

Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements - *versus* - Promise Fatigue

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Abstract

Judicial reform constitutes a sub-program within the Justice System Reform Program (JSRP) which is underway in Ethiopia since 2002. Its targets have been consistently articulated in the 2005 Comprehensive Justice System Reform Program, the First Growth and Transformation Plan and various strategic plans. However, the outcome and impact as, *inter alia*, manifested in *public trust and confidence* seem to be declining. The core problems in the Ethiopian justice system (including the judiciary) that were identified in the 2005 Comprehensive Justice System Reform Program were (a) gaps in accessibility and responsiveness to the needs of the poor, (b) inadequacy of “serious steps to tackle corruption, abuse of power and political interference in the administration of justice,” and (c) inadequate funding which “aggravates most deficiencies of the administration of justice”. As these problems still persist, I argue that future judicial reform pursuits require a new path which facilitates court-level and institution-level reform through grassroots empowerment including enhanced independence and resource allocation. Subject to justice sector reform harmonization, there should be an independent judicial reform which is not conflated with other components of justice sector reform. It is also argued that justice sector reform should not be subsumed under the Good Governance Reform Cluster which should rather be limited to macro-level harmonization of reform pursuits. In the absence of such measures, the various targets, aspirations and pledges for judicial reform may eventually end up in *promise fatigue* and *regression*.

Key terms

Judicial reform, judiciary, judicial independence, rule of law, GTP, Ethiopia

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Introduction

Development pursuits envisage a predictable, coherent, efficient, effective and accessible justice system which, *inter alia*, ensures contract enforcement, (clearly defined, secure and easily transferable) property rights, access to justice and a normative and institutional setting in the context of *good governance*. The justice system is constituted of a legal and judicial system which are inter-related and whose performance and effectiveness are inter-dependent. “An efficient legal and judicial system which delivers quick and quality justice reinforces the confidence of people in the rule of law, facilitates investment and production of wealth, enables better distributive justice, promotes basic human rights and enhances accountability and democratic governance”.¹

The 2005 Baseline Study Report of Ethiopia’s Ministry of Capacity Building, i.e. the *Comprehensive Justice System Reform Program (CJSRP)*² states *four* core components and a *fifth* crosscutting component of comprehensive Justice Sector Reform. They are (a) lawmaking and revision; (b) the judiciary; (c) law enforcement which includes prosecutors, the police and the penitentiary system; (d) legal education and research; and (e) information flow within and outside the justice system.

This article is an overview of post-2002 reform pursuits in one of the components of the justice system, i.e., the judiciary. The first section highlights the political and economic factors that influence judicial empowerment. Sections 2 and 3 assesses the judicial reform pursuits since 2002 which are embodied in JSRP, in Ethiopia’s Growth and Transformation Plans and in the strategic plan of federal courts for the GTP II period. The fourth section compares the projects under the judicial reform sub-program that was underway during the GTP I period with the projects that relate to the judiciary in the strategic plan of the Good Governance Reform Cluster for the GTP II period. Section 5 briefly indicates the independence of the judiciary in a democratic developmental state, followed by the sixth section which highlights current public perception and trust in the judiciary. The article can inspire further research on specific themes related with judicial reform.

¹ Report and Recommendations of the Working Group for Department of Justice for the 12th Five-Year Plan (2012-2017), Department of Justice, Ministry of Law and Justice, Government of India, September 2011.

² Ministry of Capacity Building, Justice System Reform Program Office (2005), *Comprehensive Justice System Reform Program Baseline Study Report*, February 2005.

1. Factors toward Judicial Empowerment

1.1 External-driven –versus- largely domestic judicial reform

The *law and development* projects and pursuits of the 1960s primarily focused on legal education and the *modernization of laws* toward social engineering. They were meant to facilitate the ‘modernization’ of developing countries through the path undergone by the Global North. The subsequent thinking since the 1980s has espoused wider perspectives such as *rule of law* reform, *judicial* reform and *governance*. As reforms that relate to rule of law including judicial reform envisage political will and the necessary domestic factors for their realization, most of the pledges and declarations expressed in developing countries do not match up with real achievements.

As Santos observes, the USAID identifies four generations of law programmes which prevailed since the early 1960s. “The first generation focused on legal education and law reform; the second, on basic needs legal aid; the third, on court reform”.³ The fourth generation “is the most ambitious and political in the Agency’s terms because it encompasses all the concerns of the three previous generations of programmes and broadens their scope while including them in the design and implementation of country democracy programme”.⁴

Santos recalls that “the semi-peripheral countries of Europe, Portugal and Spain lived under an authoritarian regime for four decades” during which “the judicial system was either reduced to an appendage of the government –in politically sensitive areas such as political crimes and labour disputes– or kept a low-profile independence and remained utterly isolated from society”.⁵ Although the democratic transition of these countries in the 1970s brought about “large institutional changes in the judicial system”, it “took a decade for the courts to vindicate a more active role in society”.⁶ Santos notes that the nature and outcomes of judicial reform in the semi-peripheral countries in Europe was different from the judicial reform outcomes in the “semi-peripheral countries of Central and Eastern Europe” after their democratic transitions in the late 1980s.⁷

The reform of courts in Southern Europe was mainly domestic, which reintegrates the judicial system with “the legal culture and the democratic

³ Boaventura de Sousa Santos (2002). *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, Cambridge University Press, p. 326 (citing USAID 1994, p. 18).

⁴ Ibid.

⁵ Id., p. 320.

⁶ Id. p, 321.

⁷ Id., pp. 321 ff.

tradition of continental Europe”.⁸ However, the reforms in various countries such as Latin America and Eastern European countries mainly resulted from exogenous factors rather than internal dynamic forces of change. In effect, Santos argues that “under these circumstances, the distrust of law and legal institutions cannot be remedied with quick-fix reform”.⁹

This should not, however, undermine the positive role of external factors, because in view of the current global interdependence in various economic, social, technological, informational and political realms, judicial reforms indeed benefit from external interventions and support. Nor can largely external-driven reforms succeed because the effectiveness of institutional reforms mainly depends on domestic factors and internal dynamics.

The role of domestic realities in judicial reform can be illustrated by the observations of Faundez in Kazakhstan regarding the adverse impact of “chronic political instability or faltering political commitment” which is “exacerbated by unrealistic and exaggerated expectations”.¹⁰ Even though “the objectives of the project was to strengthen judicial independence”, the project “failed to take into account that the political elites had no experience of constitutionalism and hence could not be easily persuaded to accept the notion of separation of powers”.¹¹

According to Faundez a more practical approach in the case of Kazakhstan would have been “less ambitious, but achievable intermediate goals”. It is, however, to be noted that the end in view was not problematic. Instead, it was the largely external-driven approach and inadequate attention to the objective realities that brought about the challenges in achievement because the most effective approaches are mainly domestic-driven reforms that can meanwhile obtain external support and partnership.

1.2 Europe’s path to rule of law

During the Middle Ages of Western Europe, informal institutions facilitated exchanges and economic activities. As Dam observes, one of the early European substitutes for rule of law in long-distance trade was *community responsibility* in which “city-states (communities) would hold all members of a foreign

⁸ Boaventura de Sousa Santos (1999). *The GATT, Law and Democracy: (Mis)trusting the Global Reform of Courts*, in J. Feest (ed.) *Onati Papers 7: Globalization and Legal Cultures*, IISL.

