in order to have a strong training center that addresses this need of a strong judiciary.

Although an independent judiciary is established by the Constitution, this research indicates that there are no grounds where state and federal courts get together and evaluate their overall performance and their challenges, except for the system of appeal. This is a gap in the Constitution and other legislation, because nothing about the cooperation of courts is upheld in a way that they can evaluate their performance nationwide.

Besides this, there is no mechanism where different state courts meet to gather and evaluate their work performance, including the question of whether they are satisfying the question of justice for the people or the vision of the Constitution to build one political and economic community. The reforms that are conducted here and there are not coordinated in a way that each state and the federal government gains experience and learn from each other. Not only this, there is no mechanism where the judiciary gets the minutes of the legislature and the new proclamations.

Moreover, there is no mechanism where judges update their knowledge and get training on the new proclamations and regulations passed by Parliament and other respected institutions. This is an especially great barrier to those judges who are in rural areas of the country. Because of this severe problem, there are situations where judges get proclamations from disputant parties and then sometimes render judgment applying these newly revealed or amended proclamations. This is what I witnessed while I was a judge and still happens. This also happens with those proclamations and regulations passed by state councils and other respected authorities. It is highly cumbersome for the judges in a country like Ethiopia, where proclamations and regulations are amended often.

Although judges are expected to render judgments without bias from internal and external influences, they are also accountable to the public. Since the judiciary is working with

taxpayer money and is appointed by the House of Peoples' Representatives, there has to be public forums where the public knows and evaluates the function of the judiciary. Since this is delicate by its nature, there should be serious scrutiny as to not violate the independence of the judiciary. There has to be a systemic arrangement on how those forums are to be conducted and regulated. They should not be forums that frustrate the judges and cause a loss of confidence. The discussion should be limited to the overall operation of the judiciary, excluding the decisions rendered by each judge. Per this research, there are no guidelines on how the judiciary is to conduct public forums. While there are initiatives to conduct public forums, as discussed in Chapter Four of this paper, they are full of deficiencies.

The other thing missing in the federal judiciary that the research revealed is the lack of well-organized IT. Although there are some promising efforts by the federal Supreme Court and some benches of the Federal High Court, it does not cover the whole structure, especially benches of Federal High and First Instance courts. Additionally, it is not well organized and sometimes there are days where it does not work at all, in the case of electric problems. They do not have qualified technicians and the technicians they have are few in number. Thus, there are situations where litigants get their judgments after many adjournments. Sometimes it takes months, resulting in a lack of speedy judgments.

The other short coming of the federal judicial structure is that most of the buildings and courtrooms, except for the Federal Supreme Court and some benches of the Federal High and First Instance Benches, are not comfortable places to wait and listen to the whole process of a case. There are not enough rooms where litigants can wait and the courtrooms are very small. Some of the buildings were built when Addis Ababa had a small population and some of them are near collapse. A strong judiciary needs to fix the above-stated infrastructure issues.

There is also the problem of not having enough qualified legal councils to be assigned to litigants as often as needed. The small number of legal aid centers is also worth mentioning and needs to be worked on. (See the Number of Clerks in Annex)

Litigants do not have access to the working procedures of the judiciary or the knowledge to get important codes, proclamations and regulations that can assist them in formulating their cases.

There is no common understanding surrounding the criteria of what is considered a quality judgment. Different countries use their own criteria to evaluate the quality of judgments in their courts. According to the research, in the Ethiopian situation the shortage of quality judgments is evaluated by the performance of courts and has been reported as a serious problem of the judiciary for years by courts, lawyers and the society. Still, the courts could not come up with basic standards to evaluate the quality of their judgments. This is always reported to the House of Peoples' Representatives and state councils where the report of courts is heard, but this problem is not yet solved and has become a source of the public's lack of trust. The Joined Up Justice Forum has discussed the issue in an attempt to alleviate the problem, but there still is no solution.

Joined up Justice is a forum that was started ten years ago and has conducted more than fifteen meetings since then. The Joined up Justice Forum has members from all federal and state justice sectors. Specifically, the members are the leaders of each justice sector, the Federal Supreme Court President and Vice President, and presidents and vice presidents of the state supreme courts. This forum has no legal ground, it has no regulation of procedure for its meetings and its agendas are not predetermined or prescheduled. Members complain about its accomplishments. The evaluation reveals that most of the members do not have interest in the forum. Although the forum has come up with significant policy decisions, legal reforms and

amendments, it is not strong enough to bring strategic and transformative changes. There seems to be no positive image for the judges and there is suspicion that this forum is meant to satisfy the interests of the executive by interfering with the independence of the judiciary. The judiciary is very sensitive, so when the judiciary becomes members of this forum certain conditions were to be set that must be respected by other justice organs and be transparent to all judges who are members of the judiciary. The forum has to have a legal basis that binds all members to discharge their functions based on limited jurisdiction, and to be accountable when it trespasses on other jurisdictions. Otherwise, this kind of forum with no legal basis will be exposed to arbitrariness and may be twisted by the whims of vocal and opportunistic individuals, which would result in gross injustice and mistrust of the whole administration of justice.

The existence of corruption, rent-seeking and lack of good governance in the judiciary is another finding of the research that is currently evaluated in different forums.

The problem of qualified and competent human resources is a serious problem of the federal judiciary, according to the findings of this research.

In the Ethiopian judicial system, the overall administration of courts is levied on the presidents of each court, starting from the Supreme Court to the High and First Instance Courts, although the nomination to be president varies. They are all appointed as judges. Therefore, the finding of the research reveals that they lack managerial skills when they become direct leaders of courts, where they must administer programs including human resources, material resources and financial resources (including the budget). They are also the heads of the Judicial Administration Councils, which makes it cumbersome to administer the judiciary and bring transformational changes to the judicial structure. The problem does not stop here. Sitting as ordinary judges on benches takes their whole time and does not leave time to deal with administrative issues, let

alone strategic leadership. That is one of the reasons why many reform projects failed without being implemented. Even after more than twenty years of a constitutional guarantee for the independent judiciary, a lot is needed for the federal judiciary to be accessible, speedy, efficient and effective, in order to gain public trust.

The Federal Judicial Administration Council is expected to have its own office and its own budget. However, according to this research, it does not have its own office and the staff is using the budget, office, and staff of the FSC. Even though the Establishment Proclamation stipulates that they are to meet once a month, there are situations where they meet after three or four months. Because of this, many grievances appealed to the council remain pending for three or four months with no response. Most judges interviewed responded that the council is not strong.

The most important finding of the research is that although there is a long standing practice of traditional justice practiced in resolving conflicts and disputes, the Nations, Nationalities and Peoples of Ethiopia with their different languages, traditions and culture do not have any significant link with the formal justice system, as stated in Chapter Two of this study. In some cases, especially criminal cases, there is no linkage. Even if the current criminal policy were to permit such a connection to exist, it would not be practical because of the almost nine year delay in revising the code. Although there are scattered provisions that permit the enforcement of traditional disputes on civil matters, they are not widely practiced in the formal judicial system, contrary to the long-standing practice and culture of Ethiopians. Therefore, there has to be adequate legal backing in order to resolve the gap and create a strong link between the judiciary and the people.

CONCLUSION

In this dissertation, an effort is exerted to discuss and analyze the historical evolution of Ethiopian judiciary and the working of the current federal judiciary, with all its challenges and impacts. For the purpose of this dissertation the traditional dispute resolution mechanisms exercised before the establishment of formal courts and the overall historical development of formal courts of Ethiopia from the unitary court structure to that of federal judicial structure is discussed. As revealed in the research, the structure of the courts in the previous regimes was highly centralized, inefficient and not accessible. The judiciary was functioning by incompetent and unqualified judges and personnel's with controversial constitutional guarantees of independence.

