JUDICIAL REFORM FOR HARNESSING ECONOMIC GROWTH AND DEVELOPMENT

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"The absence of low cost means of enforcing contracts was the most important source of both historical stagnation and contemporary under development of the third world"

Douglas North

1. JUDICIAL INSTITUTIONS AND THEIR IMPACT ON ECONOMIC GROWTH AND DEVELOPMENT,

CONCEPTUAL FRAM WORK;

Ethiopia is confronted with the problem of bringing about as fast a rate of economic growth as possible. It is confronted with the problem of raising the material standing of its people and hence raising per capita production, income and consumption. Regarding how such rapid economic growth can be induced there are a number of policy prescriptions ranging from variants of doctrianne communism to doctrianne capitalism.

Regarding the role of government in enforcing the same, there are two divergent theories one propounding for strong government and the other for government by consent (democratic government). The former asserts the government must have the powers and determination to take and enforce without fear or favor, the decisions which the situation calls for and only such a government would be able to overcome the opposition which is only to be expected, and to retain the national unity of countries whose basis in any case is often fragile and would be able to uproot inefficiency and corruption and actually carry its plan into effect instead of limiting itself to vague and unrealistic policy statements. The other theory asserts that development requires above all else the consent, indeed the backing and participation of the people. No amount of government direction can do the job unless

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infused by the impetus a truly national movement can give. Imposed government will only lead to resistance where as popular commitment will make it possible to overcome many difficulties and much of the opposition. Subsumed in the latter doctrine is the concept of rights of different variants ranging from rights of life, liberty, and property to the **right of due process.**

The protection of human rights is justified on the basis that a society in which rights are granted will have for greater advantages over a society in which they are not. By advantage it is meant that the allowance of the right will promote conditions of life, which give the individual and the society more tangible rewards and more intangible satisfaction out of life. In the words of John Stuart Mill (1806-1875) "all free communities have been more exempt from social injustice and crime and have obtained more brilliant prosperity than any other or than they themselves after they lost their freedom". During the last 70 years Ethiopia has experienced different forms of governments. The 1994 FDRE constitution currently in force in its preamble states the constitution is aimed at:-

> *"---- building a political community founded on the rule of law and capable of ensuring a lasting peace guaranteeing a democratic order, and advancing our economic and social development".*

The Ethiopian constitution endorses a multitude of rights and securities against incursions by the incumbent government. Of all the rights enshrined in the constitution, those that may be classified in constitutional parlance as the right to due process of law is the most important one for it provides for against arbitrariness, uncertainty and inequality.

The right of due process of law has come to signify a guarantee of fairness in law enforcement embodying many specific rights, which an individual should enjoy when government action threatens to deprive liberty or property rights, which include among others the following;

1. The right to notice, hearing and opportunity to defend and to confront one's accusers and those giving adverse evidence and more recently the right to counsel,
2. The right to be judged by an impartial tribunal.
3. The right to be protected against law which are either discriminatory or so unreasonably vague as to be capable of discriminatory application,
4. The right to be protected by the principle *nulla poena sene lege.(no punishment without law)*

5. The right to habeas corpus as remedy to secure release from illegal imprisonment.

These rights and liberties of individuals are best protected through the system of separation of power and check and balance when government power is divided as the legislative executive and judicial. The separation of powers between the three branches of the government is intended to promote *rule of law.*

In the words of Dicey, rule of law has three meanings

1. The absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the arbitrariness of prerogative, or even of wide discriminatory power on the part of government.
2. It means equality before the law or equal subjection of all classes to the ordinary law of the land administered by the ordinary courts.

The rule of law may be used as a formula for expressing the fact that that the law of the constitutions is not the source but the consequence of the rights of the individual as affirmed and enforced by the courts.

Yet another definition of rule of law as given by international human rights conventions provide, the rule of law to comprise the following main elements

- Respect for human rights
- A government monopoly over the exercise of force
- The separation of powers into legislature, executive and judiciary
- The principle of the legislation of the administration
- Independent and functioning judiciary

Concerning the importance of rule of law for development a study conducted by The Ministry of Development and Cooperation of Germany states.