⁹ Santos (2002), *supra* note 3, p. 322.

¹⁰ Julio Faundez (2009). ‘Rule of Law or Washington Consensus: The Evolution of the World Bank’s Approach to Legal and Judicial Reform’ in Amanda Perry-Kesaris (ed), *Law in the Pursuit of Development*, London: Routledge 2010. [Citing Kazakhstan (2003). *Implementation Completion Report on a Loan (US \$ 16.5 million) for a Legal Reform Project* (World Bank)]

¹¹ *Ibid.*

community responsible when any member of that foreign community cheated, or failed to pay a debt to, a local citizen”.¹² In case “the foreigner refused to make compensation, goods of that foreigner’s compatriots within the local community would simply be impounded for the benefit of the local citizen. In effect, the presence of a debtor’s compatriots provided *de facto* collateral”.¹³

Even though enforcement by a third party should have been pursued, “no appropriate third party was available where the two communities were not subject to a common sovereign. Neither Italy nor Germany had a single ruler because they were not unified states”.¹⁴ Similar practices of “community responsibility system played a role in England as well” because the centralized legal system created by the Normans only covered “the part of England subject to royal control through traveling judges” and “it was a costly and uncertain form of third-party enforcement”.¹⁵ As soon as such enforcement became possible, in England, the “Statute of Westminster I of 1275 outlawed the community responsibility system among communities within England”, and this practice was substituted by a voluntary registration system “in which debtor and creditor could jointly register a debt, thereby allowing designated local officials to foreclose on the movable property of the debtor in the case of nonpayment [FN10]”.¹⁶

Boycotting was another means of retaliation against deceits in contracts. “Some guilds created what amounted to a multilateral system of boycotting foreign communities whose citizens cheated, stole from, or imprisoned guild members”.¹⁷ The more advanced system was based on reputation rather than boycott in which “local traders within a town could rely on local knowledge and experience based on past trading (in other words, on reputation)” thereby, *inter alia*, leading to trade through agents with reputation. Even after the emergence of the nation states of Europe (after the 1648 Treaty of Westphalia), challenges in uniform and predictable adjudication and the vested interests of the monarchy rendered “the transition to a rule-of-law state in most countries” gradual and incremental, and in effect, this involved “an evolution over several centuries”.¹⁸ Rule of law did not thus exist in Medieval Europe and it took centuries to have full-fledged development. This does not, however, render rule of law irrelevant

¹² Kenneth W. Dam (2006). *The Law-Growth Nexus: The Rule of Law and Economic Development*, Brookings Institution Press, Washington DC, p. 73.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Id., p. 74 citing Theodore F. T. Plucknett (1949). *Legislation of Edward I*. Oxford University Press, pp. 138–43.

¹⁷ Ibid.

¹⁸ Id., p. 78.

for economic development because even if economic activity can take place in its absence, “rule of law is essential to the efficient functioning of a modern economy”.¹⁹

Unlike Europe’s experience, centuries of evolution toward rule of law were not necessary in the USA, Canada and Australia which transplanted it from Europe. The same holds true for other countries subject to the *caveat* that while USA, Canada and Australia were largely countries in which European settlements were predominant, other states which transplanted rule of law had different settings that enhanced the challenges in and complexities of the pursuits.

1.3 Political and economic challenges in judicial empowerment

Judicial independence involves “judicial budget autonomy, the existence of a uniform appointment system, stable terms, disciplinary system for court personnel, and adequate salaries and retirement benefits for judges”.²⁰ To this end, judicial reform programs include “transparent methods of appointment, removal and supervision ... in order to ensure personal and functional independence for judges”.²¹

In developing countries and other transitional systems, there are two major challenges in *rule of law* and *judicial reform* pursuits. The first challenge relates to the interest of political groups while the second is attributable to resources. Carothers states that the “primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law”.²²

Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure. Even the new generations of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.²³

Magalhães notes that “judicial institutions in emergent democracies are shaped primarily by the strategies of dominant political actors who attempt to maximize the congruence of the judiciary with their interests and its

¹⁹ Id., p. 72

²⁰ Maria Dakolias (1996). *The Judicial Sector in Latin America and the Caribbean Elements of Reform*, The World Bank, Washington DC, p. 20.

²¹ Ibid

²² Thomas Carothers (2006). ‘The Rule of Law Revival’, in *Prompting the Rule of Law Abroad: in Search of Knowledge*, Carothers ed., Washington DC, Carnegie Endowment for Peace, p. 4.

²³ Ibid.

responsiveness to their priorities”.²⁴ Political actors who are in power have vested interest in “the likelihood of judicial decisions that favor their interests”. To this end, they use the “rules regarding the management of judicial careers” in order to “influence the responsiveness of judiciaries to dominant political actors”. The influence of the executive in judicial careers includes promotion, assignment and recall that “can be used to condition judicial behavior”.²⁵

In culturally divided polities, traditionally hegemonic groups can have interest in promoting judicial empowerment. This is because rule of law and empowered judiciary can be effective safeguards against prospective pressure by political actors with majority control of executive and legislative state power. Based on the assessment of “the political vectors behind constitutional reform in Israel (1992), Canada (1982), New Zealand (1990), and South Africa (1993)” and upon examining “the political origins of these four constitutional revolutions”, Hirshl observes that “judicial empowerment is in many cases the consequence of a conscious strategy undertaken by threatened political and economic elites seeking to preserve their hegemony vis-à-vis the growing influence of ‘peripheral’ groups in crucial majoritarian policymaking arenas”. According to Hirshl, such “conscious judicial empowerment is likely to occur (a) when the judiciary's public reputation for political impartiality and rectitude is relatively high, and (b) when the courts are likely to rule, by and large, in accordance with the cultural propensities and policy preferences of the traditionally hegemonic elites”.²⁶

The first core factor in judicial independence is *political will*, because effective judicial independence requires the “de-politicisation of the process by which judicial personnel are appointed and removed”.²⁷ Moreover, “the judicial branch should be financially and administratively independent from executive branch control” and the courts should be empowered “to declare executive and legislative actions unconstitutional”.²⁸

The second major challenge in the pursuits toward judicial empowerment is inadequacy of resources, remuneration and facilities that have adverse impact on

²⁴ Pedro C. Magalhães (1999). “The Politics of Judicial Reform in Eastern Europe”. *Comparative Politics*, Vol. 32, No. 1 (Oct., 1999), p. 43.

²⁵ Id., p. 44.

²⁶ Ran Hirschl (2000). “The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions”. *Law & Social Inquiry*. Vol. 25, No. 1 (Winter, 2000), p. 91.

²⁷ Bruce M. Wilson, Juan Carlos Rodríguez Cordero and Roger Handberg (2004). “The Best Laid Schemes ... Gang Aft A-Gley: Judicial Reform in Latin America: Evidence from Costa Rica”. *Journal of Latin American Studies*, Vol. 36, No. 3 (Aug., 2004), p. 514.

Footnotes omitted.