However, this does not mean that the previous structure, with all its deficiencies, was not exercising its judicial duty. It means that although it was discharging its judicial duty, it was not a strong judiciary that could address the demands of the people for accessible, speedy, efficient, effective, impartial and independent judiciary that renders quality judgment. The judiciary was engulfed by the intervention of the executive with full of challenges of human resource, infrastructure and budget, which eroded the independence of the judiciary. Therefore, as mentioned in the research, it is factual to conclude that the judiciary in the unitary system was not strong and independent and that is the reason why it lacked public trust and confidence. Especially in the Derge regime, the judiciary was insignificant because of the ad hoc military courts that took the whole power of the judiciary. Its existence was almost nominal. In the name of Red Terror, people were killed and thrown in the streets without appearing to court and with no court judgment. This was a very severe time to Ethiopia. In such situation leave alone to dream about strong Judiciary you do not know what it will happen next except to pray to God.

Then it was the EPRDF that toppled the Derge after 17 years protracted war and gave relief to the society and introduced the federal system. It was the FDRE Constitution that resulted in a paradigm shift as a whole in the country from that of the centralized unitary system to that of Federal system. With the adoption of federalism in the whole country, the judiciary was also restructured from the unitary judicial structure to the federal judicial structure. The FDRE Constitution decentralized the power of the judiciary by establishing courts in the center and the states, and by vesting the Federal Supreme Court with the highest power over federal matters and the state Supreme Courts with the highest power over state matters. Since the federal judiciary is established, it has recorded positive changes, but there are still multifarious unresolved challenges and impacts that are barriers strong judiciary not to become into reality, which is the long-standing demand of the people. A lot was expected from the current federal system but it is not found as what it is expected.

As per the discussion any country with a federal system is not necessarily obliged to have a carbon copy of the organizational structure of other countries with a federal system, except for the basics. It can introduce and establish its own government organs and an institution that is fit to its political, economic, social and cultural situations as well the dynamics of the globe. From the discussion, we can infer the Ethiopian Federal judicial structural arrangement is something unique from the USA and India in various aspects, even though it does not totally violate the basic principles of judicial structure that should exist in a federal system. However, the result of this research shows that the current federal judicial structure is unable to result accessible, speedy, efficient, effective, and independent judiciary, which is the long-standing problem of the society. Therefore, from the interviews, data and other information, it is deduced in this research that even if the current federal judiciary has done a paradigm shifted from the

unitary judicial system to that of federal judicial system and of course, it has registered positive changes, in its current state it is not capable of addressing the problems of the society that they were facing under the unitary system. This is the reason why people do not trust the current federal judiciary. Rendering accessible, speedy, efficient, effective, fair and independent judgment is still considered a serious problem of the judiciary in every forum.

The cause of all of those challenges, according to this research, is mainly the lack of conviction and commitment by the leadership to strengthen the current judiciary with adequate human resources; a sound budget and an infrastructure that will assign competent, committed and independent leadership who recognize the viability of a well-organized and well-equipped judiciary with a strong judicial structure. This also leads to suspect the government's conviction and commitment to establish strong independent judiciary with strong judicial structure because at the time of armed struggle EPRDF was a Marxist and Marxism has less conviction on the independence of Judiciary. Even some of the rights guaranteed in the Constitution that safeguards the independence of the judiciary are not implemented in conformity with the constitution. There are issues that clearly violate the Constitution.

Therefore, unless the government, the leadership of the judiciary and the judges are committed with full conviction to alleviate all of the above-stated challenges and impacts by conducting transformational change setting short, middle and long-term strategies, it is impossible to address the demand of the people for a strong independent judiciary that is accountable and transparent and that can address the painful problems of the society and the nation that they are encountering in the previous unitary system and in the current federal system. Although giving a constitutional guarantee to an independent judiciary to be established is positive however it is not suffice by itself unless all the ingredients of independent judiciary

are fulfilled. Therefore, it is the time for the current government to take transformational change that results in strong judiciary. Otherwise the whole federal system will be in danger. Hence strong independent judiciaries to exist the following recommendations are forwarded.

RECOMMENDATIONS

In all of the previous chapters, an effort has been made to analyze the challenges and impacts on the current judiciary. Generally in each chapter and specifically in chapter six, findings of the research are indicated. Based on the findings, here are important recommendations in relations to their priority and significance.

THE ISSUE OF JUDICIAL INDEPENDENCE AS A SERIOUS PRIORITY

Since we cannot think of strong judiciary without strong structure, this recommendation goes to the judicial organization. Federal courts are currently found only in Addis Ababa, the capital city of Ethiopia, and Dire Dawa, which is administered under the federal government. This is greatly discussed in the paper. The recommendation is that a federal court be established in each state. If this is not possible, there should be permanent circuit courts, otherwise the constitutional guarantee of access to justice and the constitutional principle of the right to self-determination cannot be met. Along with this, a prolonged controversy with regard to the jurisdiction of federal courts that are situated in Addis Ababa versus the jurisdiction of Addis Ababa city court established by the Charter has to be solved for a smooth relationship to exist between them.

The other structural problem identified by this research is the lack of any set mechanism of cooperation between the federal and state courts and among the state courts. When the government system of the country is changed from the unitary system to the federal system, the structure of courts is changed in the same manner. Although the Establishment Proclamation

number 25/96 recognizes federal and state courts, no proclamation explains the kind of cooperation that should exist, and the Constitution makes no mention of this. It was expected that this would be resolved in the Civil or Criminal Codes, but the two procedures have not been amended or revised to date. Because of this gap, a lot of problems are manifested in the execution of judgments, summons, orders and others. This has created holes of inefficiency in the performance of the courts and in the reform of the courts. It is recommended that there should be a legal basis clearly in dictating how the courts should cooperate, which reforms should be initiated and what kind of transparency and accountability should exist between state and federal courts and among state courts.

Since a lot has been discussed in the research about Joined- Up Justice Forum, it has to have its own legal basis. There has to be a clear and transparent separation in the participation of the judiciary to avoid the current controversy with regard to impartiality and independence of the judiciary. Therefore, it is advisable to make the Joined - Up Justice Forum focus on strategic issues, such as combating rent-seeking, overcoming the lack of good governance, rendering quality judgment and quality justice, building the rule of law and advancing the global situation.

The other essential recommendation with regard to judicial independence is the judicial administration. Based on regulations, the judiciary has currently no independence to hire and fire its employees. It is obliged to apply the Civil Service Proclamation for hiring, promotion and discipline. This has become a serious impediment, as the courts do not have qualified employees that are in accord with their mission. Since the workload and the payment of the employees do not match, a lot of employees leave their profession after a short period. This results in delays and dissatisfaction among court users attempting to get copies of judgments, orders of judges and other documents on time. Although many complaints have been made, there has been no

resolution. The judiciary has recently conducted research on the issue and has submitted the case as a serious problem that urgently needs to be solved without delay. Consequently, the recommendation is to vest courts with institutional independence to hire, promote, and discipline their court employees according to their own regulations and rules.

The current practice of dismissing presidents of supreme courts, especially at state level, is exposed to abuse by the presidents of the states. As a consequence, this practice must be avoided and there should be legally established standards on how Supreme Court presidents are disciplined and dismissed.

Although there is progress from the unitary system, competent and skilled professionals continue to be a serious need of the judiciary. Without skilled and qualified judges, there cannot be a strong judiciary. Based on the findings of the research, the Ethiopian federal judiciary lacks qualified and skilled judges, both in number and in quality. As a result, it is urgent that a solution is identified in order to have skilled and competent professional judges in the whole judiciary. Initially, it was sufficient for potential judges to have completed a LLB or higher degree to be considered competent and efficient for a position in the federal judiciary. However, since the law is always changing and there are new proclamations that regulate interactions and transactions, the judges should update their knowledge, skills and attitudes. For that reason, there has to be a strong judicial training center for judges in the system led by the judiciary with its own curriculum and permanent/part time trainers for specialized areas. It has to have strong leadership and its own budget and personnel, which would be administered under the regulation of the training center. A federal justice sectors training center is crucial and it must be a center for research for those legal and reform issues that face it.