1. The rule of law and legal certainty provide the foundation for people's self determined personal development. Institutions based on the rule of law are indispensable elements of democratic societies: respect for human rights and equality for all social groups are the preconditions for political participation and a peaceable society. Viable institutions based on the rule of law improve chances of settling conflicts peacefully, thus contributing to crisis and conflict prevention and management.
2. At the same time, rule of law and legal certainly provide the necessary framework for sustainable economic and social development. Establishing and enforcing property rights clears the way for capital formation and a market economy. In addition, a reliable legal and judicial system reduces uncertainties and related

investment risks. So, transparent, predictable legal provision lays the foundation for vigorous economic activity, investment and growth.

Of all the components of rule of law, concern of judicial reform is the creation of an independent and functioning judiciary. The whole import of judicial reform is to contribute to a more impartial, independent, accountable and effective judiciary that is able to improve governance and advance development. Regarding to what an independent and functioning judiciary pertains to, the 1985 convention on the independence of the judiciary by the United Nations General Assembly states:-

"the independence of the judiciary is a principle to be guaranteed by the state and to be enshrined in the national constitution or laws; the judiciary should be impartial, fair, respectful of the rights of the parties to litigation and immune from inappropriate or unwarranted interference; it should be the judiciary, comprising of ordinary courts or established by or under law, to determine whether they have jurisdiction in matters before them, justice through the judiciary should be readily accessible; the state to provide adequate resources to enable the judiciary properly perform its functions. The principles recognize the rights of members of the judiciary to the freedom of expression, belief, association and assembly which should be exercised in a dignified manner while preserving dignity, impartiality and independence of the judiciary at all times. The principles expect appointees for judicial office should be persons of highest integrity qualified for the task. Their terms of office, their independence, security, adequate remuneration, conditions of service, pension and age of retirement should be adequately secured by law with guaranteed tenure for their terms of office. Promotions should be based on ability, integrity and experience. Discipline suspension and removal should be dignified and based on sound legal procedures which allow fair and speedy hearings where necessary".

Regarding the tangible and intangible benefits of establishing a judiciary in tune with the aforementioned criteria for economic advancement, according to a World Bank study on *Institutional Reform And The Judiciary,* an efficient judiciary hastens growth for the following reasons,

1) Increasing evidence from around the world suggests that when the court performance improves it can support economic development by facilitating market transactions by avoiding the problems of moral hazard and information asymmetry. Conversely liberalization, more trade within the country and business with foreigners means an increased demand for formal dispute resolution mechanisms. For example China in 1979 undertook an economic reform program that provided incentives for new enterprise creation, increased inter provincial trade, and allowed the entry of foreign investors, with business

expanding, the number of cases filed in commercial courts increased dramatically. Between 1979 - 82 and 1997 there has been more than a 100 fold increase in the average number of commercial disputes filed in the courts beginning from around 19,000 in 1979 to 1.5 million new cases in 1997.

2) In the absence of formal judicial organs, business and individual investors design alternative methods of reducing risks which itself entail costs. However, if formal dispute resolution mechanisms are set in place businesses can diversify their business dealings without bothering about designing expensive risk minimizing safety nets.
3) When the judicial system is strong, countries tend to have larger firms. Firms can rely on courts to protect their property rights and enforce increasingly sophisticated contracts. Countries with better performing courts have more developed credit markets, and entrepreneurs are encouraged to contract with new suppliers. Without well functioning courts, firms are forced to rely only on relationship business. In rapidly changing economic environment such constraints prevents firms from venturing into potentially profitable opportunities.

Besides with the coming into prominence of The New Institutional Economics **(NIE)** against main stream economics, the role of institutions especially judicial institutions in protecting property rights and enforcing contracts and there by reducing transaction costs and risks associated with the problems of adverse selection and moral hazard is greatly appreciated and no more is the study of institutions confined to the ambit of history, sociology, political science and law but also of economics.

It is in this whole background that the role of judicial institutions in speeding up the pace of economic growth and development is analyzed.

2. BACKGROUNDS AND CURRENT SITUATION OF THE ETHIOPIAN JUDICIARY

Throughout most of its modern history, Ethiopia has been a highly centralized unitary state. This is because the politics of nation building has been anchored in creating a strong, centralist state that jealously guarded the source central power. It is within this context that the background of the Ethiopian judiciary should be appreciated.

The modern beginnings of Ethiopia's judicial system can conveniently be traced to the general and military agreement signed between Emperor Haileselassie and Great Britain in January 1942, The British assistance in establishing an effective administration of justice machinery loomed large among the provisions of the agreement. Under the agreement, Britain committed itself to provide British citizens as advisors, judges and police custom offices while the emperor committed himself

not to employ such officials without the consent of the government of the United Kingdom.