²⁸ Ibid.

the level of professionalism, integrity, retention and performance of judges. Europe's experience shows causal reciprocity between economic development and judicial independence (in the context of rule of law and robust legal profession). However, developing countries are sailing through a global economy which necessitates rapid institutional reforms. The paradox is that the advance in institutional competence corresponds with higher levels of economic development.

Chang states the role of institutions such as an independent judiciary in relation with "the *functions* that they perform (such as rule of law, respect for private property, government effectiveness, enforceability of contracts, maintenance of price stability, the restraint on corruption)".²⁹ He notes that the causal relationship between institutions and economic development should not ignore "the important possibility that economic development changes institutions".³⁰ Yet, he "does not deny the role of institutions in development but envisages a dual and reciprocal relationship between economic and institutional development".³¹

According to Wilson *et al*³² "the assumed link between the rule of law and economic development predates the current round of judicial reform" and it has long intellectual history as documented by "Rick Messick".³³ They state Messick's observations that:

this argument was first made by a fifteenth-century English jurist, Sir John Fortescue, later by the eighteenth-century Scottish economist Adam Smith, subsequently by the nineteenth-century German sociologist, Max Weber, and currently by neo-institutional economists such as Douglas North, all of whom outline the important link between a well functioning judicial system, the rule of law and free market economic development. According to this reasoning, which is currently accepted by international development agencies, any country following the rule of law reforms advocated by these institutions should experience free market economic development as predicted.

Dam raises the same question whether independent legal institutions enhance economic development or the vice versa. In the context of the judiciary, he observes that with more money [that can be available in the course of economic

²⁹ Ha-Joon Chang (2010). "Institutions and Economic Development: theory, policy and history", *Journal of Institutional Economics* (2011), 7:4, p. 485.

³⁰ *Ibid*, p. 476

³¹ Elias N. Stebek (2012). "Ambiguities and Inconsistencies in the Prescriptions toward Development". *Mizan Law Review*, Vol. 6, No. 2, p. 319.

³² Wilson et al, *supra* note 27, p. 508.

³³ *Ibid*, *citing* Richard E. Messick (1999). 'Judicial Reform and Economic Development: A Survey of the Issues,' *The World Bank Research Observer*, Vol. 14, N o. 1.

development] “judges can be paid more and be provided with ... better libraries, thereby insulating them better against political pressures and the temptation of bribes”.³⁴

1.4 State legitimacy as a factor in judicial empowerment or disempowerment

State legitimacy under absolute monarchy or communism emanates from political myth. While the absolute monarch claims to be “*Elect of God*”, Marxist governments claim legitimacy from an ideology which pledges to resolve the contradiction between *social* production and *private* appropriation under capitalism, and in effect, the ideology advocates for working class dictatorship represented by the communist party. Military regimes that usurp state power may attribute their legitimacy to the corruption, inefficiency and atrocities of earlier regimes, and they usually present themselves as provisionally indispensable during the path toward elections and democratization. These categories of governments have vested interest against judicial independence whenever such empowerment is in tension with their interests.

There are some authoritarian and semi-authoritarian regimes that influence the judiciary only in selected cases which they consider as ‘politically sensitive’. Where interventions in ‘politically sensitive’ cases are subtle, most citizens may not realize them. Yet, the impact of executive intervention which is initially prompted by political interest gradually nurtures widespread corruption and influences the judiciary’s organizational sub-culture. Eventually, this corrodes the impartiality of courts and extends to court cases that purely involve private citizens.

As judicial reform is an incremental process, its strength and magnitude depend on the ideas of and commitment to constitutionalism commensurate with the political, social and economic realities. Ideas “were critical factors driving judicial empowerment ([in] Turkey, Israel, Canada, and the United Kingdom)”, and they “were part of a wider set of forces driving judicial empowerment, such as the case of Spain, in which a process including opposition political parties was key”.³⁵

Woods and Hilbink further observe that “rational-strategic approaches have tended to emphasize politicians’ or judges’ abilities to read the implications of current events for predicted changes in the future”.³⁶ In addition to such possibilities, “those who supply judicial empowerment may do so reactively, as

³⁴ Dam, *supra* note 12, p. 52.

³⁵ Patricia J. Woods & Lisa Hilbink (2009). ‘Comparative Sources of Judicial Empowerment: Ideas and Interests’. *Political Research Quarterly*, Vol. 62, No. 4 (Dec., 2009), p. 750.

³⁶ *Ibid.*

a response to past experiences that they want to prevent from reoccurring”.³⁷ Woods and Hiblink suggest that “judicial empowerment is a process that often occurs over time rather than through discrete, momentary changes”.³⁸

A case in point is the change that is underway in China’s judiciary. China does not claim state legitimacy from constitutional democracy, but from the ideology of “socialism with Chinese characteristics” which blends communism with market economy. Yet, there are trends of change in the scope of judicial functions mainly owing to the demands of economic activities. For example, China’s rating in contract enforcement (according to the June 2015 World Bank data) is commendable.

According to Peerenboom, courts in China “handle more than 8 million cases a year” and judicial independence “is not an issue in many cases, nor is the source, likelihood, or impact of interference the same across cases”.³⁹ As Peerenboom observes, China pursues “a two-track approach to legal development that emphasizes commercial law while imposing limits on the exercise of civil and political rights”. In this regard, he notes the need to identify the “costs of this gradualist approach” and poses questions whether China will “be able to maintain and deepen the reform agenda”, or whether the reform process will “stall, leaving China another example of a dysfunctional middle-income state that once showed great promise”.⁴⁰

Ji Weidong raises a similar question regarding the way forward in China and observes that China is at cross-roads. He suggests that “the critical nexus of institutional designing of good governance is an independent judiciary following the principle of procedural fairness”.⁴¹

[I]t is necessary for China to first establish the courts' authority through judicial reforms, laying the institutional foundation of rule-of-law. ... More importantly, an independent judiciary functions as a neutral arbiter of conflicting interest groups and a third-party enforcer of contracts, which enhances the predictability of market transactions and safeguards fair competition. Compared with structural shift of political power, judicial reform is relatively less difficult and more practical. ... This roadmap, of

³⁷ Ibid

³⁸ Ibid.

³⁹ Randall Peerenboom, in *Judicial Independence in China*. R. Peerenboom, Editor (2010), Cambridge University Press. (citing Randall Peerenboom, *China Modernizes: Threat to the West or Model for the Rest?* (London and New York: Oxford University Press, 2008). pp. 3, 4

⁴⁰ Id., p. 4.

⁴¹ Ji Weidong (2013), ‘The Judicial Reform in China: The Status Quo and Future Directions’, *Indiana Journal of Global Legal Studies*, Vol. 20, No. 1 (2013), p. 185.

course, has preconditions, that is, that the ruler has adequate practical rationality and that society reaches consensus on rule-of-law.⁴²

In the Ethiopian context, the roadmap is already articulated in the FDRE Constitution which expressly provides for *rule of law* and *judicial independence*. The preamble of the Constitution, *inter alia*, declares a “political community founded on the rule of law”. The Constitution guarantees an independent judiciary (Art. 78/1), and states that judicial powers are vested in the courts (Art. 79/1). According to Article 79(2), “Courts of any level shall be free from interference of influence of any governmental body, governmental official or from any other source.” Article 79(3) further guarantees judicial independence by providing that “Judges shall exercise their functions in full independence and shall be directed solely by law”. Steady pursuits toward *rule of law* and *judicial reform* that target at the attainment of the standards enshrined in the Constitution are among the duties of the state. These pursuits are not thus options or executive discretions in Ethiopia, but mandatory constitutional guarantees which are among the factors that determine state legitimacy.