BUDGET THAT NEEDS SPECIAL ATTENTION FROM TIME TO TIME

When it comes to the working of the federal judiciary, the findings of the research indicate an inadequate budget is allotted to the judiciary, along with the fact that the judiciary does not have the right to submit its budget for approval by Parliament. It submits its budget to the Ministry of Finance for approval, which is against the constitutional principle enshrined in Article 79(6) of the Constitution. This should be corrected and it has to be corrected in conformity with the spirit of the Constitution if the judiciary is to discharge its responsibility independently.

Another strange budgetary item is that the judiciary does not have the right to buy needed infrastructure materials, down to the smallest items (such as writing materials and pens) even after the Ministry of Finance approves the budget. It is all bought by a pull system, which is organized under the Ministry of Finance. This has been a big impediment to the overall day-to-day activities of the judiciary. Therefore, in order to be free from this structural barrier, the judiciary has to have full independence to administer its budget according to the Constitution.

With regard to the compensatory budget, the Constitution clearly states that the House of Peoples' Representatives shall allocate a compensatory budget for certain states. However, in practice, the President of the Federal Supreme Court allocates the budget arbitrarily without fixed criteria. Thus, it should follow what is clearly stipulated in the Constitution.

Additionally, even after the budget is allocated, there is no checking mechanism or audit that determines whether or not the state courts are strictly and properly applying the budget. It is highly exposed to rent-seeking and corruption. In order to function appropriately, an auditing mechanism should be in place to ensure that the federal Supreme Court checks and controls the compensatory budget.

The aim of the compensatory budget is to compensate state courts for the cost of discharging federal matters because of their delegation. Once the delegation is lifted, since they do not have to spend from their budget, the states do not have to be compensated. The current practice of allocating the compensatory budget is against the principle of the Constitution. Allocating the compensatory budget to those five states whose delegation has been lifted by proclamation is not only unconstitutional, but also unjust and unfair. An urgent remedy is recommended for this current practice to be corrected, in order to follow the spirit of the Constitution.

THE ISSUE OF JUDICIAL ADMINISTRATION COUNCIL WHICH NEEDS URGENT SOLUTION

For the first time in history, the Federal Judicial Administration Council was a constitutional guarantee. It has to be well organized, with its own independent institution, an independent staff and a sufficient budget. The council has to have clear and transparent procedures for promotions, transfers, and discipline of judges. This is a gap of the council at this time and has become a source of dissatisfaction among the judges. Specifically, this council has to be free of any interference if it is to keep its independence and build up a strong judiciary.

In addition, there has to be a system that can enhance the capacity of the Judicial Administration Council in the country as a whole. To date, the federal or state courts have established no training or other capacity building measures. There has to be a mechanism of appeal of the Federal and State Judicial Council decisions, which is currently missing. The office of the Judicial Administrative Council must be accessible to all judges and it has to be networked with all offices of the judicial councils and with the whole judicial structure in the country.

Although there are promising efforts to promote personal independence of judges, a lot remains to be accomplished in introducing selection, promotion and evaluation criteria which are transparent and framed with the participation of judges. Since this is lacking, there is dissatisfaction among judges, and they raise numerous grievances accordingly. Because of this and other factors, the judiciary is facing high turnover. Consequently, the recommendation is that the Judicial Administration Council should take the lead and introduce transparent participatory selection, promotion and evaluation standards that can curb the current grievances and dissatisfactions, as well as the culpabilities of the current appointment, which is politically biased. Based on clear and transparent appointment standards, the judicial structure should appoint competent and efficient professional judges who are insulated from party affiliation in an effort to operate the structure in a manner that relieves this problem.

TRANSPARENCY AND ACCOUNTABILITY KEY ISSUE THAT NEEDS GREAT FOCUS

The FDRE Constitution asserts that conducting affairs of the government should be accountable and transparent. However, there is no clear system that indicates how courts can be accountable and transparent. For that reason, it is recommended that the above constitutional principle needs serious attention in order to introduce a clear and transparent mechanism with all its standards and indicators of accountability and transparency to have practical application in the judiciary.

In all the evaluations conducted in 2015 and 2016E.C, the government admitted that rent-seeking, corruption and lack of good governance were the major problems of the government. The evaluations also identified at least five government institutions with the same serious problems. The federal judiciary is obviously one of them. Besides this, the federal

judiciary also has admitted this in its own institutional evaluation and in the Joined-Up Justice Forum. The research also supports this reality. In the future, unless this problem is solved, it will be an impediment to a strong judiciary. It will erode public trust in the judiciary and the whole justice system.

Therefore, the government, the Judicial Administration Council, the leadership of the judiciary, the legislators, and the judges themselves, as well as the public should work at their level best to alleviate this urgent problem. In order for the judiciary to be accountable and transparent, it has to introduce standards for conducting public forums where the public at large can participate in assessing the performance of the judiciary, and it has to have a strong inspection system that does not violate its independence.

The current cassation structure discussed in the research should be limited only to those cases of a federal nature. Cases of state nature should be entertained by state Supreme Court cassation benches, without the possibility of petition to the FSCCB.

As discussed in the research, the current power of constitutional review vested to the House of Federation should be limited to the few complex cases with a political nature. The others should be vested to the judiciary.

JUDICIAL POLICY THAT HAS TO BE ADDRESSED AS A FIRST TASK

Another unusual practice is that the Federal Judiciary (which is the third organ of the government), has a constitutional guarantee for its establishment as an independent institution but it does not have judicial policy. With that, the following questions arise: Without having well-articulated policy, how could it craft its vision, mission and core values? How could it frame what kind of administration it should follow? How could it regulate its judges and professionals? What kind of relations and cooperation should it introduce with other justice

sectors and other government organs? How it could handle its judges and personnel? For all the above mentioned questions, there are no clear and specific responses. These serious issues are discussed so many times in different forums. However, the government seems not to be ready to respond and the federal and state supreme court Presidents are not committed to fight for the policy to exist. Although the government should not wait for framing judicial policy (and the judicial structure will not work without judicial policy), the recommendation is that the federal judiciary should have an immediate judicial policy that solves the above problems and others as quickly as possible.

INFRASTRUCTURE THAT NEEDS TO BE SOLVED THROUGH SHORT TERM MEDIUM AND LONG TERM STRATEGY

The most important issue is legally recognizing that the judiciary must be equipped with materials necessary for buildings and infrastructure, so that they can discharge their vision and mission. Legal recognition through the Constitution is that crucial step.

There are a significant number of courts working in old, cracked small buildings exposed to different problems compared with the country's development of infrastructure and modern buildings. If the country is to have an effective federal judiciary with a strong structure, the government should allocate a budget sufficient to equip the judiciary with the necessary materials, infrastructure and buildings to aid its overall vision and mission.

ADDITIONAL RECOMMENDATIONS

- Establishing and introducing a guide line that can serve for properly discharging the Supreme Court Plenum (which is not practical, even though it is in the Establishment Proclamation)

- Consolidating all federal and regional laws and cassation decisions and disseminating them using IT
- Resolving the issue of quality judgment, the judiciary should frame case flow management, performance measurement and quality judgment indicators that can be developed from time to Time
- Modernizing the judiciary and becoming more accessible by introducing IT
- Establishing a well-organized publication plan such as journals or news bulletins to publish its decisions

INTRODUCING TRADITIONAL DISPUTE RESOLUTION MECHANISM

There is no clear cut link between formal justice and the traditional justice mechanisms in resolving conflicts and disputes except for a few articles stipulated in the Civil Code and Civil Procedure Code. Even though a lot of research has been conducted, it has remained untouched. Because it lacks a legal basis, the formal court structure cannot take advantage of the traditional justice tradition of the Ethiopian society. Courts are flooded by cases because simple and complex cases flow to the courts together. It is recommended that there has to be a mechanism to create a linkage between the traditional dispute resolution mechanism and the formal judicial system.