The Administration of Justice proclamation of 1942 established four levels of courts; the Supreme Imperial Court, the High Court and Regional and Communal courts. Both the Supreme and the High Courts had National Jurisdiction. Provincial courts were established in each province of the empire and their jurisdiction was limited to the more minor and civil matters. During the same period the Emperor was the chief executive who maneuvers the judges. From this it can be generalized that there was no separations of power and judicial institutions were under the highly centralized leadership of the Emperor.

As the Derg assumed power, in addition to the regular courts, special courts martial, which later became special court was established and a special penal code that is still in force was proclaimed. The nationalization of rural lands on April 1975 and urban lands and houses on 26 of July 1975 also inaugurated new courts in urban centers and rural areas.

During the same period, little change was introduced in both the structure and organization of the regular courts and they kept on functioning as they did in the past. After the down fall of the Derg regime, Ethiopia has established a Federal state structure under the 1991 Transitional Charter, which was later adopted by the 1995 FDRE constitution currently in force.

The decentralized state structure at present comprises the federal state and the nine member states with parallel legislative, executive and judicial organs. Each of these federal and state organs are attributed with separate and independent law making, law enforcement and judicial powers.

The adoption of the decentralized system introduced a three-tier court structure namely; the supreme, high and first instance courts both at the federal and state levels and judicial power in legal matters is exclusively given to the courts. The constitution provides that courts exercise their functions independently without the influence on interference of the government, it officials or any other source of influence. Whether this independence of the courts is a mere letter of comfort with no real tangible value or genuinely real is a subject of empirical investigation.

3. PROBLEMS OF THE ETHIOPIAN JUDICIARY

Though, the promulgation of the constitution of the Federal Republic of Ethiopia with a federal structure has brought significant changes in the system of justice and enforcement of the laws in the country, assessments made earlier by the justice sector reform program of Ethiopia has shown there is a gap in terms of institutional, organizational, human and financial capacity both at the federal and regional levels. For the purpose of this paper the institutional problems surrounding the judiciary is considered in light of the independence of the judiciary. This in turn is expressed in terms of the manner judges are appointed, promoted, disciplined and removed. It is also measured by the independence of the judges from the state in terms of the freedom to declare acts of the executive and the legislative branches to be in violation of the constitution.

A. Institutional Problems

1. Appointment Of Judges

To strike the check and Balance inbuilt in the separation of powers principle as enshrined in the constitution, the power of appointing judges is relegated to the Prime Minister who will have his appointees approved by the House of People's Representatives. However, unless such power is exercised meticulously it may lead to abuse such that executive spearheaded by the prime minister may pack the judicial bench with appointees of a certain political persuasion. This may in turn undermine the much-desired judicial independence. In this connection the Ethiopian judiciary is criticized by some as being filled by individuals who are appointed not for their merit but for their political allegiance.

Besides in the short history of modern judicial institutions in Ethiopia, fresh graduates of the law faculty of AAU is the pool from which candidates are selected for the judicial office. However, this tradition undermines the tenet that a judicial office is an office of highest merit and integrity. Essentially the independence and efficiency of the judiciary as measured in terms of quality and quantity depends on those who assume the office.

A judge as a holder of a judicial office should be capable of discharging his/her duty with impartiality. Though, impartiality and independence may not be synonyms, there is a very close blood tie between them, for a judge who is truly impartial deciding each case on its merit as they appear to him is of necessity independent. To this end in many countries developed and developing alike, barristers and solicitors reared in a professional tradition that prizes the exercise of an independent individual judgment above all are appointed as judges. However, our tradition of appointing fresh graduates literally with no practical experience to judge their professional competence

and moral integrity is countervailing to the much-desired establishment of an impartial and independent judiciary.

2. Dismissal Of Judges

To augment the independence of the judiciary and enable judges to pass decisions without fear or favor, constitutional guarantee is given to the tenure of judges. This is true also of the successive Ethiopian constitutions including the present one. The FDRE constitution under article 79/4/ provides for strict conditions for the removal of judges from their office. However, successive Ethiopian governments are not known for respecting this constitutional strait jacket. According to the report of the Human Right Watch, in the beginning of 1996, the government dismissed 336 judges from Addis Ababa and Amhara National States and 270 judges were dismissed from Oromiya Regional State under the guise of court restructuring in violation of the constitutional stipulations. This retrenchment of judges is criticized as being dictated by removing politically undesirable elements from the judiciary. The effect of this will be more damaging to the independence and efficiency of the judiciary where these judges happened to be endowed with special skills and expertise. This trend of unwarranted removal of judges undermines the independence of the judiciary for it may compel a judge to trim or tailor his decision in order to ingratiate himself with or avoid offending any member of the executive whom he thought would be influential in deciding his stay in the office. This may seriously undermine the independence of the judiciary.