1.5 Rule of law –versus- rule by law

The United Nations Security Council defines *rule of law* as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”. UNSC’s definition further requires “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.⁴³ It is this roadmap of *rule of law* and *judicial independence* that Ethiopia has pledged to pursue under the 1995 FDRE Constitution.

In spite of Peerenboom’s arguments (highlighted earlier) regarding China’s march in the ‘rule of law’ landscape, what China can utmost attain (under its current ideology) is ‘*rule by law*’ rather than ‘*rule of law*’. As Carothers observes:

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as

⁴² Ibid.

⁴³ United Nations Security Council (UNSC), *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004), UN Doc S/2004/106, para. 6.

universal human rights over the last half-century. ... The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.⁴⁴

Carothers criticizes the narrow scope of ‘*rule by law*’ in regimes which “focus on the regular, efficient application of law but do not stress the necessity of government subordination to it. In their view, the law exists not to limit the state but to serve its power”.⁴⁵ He states that this narrow conception is more accurately “characterized as rule by law rather than rule of law”.⁴⁶

Moustafa and Ginsburg argue that in the efforts of authoritarian regimes for legitimacy they “often seek to justify their continued rule through the achievement of substantive outcomes, such as income redistribution, land reform, economic growth or political stability in post-conflict environments”. According to Mustafa and Ginsburg, such authoritarian rulers “may also attempt to make up for their questionable legitimacy by preserving judicial institutions that give the image, if not the full effect, of constraints on arbitrary rule”.⁴⁷ They further note that such states may strive to make use of courts to “maintain social control, attract capital, maintain bureaucratic discipline, adopt unpopular policies, and enhance regime legitimacy”.⁴⁸

Courts under such regimes may “also have the potential to open a space for activists to mobilize against the state”⁴⁹, and synergistic alliances sometimes form with judges who also wish to expand their mandate and affect political reform”. Under such circumstances, “authoritarian rulers work to contain judicial activism through providing incentives that favor judicial self-restraint, designing fragmented judicial systems, constraining access to justice, and incapacitating judicial support networks”.⁵⁰ However, such efforts “may not be completely effective” and may cause “a lively arena of contention” out of what seems to be “the least likely environment for the judicialization of politics”.⁵¹

⁴⁴ Carothers, *supra* note 22, p. 4.

⁴⁵ *Id.*, p. 5.

⁴⁶ *Ibid.*

⁴⁷ Tom Ginsburg & Tamir Moustafa, eds. (2008). *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press (Introduction: The Functions of Courts in Authoritarian Politics, by Moustafa & Ginsburg, p. 5).

⁴⁸ *Id.*, p. 21.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

2. Post-2002 Justice System Reform Pursuits under JSRP and GTP I

2.1 Justice system reform initiatives and challenges, 2002-2005

Ethiopia's Justice System Reform Program (JSRP) "was established in 2002, under the authority of the Ministry of Capacity Building, to assess the performance of the various institutions of justice and to propose appropriate reforms".⁵² At the outset of the reform initiatives, a workshop was organized by the Ministry of Capacity Building which had 166 participants drawn from various stakeholders and international experts in the field.⁵³ As Anne Lise Sibony noted during her presentation at the workshop, assessment of justice reform "is about measuring outcomes, impact of policies as opposed to mere measurement of inputs (funds invested, number of people working on a programme) or output (e.g. number of cases handled, number of hours taught in an education programme)".⁵⁴

Based on the experience of State courts in the United States, she states the most comprehensive system for court assessment in the US, i.e. the Trial Courts Performance Standards (TCPS). It includes 22 standards that are covered under five areas of performance, namely (a) access to justice, (b) expedition and timeliness, (c) equality, fairness and integrity, (d) independence and accountability, and (e) public trust and confidence.⁵⁵ Even though the twenty-two measurement standards in TCPS cannot be readily used in all countries, they provide "a methodology to assess the actual functioning of courts".⁵⁶ These measurement standards assess "a wide range of aspects, from very material ones, such as audibility of court debates to more substantial ones such as the conformity of rulings with the law". They cover "the organizational quality of the courts" and further assess "personal and professional quality of judges and staff and substantial quality of court work".⁵⁷ These standards can indeed be customized to the objective realities of various settings. It must, meanwhile, be noted that the five areas of performance under TCPS are embodied in the vision, mission and values of Ethiopian courts stated in Section 4.3 of this article.

Sibony notes the criticisms against comparing performance among courts and she states that the assessment does not negate the independence of the judiciary

⁵² CJSRP, *supra* note 2, p. 48.

⁵³ Ministry of Capacity Building, *Justice Reform System in Ethiopia: Proceedings of the Workshop on Ethiopia's Justice System Reform*, Africa Hall, 7-8 May 2002, pp. 205-211.

⁵⁴ *Id.*, p. 74.

⁵⁵ *Id.*, p. 76.

⁵⁶ *Id.*, p. 77.

⁵⁷ *Ibid.*

because the standards “were elaborated by a commission consisting of a majority of judges (including a court administrator and a few academics), and [because they are] meant to be implemented by the courts.” She further indicated that “the results are not intended to be known to the executive branch”.⁵⁸ This does not, however, mean that courts will be non-transparent, and this statement merely indicates that reporting to the executive branch is not among the targets of court assessments.

The 2005 Comprehensive Justice System Reform Program was an outgrowth of the *Justice System Reform Program* which was formulated in 2002. “In a document published in April 2002⁵⁹, the JSRP identified a number of major problems hindering the machinery of justice”. The document looks into the justice system as a coherent whole and it notes that “fragmented and piecemeal approaches in reforming and building the capacity of justice institutions could not solve all problems and bring the intended results”.⁶⁰ To this end it calls for “effective resource utilisation in the sector” which can “be achieved by working towards a comprehensive justice system reform program”.⁶¹

This holistic approach corresponds with the core themes stated in the World Bank’s “*Initiatives of Legal and Judicial Reform*”, 2002.⁶² It suggests the following:

Laws must simultaneously incorporate world-class best practices and be tailored to the particular country. Wholesale importation of foreign laws cannot take root when the laws are alien to the culture and values of the people. Well-drafted laws themselves are not self-executing. Complementary institutions and well-trained staff must be present to implement those laws. The judiciary must have independent judges with the utmost professional integrity; law schools need to educate the country’s lawyers, making them better professionals; legal services must reach the poor and the vulnerable. In sum, these pillars are the underpinnings of a holistic approach to legal and judicial reform projects.⁶³

Two years later, the World Bank’s 2004 assessment on Ethiopia’s legal and judicial sector reiterated the need for holistic approach in justice system reform.⁶⁴ With regard to the judiciary, the assessment mainly focused “on issues concerning the qualifications, training, and selection of judges, judicial independence and accountability at state and federal levels, and, to a much

⁵⁸ Ibid.

⁵⁹ Justice System Reform Program, Ministry of Capacity Building, Addis Ababa, April 2002

⁶⁰ CJSRP, *supra* note 2, p. 48.