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APPENDICES

APPENDIX 1: THE NUMBER OF JUDGES IN THE FEDERAL COURTS

Table 1: The table shows the number of Federal court Judges by Gender and by level of education

Court Name	Amount	Male	Female	Educational Level		
				LLM(Masters of Law)	LLB (Bachelor of Law)	Diploma
Federal First Instance Court	112	67	45	8	108	1
Federal High Court	70	55	15	8	63	2
Federal Supreme Court	26	25	1	15	17	---
Total	208	147	61			

Table 2: The table shows the number of Judge of Federal courts from 1988-2008 E.C

Year	Supreme Court	High Court	First Instance	Total
1988	9	23	24	56
1989	9	23	24	56
1990	8	31	33	72

1991	8	29	43	79
2005	26	53	101	180
2006	28	78	101	205
2007	30	75	124	220
2008	26	70	111	207

Although the number of judges has increased, when compared with number of judges that are demanded each year and the flood of cases of each year it is insignificant.

Table 3: The table shows Educational level of Judge of Federal courts in 2008 EC Compared with 1981 EC in Ethiopia.

Educational Level	1981	2008
LLM	0.5%	18%
LLB	7.3%	80.3%
Diploma	7.9%	1.7%
Certificate	5.7%	---
12 th and above	77.6%	---

This implies that there is a dynamic shift with regard to the education level of judges. It still needs work to develop the diploma to degree level and to increase the number of graduates and post-graduates, as well as for the structure to have its own judicial training center to continuously enhance the capacity of its judges.

Table 4: The table shows number of Judges in the Federal Courts from 1983 to 1985

Court Name	1983				1984				1985			
	First	Resign	New Assign	Finally	First	Resign	New Assign	Finally	First	Resign	New Assign	Finally
Central Supreme Court	16	-	-	16	16	-	-	16	16	-	-	16
Central High Court	48	-	-	48	48	-	-	48	48	-	-	48
Federal First Instance Court	48	-	-	58	58	-	-	58	58	-	-	58
Total	12	-	-	122	122	-	-	122	122	-	-	122

Table 5: The table shows number of Judges in the Federal Courts from 1986 to 1988

Court Name	1986				1987				1988			
	First	Resign	New	Finall	First	Resign	New	Finall	First	Resign	New	Finall
Central Supreme Court	16	7	-	9	9	-	-	9	9	-	-	9
Central High Court	48	25	-	23	23	-	-	23	23	-	-	23
Federal First Instance Court	58	31	-	24	24	-	-	24	24	1	-	23
Total	122	63	-	56	56	-	-	56	56	1	-	55

Table 6: The table shows number of Judges in the Federal Courts from 19893 to 1991

Court Name	1989	1990	1991

	First	Resign	New Assign	Finally	First	Resign	New Assign	Finally	First	Resign	New Assign	Finally	Finally
Central Supreme Court	9	-	-	9	9	1	-	8	8	-	-	8	8
Central High Court	23	2	-	21	21	2	10	29	29	3	-	26	26
Federal First Instance Court	23	1	-	22	22	1	12	34	34	-	43	77	77
Total	55	3	-	53	53	4	22	71	71	3	43	111	111

Table 7: The table shows number of Judges in the Federal Courts from 1992 to 1994

Court Name	1992				1993				1994			
	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed
Central Supreme Court	-	1	9	16	16	2	-	14	14	-	-	14
Central High Court	26	10	22	38	38	2	-	36	36	6	7	37
Federal First Instance Court	77	30	29	76	76	9	-	67	67	2	2	67

Total	111	41	60	130	130	13	-	117	117	8	9	118
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Table 8. The table shows number of Judges in the Federal Courts from 1995 to 1997

Court Name	1995				1996				1997			
	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed
Central Supreme Court	14	1	1	15	15	-	-	15	15	-	1	16
Central High Court	37	6	6	37	37	-	7	44	44	-	6	50
Federal First Instance Court	67	3	16	80	80	3	10	87	87	2	7	92
Total	118	10	23	132	132	3	17	146	146	2	14	158

Table 9: The table shows number of Judges in the Federal Courts from 1998 to 2000

Court Name	1998				1999				2000			
	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed
Central Supreme	16	1	-	17	17	-	4	21	24	3	-	21

Court												
Central High Court	50	-	-	50	50	6	6	50	48	-	-	48
Federal First Instance Court	92	7	-	85	85	15	1	85	53	-	3	58
Total	158	8	-	152	152	21	25	156	125	3	3	127

Table 10: The table shows number of Judges in the Federal Courts from 2001 to 2003

Court Name	2001				2002				2003			
	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed
Central Supreme Court	21	-	-	21	16	-	2	18	18	-	5	23
Central High Court	48	-	5	53	39	-	1	40	40	-	10	50

Federal First Instance Court	58	-	13	71	52	8	4	44	44	-	24	68
Total	127	-	18	145	107	8	7	106	106	-	29	141

Table 11: The table shows number of Judges in the Federal Courts from 2004 to 2006

Court Name	2004				2005				2006			
	First	Resign	New Assign	Finally	First	Resign	New Assign	Finally	First	Resign	New Assign	Finally
Central Supreme Court	26	-	-	26	26	1	-	25	25	-	-	25
Central High Court	50	2	-	48	48	-	-	48	48	-	-	48
Federal First Instance Court	68	4	-	64	64	-	-	64	64	3	-	64
Total	144	6	-	137	138	-	-	137	137	3	-	141

Table 12: The table shows number of Judges in the Federal Courts from 2007 to 2008

Court Name	2007				2008			
	First Assigned	Resign	New Assign	Finally Existed	First Assigned	Resign	New Assign	Finally Existed
Central Supreme Court	24	-	8	32	32	3	-	23

Central High Court	73	-	-	73	73	3	2	71
Federal First Instance Court	119	-	-	119	119	9	2	112
Total	216		8	224	224	15	4	206

It can be inferred that the turnover of judges is increasing from year to year, so this needs scientific research to be resolved. Otherwise, it is to be big barrier to the existence of efficient judicial structure.

APPENDIX 2: THE NUMBER OF CLERKS IN THE FEDERAL COURTS

1. There are 32 First Instance Court Clerks;out of those 22 are male 10 female. The expected number is 70.
2. There are 30 High Court Clerks, out of those 26 male 4 female. The expected number is 54.
3. There are 2 Supreme Court Clerks, the expected number 4.

Academic Qualification of clerks is LLB.Clerks,no matter where they are assigned, their salary is 3085 birr.

Table 13:*The table shows the number of benches of the Federal First Instance Court*

Type of Benches	Number of Benches
Criminal Benches	19
Civil Benches	25

Family Benches	16
Labor Benches	15
Commercial Benches	2
Bank and Insurance Benches	2
Rent benches	1
Execution Benches	8
Women and Children Benches	1
Revenue and Income tax Bench	3
Criminal Bench RTD	11
Juvenile Bench	6
Total	109

Source: the Federal First Instance Court

This figure of clerks indicates the number of clerks that are needed to assist in the day-to-day business of judges, which is pivotal in the working of the judiciary. But in the Ethiopian situation, this seems to be a great pitfall of the structure that needs to be addressed.