3. The Remuneration of Judges

Though in a country like ours where there are many development goals top on the agenda calling for resources, setting the pay level of judges on the same criteria as their counter parts in developed countries is unrealistic, appropriate rewards or remuneration should be due to our judges. This helps to avoid grafting and to attract the ablest candidates to accept judicial appointments. Though efforts are made to increase the salaries of judges, still the current pay structure remains meager in view of the demands of the office and when compared with the salaries of other professionals working in public and private organization let alone their colleagues in the private practice. This has contributed to corruption and the high attrition of judges in search for better jobs. Last year alone 28 judges have left their offices in search for better jobs. This trend may undermine the creation of a career judiciary capable of acting independently and efficiently.

4. The Power of Courts to Declare the Acts of the Legislative or the Executive as Unconstitutional or Ultra Vires

In the words of Alexander Hamilton, the judiciary has neither the sword nor the purse and therefore should be given the power to review the acts of the legislative and executive. This principle of judicial review is considered by many jurists and legal scholars as a guarantee for the protection of the constitutionally protected rights, liberties and privileges and the independence of the judiciary. However, the 1994 FDRE constitution denies the courts this power of judicial review and courts are confined to mere interpretation of the laws as promulgated by the legislative regardless of whether the latter are unconstitutional or not. Besides the other branches of the government are not famous for honoring the decisions of the courts. Rather the trend as followed by the government is to make laws that have the effect of annulling or whittling down the effect or purpose of a judicial decision. The anti corruption proclamation is a case in point in this regard, i.e. after the court ordered for the release of the accused on bail, the parliament issued an amendment denying the right to bail of persons accused for alleged corruption. Besides a torrent of legislations which take away the jurisdiction of courts to try certain types of cases are promulgated. The banking proclamation, and the tax proclamation which bestow the power of foreclosure on the Banks and tax authorities elucidates how fast the power of the courts as the sole arbiter of disputes is being eroded. The lease proclamation, which transfers the power of entertaining suits pertaining to expropriation to a specialized tribunal constituted under the executive also shows the Government's zeal to narrow down the jurisdiction of the ordinary courts. This has the effect of affecting the institutional independence of courts.

B. Organizational and Financial Problem

The success of the judiciary doesn't depend only on the personality of the judges and their independence. It also hinges on how the judicial office is organized, manned and on the availability of other facilities. The Ethiopian court system, according to a study conducted by The World Bank on "*the court administration reform program and its impact on case management",* is characterized by poorly developed filing systems, lack of modern transcribing or recording facilities, inadequate monitoring systems, absence of adjournment guide lines, inadequacy of court management skills, lack of material resources and informational gaps. According to the same study, lack of court management skills is due to lack of formal management skills and knowledge on the part of the presidents and senior officials of the courts. Lack of material resources reveals through the fact that various documents issued by courts are produced through manual type writers and due to lack of modern transcribing facilities judges

make all trial records by hand writing including the verbal testimonies of witness. Compounding the organizational problem is the information gap created due to the absence of library resources and reference materials like court decisions and case reports to which judges can make constant references. The qualification of the judicial staff is another organizational problem hampering judicial performance. That is that most of the supporting staff has no formal training qualifying them for the post. The ongoing judicial reform program is improving on these organizational set backs in the federal courts by providing for different gadgets, by giving trainings and improving the case management system in general.

4. IMPACT OF THE INADEQUACIES ON THE EFFICIENCY OF THE JUDICIAL SYSTEM

According to the report of the justice sector reform program of Ethiopia the machinery of justice is not efficient. The civil justice system is too costly, complex and unpredictable. The dispositions of criminal cases are so protracted that rights granted by the constitution are not fully operational. According to the same report the following are a few but by no means all of the impacts of the inefficiency:

a, Court congestion and delays
b. Obstacles in the promotion and protection of human and democratic rights
c. Inefficient system of enforcement
d. Obstacles in the smooth operation of the market economy and hence economic development of the country.