⁶¹ Ibid.

⁶² World Bank (2002), *Initiatives in Legal and Judicial Reform*, Washington DC.

⁶³ Id., pp. 15, 16.

⁶⁴ World Bank (2004), *Ethiopia: Legal and Judicial Sector Assessment*. Washington DC.

lesser extent, certain issues regarding basic court functions and administration”.⁶⁵ The assessment states that “In general, the judicial branch in Ethiopia suffers from dismal conditions of service, staff shortages, a lack of adequate training, debilitating infrastructure and logistical problems”.⁶⁶

It also notes a “long history of centralized governmental authority and a judiciary subjugated to the executive branch” that “has fostered a weak judicial branch with reduced capacity to exercise genuine independence, as well as a reticence of other branches to treat the judiciary as either truly independent or co-equal”.⁶⁷ The assessment thus suggests the need to address and overcome “various practical and structural impediments to judicial independence”, and it identifies four categories of issues, namely, “constitutional decision-making authority in the parliament instead of the judiciary, the composition of the Judicial Administration Commissions, independence issues at the federal judicial level, and independence issues at the state judicial level”.⁶⁸

The 2005 CJSRP identified the following three core problems with regard to Ethiopia’s justice system including the judiciary:

Firstly, it is neither accessible nor responsive to the needs of the poor. *Secondly*, serious steps to tackle corruption, abuse of power and political interference in the administration of justice have yet to be taken. *Thirdly*, inadequate funding of the justice institutions aggravates most deficiencies of the administration of justice.⁶⁹

These challenges require enhancing access of the poor to justice, addressing the issues of corruption, abuse of power and interference in the administration of justice, and the need for adequate funding of justice institutions. With regard to judicial independence, the Baseline Study reads:

The perception of the independence of the Judiciary is very low. The operation of the courts is managed and supervised by the court presidents who therefore act both as judges and administration officials accountable to the President of the Supreme Court. Potentially this compromises their independence. Besides, the process of selection and promotion of judges is insufficiently transparent and lacks inputs from other legal professions. The same can be said of performance evaluation.⁷⁰

The CJSRP states the gaps in judicial training, the weaknesses in case management, the substantial increase in caseload during the years that preceded

⁶⁵ Id., p. 10.

⁶⁶ Ibid.

⁶⁷ Id., p. 19.

⁶⁸ Ibid.

⁶⁹ CJSRP, *supra* note 2, p. 14.

⁷⁰ Ibid

the study, and limited access to all kinds of legal information.⁷¹ According to CJSRP, “the judges’ poor working conditions threaten their independence, reduce their efficiency and constitute incentives for corruption”.⁷²

Ato Mandefrot Belay who was head of the Justice System Reform Program Office at the Ministry of Capacity Building (during the initial years of the reform) had duly noted the following, regarding the pace and achievements of the justice system reform pursuits (which includes the judiciary):

One of the main challenges in the implementation of the Justice System Reform Program has been its complexity and the desire to undertake many reform projects in a short time. Each of the five components of the program are wide in scope requiring change and reform in the legal framework, institutional arrangement, streamlining working systems and procedures and institutional coordination. The Justice System Reform Program attempted to work on all these at once and in a short time. Annual implementation plans and accomplishment targets were often highly ambitious and sometimes unrealistic. [FN].⁷³ ... Big projects are usually difficult to manage and coordinate and hence, tend to fail. Such risks are usually mitigated by starting small and progressing in phase. Although the JSRP has not failed, it has lagged behind in many of its components.⁷⁴

2.2 Elements of judicial reform under GTP I: Strategic directions, objectives and targets

Section 7.3 of GTP I (2010/11- 2014/15) deals with the justice sector. It states the following *strategic directions* of the justice sector:

The overall strategic direction for the justice sector is to contribute to establishing a stable democratic and developmental state. Contributions made by the justice sector in this direction, will be to establish a system for citizens to access judicial information and ensure that the justice system is more effective. Steps will be taken to ensure that implementation and interpretation of laws are in conformity with the Constitution; where they are not, they will be amended. The independence, transparency and accountability of courts, and of the judicial system as a whole, will be assured. Law enforcement

⁷¹ Ibid.

⁷² Ibid.

⁷³ [FN 29] For example in 2004/2005 budget year, it was planned to implement all court reform projects in 721 court sites throughout the country. Actually, only 72 courts were covered in that year. Similarly, when revision of the codes started the plan has been to complete revision of all codes in two years. Revision of most codes has actually taken more than seven years.

⁷⁴ Mandefrot Belay (2008), “A Review of the Ethiopian Justice System Reform Program “, in *Digest of Ethiopia’s National Policies, Strategies and Programs*, Taye Assefa, Editor, Forum for Social Studies, Addis Ababa, p. 442.

agencies will be strengthened by strengthening human resource skills and adequate equipment....⁷⁵

During the plan period of GTP I, the *objectives* of Ethiopia's justice sector were "to strengthen the constitutional system and ensure the rule of law, make the justice system effective, efficient and accessible as well as more independent, transparent and accountable".⁷⁶ The objectives further included consolidating "the process of creating a democratic, stable and strong federal system that ensures peace and security of citizens".⁷⁷

GTP I stated categories of targets that were expected to be achieved during the period 2010/11-2014/15. It also had stated the implementation strategies of the targets. Although the categories of targets were stated in paragraphs, *fifty-three* targets can be identified under the ten categories stated in GTP I. Out of the eight *targets* that can be identified from the paragraph that deals with *human resource capacity development*,⁷⁸ (i) pre-service training for newly appointed prosecutors and judges; (ii) short-term training "at least once a year for judges and prosecutors serving at all levels ranging from Woreda to Federal Supreme Courts" and other targets are related with the judiciary.

The second category of targets under GTP I aimed at *improving the transparency and accountability of the justice system*.⁷⁹ The third category of targets expressly and specifically referred to the judiciary.⁸⁰ The *enhancement*

⁷⁵ Ministry of Finance and Economic Development (2010), *Federal Democratic Republic of Ethiopia, Growth and Transformation Plan, 2010/11- 2014/15*, Volume I, Main Text GTP I. English Version, November 2010, Addis Ababa, page 101.

⁷⁶ Id., p. 102

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

The *six targets* under this category addressed the *independence, transparency and accountability of the judiciary*. It pledged: (i) full establishment of a system that enhances transparency and accountability; (ii) establishing a mechanism to evaluate the effectiveness of the professionals; (iii) making ethical principles known and so that they can be fully implemented by the professionals involved; (iv) strengthening complaint handling offices; (v) establishing and implementing effective and cost saving resource management system; (vi) establishing strong monitoring, evaluation and support systems; and (vii) putting in place hearing process in fully open courts. These targets are generic and were thus applicable to all components of the justice sector including the judiciary.

⁸⁰ Ibid.

The *six targets* under this category addressed the *independence, transparency and accountability of the judiciary*. It pledged:

- i) to establish a system to ensure accountability, while guaranteeing the judiciary's independence;

of service accessibility (six targets) constituted the fourth category of targets under GTP I.⁸¹

The *fifth* category addressed seven targets on *the rehabilitation of prisoners*.⁸² The remaining five categories of targets of the justice sector under GTP I dealt with *strengthening the federal system*⁸³ (seven targets); *increasing public participation*⁸⁴ (two targets); *improving sector communication*⁸⁵ (two targets); *enhancing the use of ICT in the reform process*⁸⁶ (six targets) which include the establishment and putting in use a national integrated justice information system (NIJIS); and *ensuring the mainstreaming of cross cutting issues in the justice sector*⁸⁷ (two targets) with regard to rights of women, children and persons living with HIV/AIDS.