APPENDIX 3: PERFORMANCE OF FEDERAL SUPREME COURT

Table 14: Performance of Federal High Court; Date from: 1/11/2004 to 30/10/200, summary:

By Bench printing date 6/8/2008

Summary	Transferred cases from previous year	New incoming cases	Reopened cases	Closed files	Decided cases	Cases that are not appealed	Transferred to other court	Transferred to the next year
1 st Civil Court	510	2686	49	1465	1255	1	0	798
2nd Civil Court	39	408	7	223	175	0	0	56
3rd Civil Court	0	0	0	0	0	0	0	0
4th Civil Court	0	0	0	0	0	0	0	0
1 st Crime Court	318	2267	24	102	2299	0	0	208
2nd Crime Court	262	2049	9	109	1833	0	0	385
Cassation Court	3730	13664	64	679	3854	11154	0	1771
1 st investigative Cassation Court	309	6470	2	174	0	3991	0	2616
2 nd investigative Cassation Court	371	6674	2	167	0	4482	0	2398
TOTAL	5539	34218	157	2919	9416	19628	0	8232

Source: Federal High Court

Table 15: Transferred cases from previous year by the Federal High Court; Date from : 1/11/2003 to 30/10/2004 summary : cases by their type; printing date 3/5/2008; Printing time 3:30:50

Summary	Transferred cases from previous year	New incoming cases	Reopened cases	Closed files	Decided cases	Cases that are not appealed	Transferred to other court	Transferred to the next year
Crime	1,583	4,864	199	1,333	3,448	14	0	1,851
Labor	270	1,335	89	207	660	618	0	209
Civil	1,551	4,257	695	1,454	1,638	1,397	0	2,014
TOTAL	3,404	10,456	983	2,994	5,746	2,029	0	4,074

Source: Federal High Court

Table 16: Transferred cases from previous year by the Federal High Court; Date from : 11/11/2004 to 30/10/2005 summary : cases by their type, Printed date 3/5/2008; Printed time 3:31:38

Summary	Transferred	New	Reopened	Closed	Decided	Cases	Transferred	Transferred
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	cases from previous year	incoming cases	cases Reopened	files Closed	cases Decided	cases that are not appealed	that are not appealed	to other court	to the next year
Crime	1,851	4,809	205	1,307	3,275	41	0	2,242	
Labor	209	1,588	37	166	485	795	0	388	
Civil	2,014	5,272	785	1,699	2,020	1,015	0	3,337	
TOTAL	4,074	11,669	1,027	3,172	5,780		0	5,967	

Source: Federal High Court

Table 17: Transferred cases from previous year by the f Federal High Court; Date from :

1/11/2005 to 30/10/2006; Summary: cases by their type Printing Date 3/5/2008;

Printing Time 3:33:43

Summary	Transferred cases from previous year	New incoming cases	Reopened cases	Closed files	Decided cases	Cases that are not appealed	Transferred to other court	Transferred to the next year
Crime	2,242	4,647	249	1,250	2,558	21	1	3,308
Labor	388	1,358	30	247	454	541	0	534
Civil	3,337	6,317	998	2,235	2,504	1,514	0	4,399
TOTAL	4,074	12,322	1,277	3,732	5,516	2,076	1	8,241

Source: Federal High Court

Table 18: Transferred cases from previous year by the f Federal High Court; Date from :
1/11/2006 To 30/10/2007; Summary: cases by their type Printing Date 3/5/2008
Printing Time 3:34:39

Summary	Transferred cases from previous year	New incoming cases	Reopened cases	Closed files	Decided cases	Cases that are not appealed	Transferred to other court	Transferred to the next year
Crime	3,308	3,748	215	1,441	2,547	4	0	3,279
Labor	534	1,266	32	218	493	629	3	489
Civic	4,399	5,930	781	2,231	2,712	1,661	41	4,465
TOTAL	8,241	10,944	1,028	3,890	5,752	2,294	44	8,233

Source: Federal High Court

Table 19: Transferred cases from previous year by the f Federal High Court; Date from :1/11/2006 to 30/10/2007 summary: cases by their type; Printing date 3/5/2008; Printing time 3:46:11

Summary	Transferred cases from previous year	New incoming cases	Reopened cases	Closed files	Decided cases	Cases that are not appealed	Transferred to other court	Transferred to the next year
Appeal	3,977	7,225	292	1,718	3,607	2,249	44	3,876

First Instance	4,264	3,719	736	2,172	2,145	45	0	4,357
Cassation	0	0	0	0	0	0	0	0
TOTAL	8,241	10,944	1,028	3,890	5,752	2,294	44	8,233

Source: Federal High Court

Table 20: Transferred cases from previous year by the f Federal High Court; Date from :

1/11/2005 to 30/10/2006 summary: cases by their type; Printing date 3/5/2008; Printing time

3:45:37

Summary	Transferred cases from previous year	New incoming cases	Reopened cases	Closed files	Decided cases	Cases that are not appealed	Transferred to other Court	Transferred to the next year
Appeal	2,947	7,567	336	1,540	3,281	2,052	0	3,977
First Instance	3,020	4,754	941	2,192	2,235	23	1	4,264
Cassation	0	1	0	0	0	1	0	0
TOTAL	5,967	12,322	1,277	3,732	5,516	2,076	1	8,241

Source: Federal High Court

Table 21: Transferred cases from previous year by the f Federal High Court; Date from :
1/11/2004 to 30/10/2005 summary: Cases by Level; Printing date 3/5/2008; Printing Time
3:44:53

Summary	Transferred cases from previous year	New incoming cases	Reopened cases	Closed files	Decided cases	Cases that are not appealed	Transferred to other Court	Transferred to the next year
Appeal	1,865	7,273	274	1,220	3,401	1,844	0	2,947
First Instance	2,209	4,396	753	1,952	2,379	7	0	3,020
Cassation	0	0	0	0	0	0	0	0
TOTAL	4,074	11,669	1,027	3,172	5,780	1,851	0	5,967

Source: Federal High Court

Table 22: Transferred cases from previous year by the f Federal High Court; Date from :
1/11/2003 to 30/10/2004 summary: Cases by Level; Printing date 3/5/2008; Printing
time 3:43:23

Summary	Transferred cases from previous year	New incoming cases	Reopened cases	Closed files	Decided cases	Cases that are not appealed	Transferred to other Court	Transferred to the next year
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Appeal	1,373	6,447	344	1,128	3,145	2,026	0	1,865
Frist	2,031	4,009	639	1,866	2,601	3	0	2,209
Instance								
Cassation	0	0	0	0	0	0	0	0
TOTAL	3,404	10,456	983	2,994	5,746	2,029	0	4,074

Source: Federal High Court

From the above information it is easy to understand the conjunction of courts with cases.

Especially when compared with the number of judges, it is beyond their capacity. When the above stated problems of the judicial structure are also added, it is easy to imagine how the federal judicial structure can be highly devastating and lack public trust and confidence.