5. DIRECTION OF REFORM

In light of the current state of affairs of the judiciary, the immediate need of judicial reform is uncontestable. The government has embarked upon a large-scale program of judicial reform and this is highly commendable. The government's program is limited mainly to file management and organizational issues. To make meaningful changes in the true sense of judicial reform, the following should be considered among others.

A. Improving the Institutional Setting

1. In the foregoing we have underscored the importance of the independence of the judiciary in expediting economic growth and development by providing for certainty and rule of law. The independence of the judiciary principally rests on how judges are appointed, promoted, removed and paid. As is mentioned earlier, the appointment of judges is defective to meet the high demands of the judiciary.

This may be due to the lack of transparency and the monopoly exercised by the executive in the appointment of judges. Under the Ethiopian constitution, the power of appointing judges is left with the Prime Minister in consultation with the judicial administration council with the final approval of the House of Representatives. So far, the parliament has never declined the appointment of a judge as submitted by the prime minister. This may be an indicator of the absence of the check and balance as envisaged by the constitution. In other countries Bar Associations, law schools and others are represented in judicial administration councils to deliberate on the appointment judges and other matters affecting the performance of the judiciary. This practice helps in making the appointments of judges more transparent, and hence leads to the creation of an independent body of judges. Therefore there is no overriding rationale why this tradition cannot be repeated here. Besides it is possible to define by law the criteria and the pool from which candidates for judicial appointment can be selected. In this regard it is desirable to make practicing lawyers be included in the group. This helps to avoid executive abuse in the appointment of judges by selecting those with a certain political persuasion, and have the ablest candidates tested by challenges and time to join the judicial office.

2. Constitutional guarantee is given to the tenure of judges to enable them to discharge their judicial responsibility without the fear of unemployment. In a similar fashion the FDRE constitution provides stringent conditions for the dismissal of judges. However, the government seems to engage in dismissing judges without adhering to the procedures. This shows that the letters of the constitution are nothing unless accompanied by the political will of the government. Hence the reform should work in cultivating this political will or commitment of the government. Further, unlike other constituencies, quite few provisions dealing with the judiciary do exist in our constitution. If we look at the constitution of Ghana, for instance, it has more than 30 provisions dealing with the appointment, removal and promotion of judges, while the Ethiopian counter part has merely seven provisions. This can undermine the guarantee that should be accorded for judges. Hence it is desirable, despite the rigorous procedures for the amendment of the constitution, to make a detailed regulation of the judicial office in the constitution for this may deter the arbitrariness experienced in the dismissal of judges.
3. As the saying goes "a power over a man's subsistence amounts to a power over his will". Thus the remuneration due to judges should be given a serious thought. Underpayment is a disincentive for judges to discharge their responsibilities with utmost diligence and honesty. Besides it may lead to grafting. In addition it may result in a judiciary filled with second raters. Hence, a pay structure

commensurate with the demands of the profession and enough to attract the ablest to judicial office should be designed.

4. Besides, the government's trend of taking away the jurisdiction of ordinary courts should be stopped. Otherwise the independence of the judiciary will be hampered.
5. Regarding the organizational and financial problems associated with the judiciary, however taxing it may be, the government should be ready to invest in the training of the support staff, in the procurement of computers and transcribers, in developing adjournment guidelines and establishment of libraries. Otherwise, cases continue to take time before dispositions, decisions remain to be of poor qualities. Current efforts by the court administration in this regard is commendable.
6. The independence of the judiciary should also extend to the power of the judiciary to have the necessary number of judges and supporting staff as the size of cases may demand. However, the dependency of the judiciary on the good wish of the other arms of Government for its budget may have constrained the judiciary from having the necessary manpower, and results in delay. Hence, the reform should sift out a means to give the judiciary a degree of fiscal independence.
7. Currently, The Ethiopian Bar Association is a voluntary association of lawyers without a statutory basis. The licensing, barring and disciplining of lawyers is done by the Ministry Of Justice. However, the existence of an independent and organized legal profession is an essential component in the protection of the rule of law and the attendant independence of the judiciary. So that, the justice sector reform program should sort out a means that the power of licensing, disciplining and debarring of lawyers rests with the Bar.
8. The existing procedural laws are complex for a timely disposal of cases there by making litigations a costly exercise. Hence, the reform should also be directed at amending the procedural laws for a timely disposition of suits, including the introduction of compulsory conciliation and private alternative dispute resolution mechanisms. Besides, the procedural laws should incorporate stringent penalty clauses for those recalcitrant parties who opt for making use of the inefficient court structure for their advantage and contributing for the congestion of cases.