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- ii) appointment of judges based on competence and ensure fair regional and gender representation;
 - iii) to expand the performance evaluation system for judges, ensuring the continuity of the evaluation system and improving the screening process;
 - iv) to establish a system ‘for the speedy resolution of disciplinary matters that are brought before the Judicial Administration Council’;
 - v) improvements ‘based on consultations with and contributions from service users and stakeholders’; and
 - vi) timely availability of cassation decisions and laws to judges.

⁸¹ Id., pp. 102, 103.

These targets aimed at (i) providing ‘standardized accommodation in which justice agencies and courts can work in an integrated manner and which are more accessible’; (ii) expanding the ‘initiatives to provide the services of the courts throughout the year’ to all courts, and the provision of court ‘services 24 hours-a-day’; (iii) Full implementation of ‘efforts that have been started to make the courts more accessible to women and children’ and expanding same ‘to all courts in the country’; (iv) expanding and implementing the ‘initiatives that have been started to make the court environment friendlier for users’; (v) providing ‘adequate legal counsel, aid and translation services’ to indigent litigants; and (vi) increasing the number of judges to ensure that it ‘corresponds to the size of the population they serve.’

⁸² Id., p. 103.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid.

3. Judicial Reform Components in GTP II

3.1 GTP II's evaluation of performance during GTP I

The performance of GTP I is assessed in Part I of GTP II (December 2015),⁸⁸ under Section 5 titled *Capacity Building and Good Governance (የማስፈጸም አቅም ግንባታና መልካም አስተዳደር)*. Subsection 5.2 (titled *Developmental Good Governance/ ልማታዊ መልካም አስተዳደር*) devotes two paragraphs which specifically make reference to the justice sector. The word *developmental* as a qualifier for good governance seems to be redundant in accompanying 'good' because good governance naturally enhances and facilitates development. Adjectives qualify nouns and the usage of the qualifier 'developmental' to 'good governance' gives the inference that there can be good governance which is not developmental.

One of the paragraphs in Subsection 5.2 that evaluates the performance of the justice sector during GTP I embodies ten elements out of which the last two elements⁸⁹ specifically refer to the judiciary. GTP II identifies various gaps in its evaluation of the justice sector's performance during GTP I.⁹⁰ These gaps relate to all components of the justice sector. The last two paragraphs of the subsection (i.e. Subsection 5.2) on good governance deal with the public service in general and the role of the Anti-Corruption Commission in good governance.

The shortcomings of the earlier (April 2015) Draft GTP II are repeated in GTP II (December 2015) with regard to the evaluation of the performance of the

⁸⁸ የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ፣ የሁለተኛው አምስት ዓመት የዕድገትና ጎራንስፎርሜሽን ዕቅድ (2008-2012)፣ ጥራዝ 1፣ ዋና ሰነድ፣ ብሔራዊ የፕላን ኮሚሽን፣ ታህሳስ 2008፣ አዲስ አበባ።

Federal Democratic Republic of Ethiopia, Second Five Year Growth and Transformation Plan (2015/16- 2019/20), Volume 1, Main Text, National Planning Commission, December 2015, Addis Ababa (Amharic version)

⁸⁹ Id., p. 40 paragraph 3. The two sentences which refer to the judiciary state that:

- 'The Constitution ensures judicial independence and at the same time makes it accountable in accordance with the law, and positive achievements have been accomplished with regard to judicial independence'.
- 'There are developments with regard to enabling the judiciary to be subject only to the law, and to enable courts operate free from any influence particularly interference and pressures from the executive, and at the same time free from any external interference or pressure'.

⁹⁰ Id., p. 40 para 4.

The gaps include (i) problems regarding attitudes and professional competence; (ii) various factors that are attributable to corruption and gaps in impartiality which adversely affect justice and the rule of law; (iii) gaps in harmonizing the capacities of various justice sector institutions that have inter-dependent functions; (iv) the need to strengthen the justice sector institutions closer to the public in the lower administrative units; and (v) the need to give due attention to enhance the accessibility, efficiency, transparency and rule of law.

justice sector during GTP I. The evaluation was expected to follow the classification of the *fifty three* targets of GTP I so that the level of performance and challenges could be objectively and clearly assessed.

3.2 Judicial Reform Components in GTP II

3.2.1 Targets in the earlier Draft GTP II (April 2015)

In Part 2 of the earlier Draft GTP II (April 2015 version)⁹¹, the third section of Chapter 3 was titled ‘Major Targets’ (ዋና ዋና ግቦች). Out of the nine targets that can be identified from the *second paragraph*, the six targets were related to the judiciary.⁹² Even though the element which had pledged to conduct research and implement “a judicial policy in tune with the concept of the developmental state” is omitted in GTP II (December 2015), it deserves attention. It is thus discussed in the fifth section of this article which examines whether democratic developmental statehood warrants intervention in the independence of the judiciary. Ten targets can be identified from the *third paragraph* five of which were directly or generally related to the judiciary.⁹³ Three out of the five targets in the *fourth paragraph* in the April 2015 Draft were also related to the judiciary.⁹⁴

⁹¹ የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ፣ የሁለተኛው አምስት ዓመት (2008-2012) የዕድገትና የትራንስፎርሜሽን ዕቅድ የመጨረሻ ረቀቅ፣ ሚያዝያ 2007፣ አዲስ አበባ።

Ethiopian Federal Democratic Republic, Second Five Year (2015/15- 2019/20) Growth and Transformation Plan, Final Draft (Amharic version), April 2015 (Miazia 2007 EC), Addis Ababa .

⁹² *Id.*, p. 173.

The targets that relate to the judiciary in the earlier April 2015 Draft GTP II were:

- ‘research and implementation of a judicial policy in tune with the concept of the developmental state that can serve the demands of a developmental state, developmental investors and citizens’;
- ‘research and putting in place specialized benches for cases that have significant impact on development’;
- ‘reduction of attrition rates and attention to summary and accelerated proceedings’;
- ‘correct and enforceable judicial decisions’;
- ‘publication and distribution of binding cassation decisions’; and
- ensuring that judicial decisions are in conformity with the Constitution.

⁹³ *Ibid.*

These five targets were: (a) ‘increase in the number of decided cases’; (b) ‘reduce congestion of cases and the current level of case loads’; (c) reduce duration until judicial decision to at least below six months; (d) ‘adequate and effective performance by opening additional benches for cases that need particular attention due to state and public interest’; and (e) ‘sustain the tasks that are underway toward due process of law’.

⁹⁴ *Id.*, p. 174.