APPENDIX 4: LIFE SPAN OF DECIDED MURDER CASES

Table 23: Life Span of Decided Murder cases; Date from: 1/11/2007 to 3/5/2008; Printing date

3/5/2008; Printing time 4:37:41

Courthouse	3rd Criminal Courthouse				
File number	File Opened date	File Closed date	Number of Adjournment	Age by Court (by month)	Age by lower court (by month)
00/0100/08976	15/10/1992	25/4/2008	10	1	187
00/0100/113846	5/3/2004	21/3/2008	29	49	49
00/0100/119544	26/7/2004	28/11/2007	21	40	40

00/0100/124060	21/12/2004	3/3/2008	25	39	39
00/0100/124392	14/1/2005	9/3/2008	28	38	38
00/0100/112783	20/3/2004	22/11/2007	34	44	44
00/0100/168937	25/ 10/2007	7/4/2008	4	5	5

Source: Federal High Court

From all 62 intentional homicide cases disposed from 2004 E. C up to 2008 E.C 10 cases were disposed within 34 up to 25 adjournments, 18 cases within 24 up to 20 adjournments 24 cases within 19 up to 15 adjournments, 10 cases were disposed within 14 up to 10 adjournments, 1 case was disposed within 4 adjournments. Source data base of the Federal High Court assessed on 3/5/ 2008

APPENDIX 5: SUMMARY OF WORK ACTIVITY BY BRANCH OF FEDERAL FIRST INSTANCE COURTS

Table 24: Summary of work Activity by branch of federal first instance Courts

Bra nch Cou rt	Year	Transferr ed from previous year	New opened Files	Comin g from Organi zation	Total to Present ed	Close d	Decide d	Transf erred to other Court	Total to get Solution s	Transf erred by Appoi ntmen ts
	2002	7,773	20,764	4,884	33,421	17291	12,090	4	29,385	4,036

	2003	4,034	13,298	3,575	20,907	10,317	5,671	382	16,370	4,537
	2004	4,525	10,958	3,567	19,050	8,318	5,212	4	13,534	5,516
	2005	5615	10550	4461	20626	9070	6662	0	15732	4894
	2006	4,881	9,989	4,871	19,741	8,385	6,259	0	14,644	5,097
	2007	4,784	11,630	3,589	20,003	8,781	5,136	3	13,920	6,083
Arada	2002	1,256	10,896	1,767	13,919	8,005	4,388	2	12,395	1,524
	2003	1,487	10,057	2,080	13,624	7,036	4,972	2	12,010	1,614
	2004	1,632	9,485	2,148	13,265	6,706	4,845	0	11,551	1,714
	2005	1712	9224	3183	14119	7889	4142	0	12031	2088
	2006	1,783	8,747	3,493	14,023	8,324	3,645	0	11,969	2,054
	2007	1,964	13,757	3,940	19,661	12,944	3,514	0	16,458	3,203
N/Silk	2002	2,421	12,585	1,402	16,408	6,388	6,727	0	13,115	3,293
	2003	3,297	10,098	1,630	15,025	5,597	5,898	0	11,495	3,530
	2004	3,297	10,098	1,630	15,025	5,597	5,898	0	11,495	3,530
	2005	3148	7336	1760	12244	5295	4603	0	9898	2346
	2006	2,358	7,849	2,461	12,668	5,273	4,880	0	10,153	2,515
	2007	2,471	11,217	2,804	16,492	9,024	4,208	0	13,232	3,260
Yeka	2002	3,209	9,915	1,362	14,486	7,605	5,605	2	13,212	1,274
	2003	1,296	5,432	1,332	8,060	3,472	2,296	4	5,772	2,288
	2004	1,279	6,780	1,661	9,720	4,608	3,805	1	8,414	1,306

	2005	2291	5246	1564	9101	3969	3529	5	7503	1598
	2006	1,603	6,244	1,756	9,603	3,361	4,419	1	7,781	1,822
	2007	1,755	11,279	2,471	15,505	7,295	5,367	0	12,662	2,843
Kolfe	2002	412	2,503	783	3,698	1,347	1,559	7	2,913	785
	2003	771	4,187	760	5,718	2,143	1,719	7	3,869	1,849
	2004	1,856	5,086	722	7,664	2,498	3,587	4	6,089	1,575
	2005	1582	6005	852	8439	2349	4160	0	6509	1930
	2006	1,908	6,244	887	9,039	2,461	4,225	0	6,686	2,353
	2007	2,248	10,625	1,192	14,065	6,482	4,700	0	11,182	2,883

Source: Federal High Court

Table 25: Summary of work Activity by branch of federal first instance Courts

Branch Court	Year	Transferred from previous year		Comi ng from Orga nization Present ed			Transferred to other Court		Total to get Solutions	Appoi ntment s
		Transferred from previous year	New opened Files	from Orga nization Present ed	Total to close ed	Decid ed	Transferred to other Court			
Addis Ketema	2002	1012	4281	514	5,807	2896	2531	0	5,427	380
	2003	379	3,789	412	4,580	1,48	2,780	0	4,261	319

	3					1				
	200					1,30				
	4	317	3,606	329	4,252	7	2,189	1	3,497	755
	200									
	5	759	3394	384	4537	1634	2263	0	3897	640
	200					1,19				
	6	638	3,271	274	4,183	6	2,116	0	3,312	871
	200					3,62				
	7	814	6,037	254	7,105	0	1,964	3	5,587	1,518
MenagS	200					2,08				
ha	2	533	3,633	673	4,839	9	2,400	1	4,490	349
	200					1,60				
	3	345	3,451	608	4,404	0	2,213	7	3,820	584
	200					1,28				
	4	580	2,769	787	4,136	8	1,590	15	2,893	1,243
	200									
	5	1255	2610	917	4782	1689	1986	7	3682	1100
	200					1,12				
	6	1,105	2,743	525	4,373	0	2,017	0	3,137	1,236
	200	1,221	4,312	893	6,426	2,81	2,039	10	4,865	1,561

	7					6				
Akaki	200					1,48				
	2	562	2,911	696	4,169	3	1,761	0	3,244	925
	200					1,27				
	3	786	2,865	672	4,323	0	1,961	0	3,231	1,092
	200									
	4	1,007	1,229	62	2,298	436	672	0	1,108	1190
	200									
	5	1380	3675	780	5835	1862	2678	5	4545	1290
	200					1,87				
	6	1,280	4,442	833	6,555	2	3,176	0	5,048	1,507
200					5,04					
7	1,463	7,800	1,140	10,403	3	3,716	1	8,760	1,643	
Bole	200									
	2	0	1,800	9	1,809	263	965	0	1,228	581
	200					2,05				
	3	581	6,232	466	7,279	0	4,506	1	6,557	722
	200					1,91				
	4	747	4,641	1,035	6,423	9	3,984	1	5,904	519
	200	498	5320	397	6215	1569	3418	0	4987	1228

	5									
	200					2,98				
	6	1,191	6,430	1,350	8,971	2	4,008	1	6,991	1,980
	200		10,37			7,91				
	7	1,933	5	1,789	14,097	0	3,698	0	11,608	2,489
	200									
Kirkos	2	0	1	0	1	0	1	0	1	0
	200					2,05				
	3	577	4,618	492	5,687	1	2,749	0	4,800	887
	200					2,05				
	4	577	4,618	492	5,687	1	2,749	0	4,800	887
	200									
	5	926	4165	848	5939	1907	3171	0	5078	861
	200					2,01				
	6	897	4,568	887	6,352	8	2,985	0	5,003	1,349
	200					9,20				
	7	1,351	8,529	1,411	11,291	8	3,532	0	12,740	-1,449
Dire	200					2,86				
dewa	2	1,025	4,842	866	6,733	8	3,051	0	5,919	814
	200	814	4,583	704	6,101	2,13	3,211	0	5,342	759

3						1				
200						2,61				
4	759	5,359	1,022	7,140	8	3,280	0	5,898	1,242	

Source: Federal High Court

Table 26: Case Type from 2003-2007

Year	Case Type	Coming from Previous		Complaint			Transferred to other Court		Transferred by Appointments		Clarence Rate by%	Congestion Rate	Backlog
		New	from	Total	Close	Decided	Total	Total					
2003		31,4	10,3	22,26	16,0			12,80				0.0	
	Civil	9,471	54	18	51,243	0	57	121	38,438	5	122.20	1.06	6
		28,4	1,12		12,13	16,5							0.0
	Crime	2,771	03	6	32,300	0	27	231	28,888	3,412	101.71	1.08	8

			6,46					3,39					0.2
	Labor	1,475	1	868	8,804	2,963	9	4	6,366	2,438	98.53	1.25	5
		13,71	66,3	12,3		37,35	35,9			18,65			0.0
	Total	7	18	12	92,347	3	83	356	73,692	5	111.12	1.09	9
		1222	3074	1223		2282	1801			1430			0.0
2004	Civil	6	7	4	55207	2	6	68	40906	1	133.04	1.05	5
			2588				1511						0.0
	Crime	2790	9	738	29417	9824	6	254	2586	4123	97.70	1.13	3
													0.2
	Labor	2105	5709	809	8623	2771	3230	36	6037	2586	105.75	1.29	9
		1712	6234	1378		3541	3636			2101			0.1
	Total	1	5	1	93247	7	2	458	72237	0	115.87	1.10	0
		13,79	32,7	14,7		27,54	20,4			1321			0.2
2005	Civil	9	05	10	61,214	8	46	9	48,003	1	101.24	1.28	8
			24,7				15,1						
	Crime	4,040	22	771	29,533	9,538	28	0	24,666	4867	96.76	1.2	0.2
			5,50				4,40				119.90		0.1
	Labor	2,568	0	900	8968	3,260	6	8	7674	1294	6	1.689	69
		2040	6292	1638		4034	3998			1937	101.30		0.2
	Total	7	7	1	99,715	6	0	17	80343	2	5	1.24	4

		13,20	34,8	16,5		27,51	22,9			14,24			0.2
2006	Civil	0	96	93	64,689	1	36	2	50,449	0	97.98	1.28	8
			24,2				14,2						0.2
	Crime	4,460	62	694	29,416	8,748	75	0	23,023	6,393	92.25	1.28	8
			5,80				3,12						0.2
	Labor	1,316	4	998	8,118	3,371	1	0	6,492	1,626	95.44	1.25	5
		18,97	64,9	18,2	102,22	39,63	40,3			22,25			0.2
	Total	6	62	85	3	0	32	2	79,964	9	96.06	1.28	8
2007		1381	39,9	18,8		32,02	23,6			16,86			0.3
	Civil	0	58	19	72,587	7	76	16	55,719	8	94.80	1.30	0
			54,9	1,05		37,73	13,1			11,15			0.2
	Crime	6,030	68	7	62,055	7	66	0	50,903	2	90.86	1.22	2
			5,00				2,81						0.3
	Labor	1,555	3	932	7,490	2,759	4	1	5,574	1,916	93.92	1.34	4
	Total	21,39	99,9	20,8	14213	72,52	39,6			29,93			1.2
		5	29	08	2	3	56	17	112196	6	78.94	92.93	7

Source: Federal High Court

Table 27: Total work Activity by Case Type from 2002-2007

Year	Transferred	New opened	Coming	Total to	Close d	Decid ed	Transfe nsfe	Total to get	Transferred	Clare nce	Con gesti	Back load
------	-------------	------------	--------	----------	---------	----------	--------------	--------------	-------------	-----------	-----------	-----------

	from Previo us	from Organ izatio n	prese nted		rred to othe r Cou rt	Soluti on	by Adjou rnme nt	rate by%	on Rate			
				11557	4745	2983						
2000	41572	65452	8555	9	8	7	127	77422	38157	118.29	1.38	0.38
				12557	6453	4197		10654				
2001	33725	80461	11391	7	3	0	38	1	19036	132.41	1.07	0.07
				105,29	50,23	41,07						
2002	18,203	74,131	12,956	0	5	8	16	91,329	13,961	104.87	1.15	0.15
				37,30	35,53							
2003	13,790	65,048	12,271	91,109	2	4	403	73,239	17,870	94.72	1.24	0.24
				37,34	37,81							
2004	16,576	64,629	13,455	94,660	6	1	26	75,183	19,477	96.28	1.26	0.26
				4034	3998					101.30		
2005	20407	62927	16381	99,715	6	0	17	80343	19372	5	1.24	0.24
				102,22	39,63	40,33						
2006	18,976	64,962	18,285	3	0	2	2	79,964	22,259	96.06	1.28	0.28

				14213	72,52	39,65		112,19			92.9	
2007	21395	99,929	20,808	2	3	6	17	6	29,936	78.94	3	1.27

Source: Federal High Court

APPENDIX 6: PEOPLE WHO COMPLAINED TO HUMAN RIGHTS COMMISSION

The people who claim for Human Rights commission after their case is disposed by Formal Courts although the Commission is not mandated to entertain those case.

- Total number of cases 31
- Male 24 Female 7
- Date from July 8/2016-Ffbruary 20/17

Source: Federal High Court

APPENDIX 7: EVALUATION CRITERIA OF FEDEAL JUDGES CURRENTLY APPLIED

Performance evaluation of judges to be filled by Public or Customers

Name (Optional) _____

Reasons for coming to the Court _____

Number of Adjournments 1 day 2-5 days 6-15 days above 15 days

Position _____

The Court you appear

Date _____ Month _____ Year _____ Morning

Afternoon

Name of the judge to be Evaluated _____

The Type of the case _____

Description of Evaluation Point

- 5 points for Excellent Performer
- 4 points for very good Performer
- 3 points for good Performer
- 2 point for Low Performance
- 1 point very low Performer
- 'x' to whom you are in problem or you are not ready to evaluate the judge

No	Criteria for Evaluation	Evaluation Points					
		1	2	3	4	5	X
1	Handling cases on open court proceeding	1	2	3	4	5	X
2	Time given to parties to elaborate their cases	1	2	3	4	5	X
3	Knowledge of the depth of the case	1	2	3	4	5	X
4	The initiative to dispose cases on time	1	2	3	4	5	X
5	The ability of leading the court proceeding with patience	1	2	3	4	5	X
6	Skill of investigating evidences	1	2	3	4	5	X
7	Free from any cultural religious and emotional baias	1	2	3	4	5	X

8	Clarity of decisions orders	1	2	3	4	5	X
9	Accomplishing all the necessary duties before coming to the court	1	2	3	4	5	X
10	Handling customers on the date of their adjournment	1	2	3	4	5	X
11	Showing necessary effort to clarify ambiguities to customers	1	2	3	4	5	X
12	Handling customers with a noble language	1	2	3	4	5	X
13	Showing respect to customers	1	2	3	4	5	X
14	Entertaining parties on equal footing	1	2	3	4	5	X
15	Handling the court proceeding free from any bias	1	2	3	4	5	X

If you have other Suggestion or Opinion different from the above Please feel free to put below

_____ Thank you.

Authorized Employee to make the forms available is filled Name _____

date _____ Signature _____

Performance evaluation to be filled by professionals

Name (Optional) _____

Reason for coming to the Court _____

Number of Adjournment you come to the Court 1 day 2-5 days 6-15 days

above 15 days

Position _____

Name of the Court

Date _____ Month _____ Year _____ Morning

Afternoon

Name of the judge to be Evaluated _____

Type of the case _____

Description of Evaluation Point

- 5 points for Excellent Performer
- 4 points for good Performance
- 3 points for good Performance
- 2 points for Low Performer
- 1 point for low Performance
- 'X' to whom you are in problem are not able to evaluate the judge

No	Criteria for Evaluation	Evaluation Points					
		1	2	3	4	5	X
1	The competency of leading the proceeding	1	2	3	4	5	X
2	The competency of the judge on the law related to the case	1	2	3	4	5	X
3	The ability of discharging his duty based on the procedure	1	2	3	4	5	X
4	Adequate preparation for the case he handles	1	2	3	4	5	X