These three targets were: (a) ‘improve case flow management’; (b) ‘implementation of sentencing guidelines throughout the country’ and preparation of directives to that comparable sentences can be imposed on offences that are not covered in the sentencing

3.2.2 Targets in GTP II (December 2015)

Part 2 of GTP II embodies Ethiopia's Growth and Transformation Plan for the years 2015/16- 2019/20. The last theme in Section 7.1.4 embodies the five paragraphs which include the main targets of the justice sector during the GTP II period. Among the six targets embodied in the *first paragraph*, the third element which reads "Ensuring the independence, transparency and accountability of the judicial system and courts" refers to the judiciary, while the fourth element which states the need to strengthen "the capacity of justice system institutions with regard to human resources, knowledge, skills and equipment" applies to the judiciary and other justice sector institutions. We can identify the following *eight* targets under the second paragraph:

- a) Adequate legal framework required for development and democratization;
- b) Ensure rule of law through the implementation and interpretation of laws based on their purpose.
- c) Bring about institutional reform towards the attainment of [the objectives hereabove, i.e., democratization and rule of law] and toward the pursuit of accelerated and sustainable development;
- d) Establish public empowerment structures which encourage comprehensive public participation and enhance law-abiding and peaceful citizenry;
- e) Efficient dissemination and distribution of laws to the public;
- f) Provision of efficient and modern judicial services;
- g) Tasks that strengthen the processes, organization and human resource toward effective justice system;
- h) In collaboration with the public, combat the tendencies of corruption and gaps in fair trial, and enable the justice system to win public confidence.

The third paragraph of GTP II, Section 7.1.4 embodies the following *three* targets relating to human resource development, ICT Support and judicial independence along with transparency and accountability:

- a) Capacity building with regard to justice system institutions and their human resource, and building the human resource capacity of justice sector institutions in a planned and institutional approach through training to enhance capacity in attitudes, integrity, knowledge and skills;
- b) Enhance ICT support to judicial services, plasma services for court proceedings, expansion of circuit and other benches, court services throughout the year;

guidelines'; and (c) 'full implementation of the tasks that are underway toward authentic data on execution of judgements'.

- c) Strengthen the tasks that are underway toward adequate independence, transparency and accountability of the justice system, with a view to ensuring the efficiency, effectiveness, accessibility, fairness, independence, transparency and accountability of the justice system.

While the *sixth* and *eighth* items of paragraph 2, and the second and third items of paragraph 3 specifically make reference to the judiciary, most of the items in the paragraphs apply to more than one justice sector component, including the judiciary.

4. Justice Sector Five Year Plans and Projects under GTP I and GTP II

4.1 The justice sector's Five Year Plan during GTP I : An overview

The Strategic Plan of the justice sector for GTP I's period 2010/11- 2014/15⁹⁵ states the *vision* and *mission* of the justice sector. The *vision* of the justice sector foresees Ethiopia where “good governance prevails, human rights and democratic rights are ensured, peace and security prevails, rule of law is ensured, and where there is effective, efficient, accessible and independent judicial system with due accountability and public confidence”.⁹⁶ As vision statements go beyond five-year plan periods it applies to the GTP II period as well. The *mission statement* of the justice sector for the GTP I period was the following:

The mission of the justice sector is to ensure peace and security of citizens and residents, respect and protect the human rights and democratic rights of citizens and residents, ensure rule of law, and provide speedy, equitable, cost-effective and accessible justice for all.

The objective of the Justice System Reform Program stated in the Five-Year Plan for the GTP I period reads: “to comprehensively examine and reform the justice system and provide efficient, effective and quality services which satisfy the public, and in effect ensure rule of law at all levels, and ensure that the justice system shall render its decisive contribution to the development of a democratic system, sustainable development and good governance”.⁹⁷ The Five-

⁹⁵ Five Year Plan of the Justice Sector for the period 2010/11- 2014/15, approved on Nehassie 13-15 ፣ 2003 EC (August 19-21, 2010), Joined-up Justice Forum, (የፍትሕ አካላት የጋራ ጉባዔ) Hawassa.

⁹⁶ The Amharic text of the vision reads “መልካም አስተዳደር የሰፈነባት፣ ሰብአዊና ዲሞክራሲያዊ መብቶች የተከበሩባት፣ የዜጎች ሰላምና ደህንነት የሰፈነባት፣ የሕግ የበላይነት የተረጋገጠባት፣ ውጤታማ፣ ቀልጣፋ፣ ተደራሽ፣ ነፃና ተደራሽነት ያለው የሕዝብ አመኔታ የተቸረው የፍትሕ ሥርዓት የሰፈነባት ኢትዮጵያን አውን ማድረግ ነው።”

⁹⁷ The Amharic text of the objectives of the Justice System Reform Program reads: “የፍትሕ ሥርዓት ማሻሻያ ፕሮግራም ዓላማ የፍትሕ ሥርዓቱን በሁለንተናዊ መልኩ በመፈተሽና በማስተካከል አዝቡን

Year Plan of the justice sector further identifies *seven* specific objectives for the plan period, and it also states three sub-programmes of the Justice System Reform Programme (namely the sub-program for judicial reform, the sub-program for law enforcement reform, and the sub-program for reform in legal education, training and research). As the following section shows, specific reference to these sub-programs is missing in the current Strategic Plan for the Good Governance Reform Cluster.

4.2 Good Governance Reform Cluster's Five Year Plan during GTP II

4.2.1 Strategic Plan for GTP II period and the institutions involved

The strategic plan of the justice sector for the GTP II period (2015/6 – 2019/20) is included in “Good Governance Reform Cluster Second Five-Year Growth and Transformation Plan”.⁹⁸ The second part of the document states the strategic plan of the Good Governance Reform Cluster during the GTP II period.⁹⁹ The vision and mission statements refer to Ethiopia’s vision and the mission of the

የሚያረካ ውጤታማ፣ ቀልጣፋና ብቃት ያለው አገልግሎት በመስጠት በሁሉም ደረጃ የሕግ የበላይነትን ማስፈንና የፍትሕ ሥርዓቱ ለዲሞክራሲያዊ ሥርዓት ግንባታ፣ ለዘላቂ ልማትና ለመልካም አስተዳደር የበኩሉን ወሳኝ ድርሻ እንዲወጣ ማድረግ ነው።”

⁹⁸ Good Governance Reform Cluster Second Five-Year Growth and Transformation Plan 2015/16- 2019/20, Ministry of Justice, March 2015፣ (የመልካም አስተዳደር ሪፎርም ክላስተር፣ የሁለተኛው አምስት ዓመታት የእድገትና የትራንስፎርሜሽን ዕቅድ፣ 2008-2012፣ ፍትሕ ሚኒስቴር፣ መጋቢት 2007 ዓ.ም.)

⁹⁹ *Id.*, pp. 39 – 52. The targets of the Cluster are the following:

- i. Human resource development (p. 39),
 - ii. Improve organizational structure and processes:
 - (a) effectiveness and efficiency (pp. 40-41)
 - (b) accessibility of services (pp. 41-42),
 - (c) transparency and accountability (p. 42),
 - (d) judicial independence, transparency and accountability (pp. 42-43),
 - (e) combat against and control of corruption and rent seeking (pp. 43-44),
 - (f) coordinating activities of justice sector institutions (p. 43),
 - iii. Ensure rule of law (p. 43, 44),
 - iv. Enhance public participation (pp. 44- 45),
 - v. Strengthen the federal system (pp. 45-46),
 - vi. Strengthen the justice administration system
 - (a) criminal justice system administration (pp. 46-47)
 - (b) enhancing civil justice administration (pp. 47-48)
 - (c) prison administration, handling, correction and rehabilitation (pp. 48-49)
 - vii. Enhance change communication (የለውጥ ኮሙኒኬሽን ማሳደግ), p. 49
 - viii. Enhance performance capacity through ICT support (በኢንፎርሜሽን ኮሚኒኬሽን ቴክኖሎጂ ተደግፎ የመሥራት አቅምን ማጎልበት), pp. 50-51.
 - ix. Enhance performance by mainstreaming cross-cutting issues (pp. 51-52).
-

Cluster. The strategic directions, objectives and targets stated in the document also relate to good governance at large.