5	Skill in evaluating analyzing and briefing of evidence related to the issue	1	2	3	4	5	X
6	Framing issues that relates to the case	1	2	3	4	5	X
7	Giving detail clarification to the judgment or order rendered by him	1	2	3	4	5	X
8	Rendering judgment free from any bias	1	2	3	4	5	X
9	Respecting and enforcing the principles of the Constitution	1	2	3	4	5	X
10	The ability of entertaining cases in open court room	1	2	3	4	5	X
11	The time he allots to parties to brief their case	1	2	3	4	5	X
12	His knowledge of the law on the case	1	2	3	4	5	X
13	His endeavor to finish the case on time	1	2	3	4	5	X
14	His ability to lead the court proceeding with patience	1	2	3	4	5	X
15	The ability to refine evidence at the time of court proceeding	1	2	3	4	5	X
16	His being free from cultural, religious and emotional bias	1	2	3	4	5	X
17	The clarity of his judgment and order	1	2	3	4	5	X
18	His commitment to be present at the date of adjournment	1	2	3	4	5	X
19	His ability of entertaining litigants at the date of their adjournment	1	2	3	4	5	X
20	His readiness to clarify the issues one by one to the parties	1	2	3	4	5	X
21	His humbleness in using words	1	2	3	4	5	X
22	His way of respect to the parties	1	2	3	4	5	X
23	His ability of entertaining parties in equal footing	1	2	3	4	5	X

If you have other Suggestion or Opinion different from the above Please feel free to put below

_____ Thank you.

Authorized Employee to make available the forms to be filled Name_____ date

_____ Signature _____

The judges of all federal Courts suggest in the questionnaire this performance evaluation format was introduced in the year 2015 but it is not accepted by the judges as well as it is not based on the international standard that maintains the independence of judiciary rather it makes it frustrate and compromise his independence see the questionnaire annexed

Source: Data base of the Federal Supreme Court

APPENDIX 8: INTERVIEWEE

Name of Interviews and interview dates

No	Interviewee	Position	Date
1	Haile Michael Melaku	LLM, Department head of international law study under the legal research Institute	31 March 2016

2	HabteFichala	LLM PHD Candidate The then Federal High Court	March 20/2016 March 27/2016
3	KifleTseionMamo	LLB MA Legal Consultant of the Commercial Bank of Ethiopia Member of the Federal Constitutional Inquiry by now the Federal Supreme Court Judge At the Federal Ministry of justice currently Attorney General	May 25/2016
4	Solomon Werku	Data Incoder Supervisor of the Fedral High Court	Marc 10/2016
5	Saare Mengistu	The then head of the office of Federal Judicial Administrative Council LLB	May 10/2016
6	Emebet Weldegiorgis	The Finance Director of the Federal Supreme Court	May 2016
7	Boja Taddesee	the then vice president of Oromia Supreme Court Currently the head of the Office of the Vice President	May 2016
8	Woubshet Shiferaw	The then president of the Federal	May 12/2016

		Supreme court LLM PHD Candidate	
9	Kidir Mohamed	The president of Afar Supreme court	May 2016
10	Eshetu Tolla	LLB Advocate of First Instance Court	July 2016
11	Kiflu Mekuria	Plintiff Cassation Case	May 2016
12	AsmeretTesfaye	LLb Advocate in all Federal courts	June 2016
13	GezahegnLemamaGebrem ariam	trader Plaintiff on commercial case	June 2016
14	YergaAicheh	The judge of The FederalHigh Court LLB	May 18/ 2016
15	AsnakechGuideta	Court Clerk of the Federal circuit Bench	June 12/2016
16	AbrahaMesselle	LLM The then judge of Tigray Supreme Court currently the judge of Federal Supreme Court Cassation Bench	May 20/2016
17	HailuNegash	LLM the then judge of the Tigray Supreme Court and Currently the Judge of Federal Supreme Court Cassation Bench	May / 2016
18	BerhaneMeskelWagari	The vice President of First Instance	May /2016

		Court	
19	TuemArega	The vice president of the Fedral High Court	June /2016
20	BerihuTeweldebrehan	The Vice president of the federal Supreme Court	December/2016
21	Mulugeta Ago	The Preident of the Supreme Court of the Southern Nations nationalities and Peoples	December /2015
22	Luel Kahsay	LLM the head of Tigray Justice Bureau	December 2016
23	MuraduAbdo	lecturer of Addis Ababa University	January 2016
24	TeklitYemesil	The Judge of Federal Supreme Court cassation Bench	March 2016
25	AlemawWelle	The judge of the Federal Supreme Court cassation Bench	February 2016
26	Ali Mohamed	The Judge of Federal Supreme Court Cassation Bench	March 2016
27	TekaMehari	The then judge of Federal First Instance Court	March 2016
28	TesfayGebreyesus	The Judge of the trainer and	March 2016

		administrator of justice sector Training center	
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Sample Interview with elders and clan leaders about Traditional justice of Afar and Amhara

No	Interviewee	Position	Date
1	Mohammed Srul	Tribe leader and Sheria Judge Asyita State of Afar	March 2014
2	Abas Seid	Tribe leader Assayita State of Afar	March 2014
3	Mohamed Seid	SemeraWereda The State of Afar	February 2014
4	Datona Mohammed	Tribe leader DubtiWereda State of Afar	March 2015
5	Ayalew Kebede	Bonjawereda State of Amhara	February 2015
6	Berhanu Fante	EnjibaraWereda State of Amhara	March /2015
7	Temesgen Sintayehu	Awi Zone State of Amhara	March 2015
8	Fenta Silt	DenbiaWereda State of Amhara	February 23/2015
9	Belete Meshesha	Hagere Mariam Wereda State of Amhara	May 2016

I. Interview Guide questions related to key information to judges

Q1. What do you think are the challenges of the current federal judiciary?

- Q2. What are the overall structural problems?
- Q3. How is the budget allocated and administered
- Q4. How do you evaluate the current justice training center?
- Q5. What are the main problems of federal Supreme Court cassation bench and its power of cassation over cassation?
- Q6. How do you evaluate the appointment promotion and dismissal of judges?
- Q7. What do you say about the working of the federal judicial administration council?
- Q8. How do you evaluate the overall leadership?
- Q9. What your view on the performance of joined up justice ?
- Q10. What is you view on the current federal judiciary on its rejection the power of judicial review?
- Q11. At last what do you say about the strong and independence of the current federal judiciary and your overall recommendation?

II. Interview guide questions for lawyers, court clerks, trainer of judges and university

instructors as well as court users

- A. How do you evaluate the overall independence of the judiciary
- B. Do you say the courts are accessible speedy and predictable
- C. Do you imagine the federal courts are gaining public trust
- D. How do you evaluate the current structure of courts
- E. Are there adequate public defender or legal Aid schemes and interpreters
- F. How do you evaluate the competence skill of judges

- G. How do you evaluate the current working of judicial administration commission
- H. Do you have any comment on the current justice training center
- I. Do you say the current performance of cassation bench enables uniformity and predictability of judgments in the whole nation
- J. Do you agree in the current federal system there is strong and independent judiciary

APPENDIX 9: IRB APPROVAL LETTER

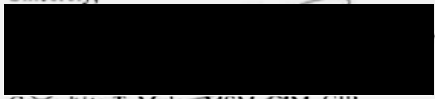
July 26, 2018

Haile Abraha Mehari
School of Law
The University of Alabama

Re: IRB # EX-18-CM-067 "The Working of Ethiopian Judiciary"

Good luck with your research.

Sincerely,



Carpartato T. Myles, MSM, CIM, CIP
Director & Research Compliance Officer
Office for Research Compliance

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Approved—this proposal complies with University and federal regulations for the protection of human

Approval is effective until the following date: 7-25-19⁵⁵

Items approved:	<input type="checkbox"/>	Research protocol:	dated
	<input type="checkbox"/>	Informed consent:	dated
		Recruitment materials:	dated
			dated

Approval signature

date 7/26/2018