Moreover, the document states implementation strategies (p. 52), forty projects (p. 53), and summary (pp. 54-82) of outcomes, indicators, annual rates of achievement and organs responsible are set out in the Strategic Plan. The summary of the goals and the organs in charge of implementation indicate that the cluster includes various institutions at federal and regional levels. In the sequence of the matrix for activities (pp. 54-82), they are: the Ministry of Public Service and Human Resource Development, Federal and State institutions, Police, Prison Administration, Federal Courts, Federal Charities and Societies Agency, Anti Corruption Commission, Federal and State anti-corruption commissions, Ministry of Federal Affairs, Regional states, Ministry of Justice, and Justice and Legal System Research Institute.

4.2.2 Good Governance Reform Cluster –*versus*- justice sector strategic plan

Unlike the strategic plan of the justice sector for the GTP I period, the strategic plan for the Good Governance Reform Cluster does not make direct reference to the ‘justice sector’ in its title. Four challenges can emerge from generic strategic plans that are not accompanied by specific strategic plans which target at justice sector institutions. The *first challenge* relates to the gap that will be created due to the substitution of the justice sector’s *vision, mission and objectives* (stated above in Section 4.1) by other general formulations applicable to the good governance reform cluster. *Second*, the reform pursuits which directly relate to the core components of the justice sector run the risk of being diluted (in content and focus) thereby spreading out thin in the midst of generic reference to good governance. The *third challenge* relates to the adverse impact of this approach on institutions outside the justice sector if it involves the formulation of a strategic plan that predominantly refers to the justice sector while it bears the title of ‘Good Governance Reform Cluster’. The *fourth challenge* can be susceptibility to a predominantly legalistic approach while good governance – which addresses various dimensions of how well a country is governed– is mainly nurtured and honed bottom-up.

As proactive peacemaking and peace building are more effective than prevention and control, addressing the elements, the sub-elements and the micro-elements of justice sector reform components that were identified in the 2005 Comprehensive Justice System Reform Program are among the factors that can bring about good governance, an *enabler* which in return facilitates the steady march toward the attainment of the vision and mission statements of Ethiopia’s justice sector institutions. It is against this backdrop that the following comparison is made between the justice sector reform projects under GTP I and GTP II that relate to the judiciary.

4.2.3 Sub-program for judicial reform GTP I projects –*versus*- Good Governance Reform Cluster –GTP II projects

The Justice Sector Reform Program had *fifty four* projects for the GTP I period. The projects were classified into three sub-programs namely: (a) Sub-Program for the Reform of Courts (የፍርድ ቤቶች ማሻሻያ ንዑስ ፕሮግራም): 16 projects; (b) Sub-Program for Law Enforcement Reform (የሕግ አስከባሪ አካላትን ማሻሻያ ንዑስ ፕሮግራም): 30 projects; and (c) Sub-Program for Enhancing Legal Education, Training and Research (የሕግ ትምህርት፣ ሥልጠናና ምርምር ማጠናከሪያ ንዑስ ፕሮግራም): 8 projects. Most of these projects are inherently continuous, while some can be operational activities during GTP II period rather than projects.

Out of the 16 projects of court reform, the following *nine* projects are not included among the 40 projects listed in the Good Governance Reform Cluster Projects for the GTP II period:

- Judgement Execution Enhancement Project;
- Project to ensure the constitutionality of judgements and decrees;
- Project to enhance the system that ensures the independence, transparency and accountability of judges;
- Project to strengthen Judicial Administration Council;
- Project to formulate procedures for public assessment on courts;
- Project to enhance and strengthen Alternative Dispute Resolution;
- Project to support city courts, Sharia courts, military courts, and administrative tribunals;
- Project to improve public defender's services
- Project to enhance public participation in courts.

It is impossible to incorporate all projects of the justice sector in the Good Governance Reform Cluster because the cluster includes other sectors as well. Attempting to include all justice sector targets and projects in the Good Governance Reform Cluster transforms the cluster into the justice sector. Moreover, the predominance of justice sector elements in the Cluster's targets and projects will inevitably affect the fair representation of non-justice sector institutions. Thus, such clustering of strategic plans can neither adequately incorporate justice sector targets and projects; nor can it fairly represent the strategic plans of other institutions outside the justice sector.

4.3 Strategic Plan (2015-2020) of Federal Courts

Reference to the strategic plan of the federal courts for the five years ahead (including the current budget year) gives insight into the reform pursuits of courts that are underway. The Strategic Plan of Federal Courts for the Period 2015/16- 2019/20 has six parts. Part I assesses the external national environment and institutional issues. Parts 2 and 3 of the Strategic Plan state areas of focus and strategic goals. The last three parts deal with the relationship between the

strategic goals (Part 4), Targets of the strategic goals (Part 5) and Implementation strategies (Part 6).

The introduction of the Strategic Plan states that “the judiciary is the organ which enables citizens to enforce their human rights and democratic rights enshrined in the Constitution or in other laws free from the intervention of any government organ or individual”.¹⁰⁰ It further notes that courts should provide “efficient, quality and accessible judicial services to enhance the satisfaction and confidence of the public”.¹⁰¹ In its assessment of the external environment, the Strategic Plan, *inter alia*, states the steady increase in the complexity of issues and the number of cases that are brought to courts in the course of Ethiopia’s economic development.¹⁰² It underlines that:

Commensurate with the pace of Ethiopia’s economic development and in the context of judicial independence, courts are required to resolve the issues in the cases brought to them by rendering efficient, quality and accessible services. When courts perform their functions properly, they have an indispensable role in attracting investment and enhancing goodwill; and on the contrary, their inability to catch up with economic development will have adverse impact on the sustainability of the development which is underway.¹⁰³

It further assesses current social and technological changes that need the enhancement of human and other resources. In the schedule that analyzes opportunities and challenges, the *opportunities* in the political environment are (a) the constitutional guarantee for rule of law and separation of powers, (b) constitutional guarantee for judicial independence and accountability, (c) favourable government policies and strategies, and (d) government efforts toward success in judicial reform.¹⁰⁴ The *challenges* stated in the schedule are (a) erosion of judicial powers through enactment of various laws, (b) the level of confidence of the executive in the judicial services rendered by courts, (c) inadequacy in the pace of reform, and (d) attempts of undue intervention of the executive in judicial independence.¹⁰⁵

The challenges stated in the preceding paragraph such as judicial power erosion through enactment of various laws and attempts of undue executive intervention in judicial independence are inconsistent with the opportunities noted in the same paragraph, which include favourable government policy and

¹⁰⁰ *Strategic Plan of Federal Courts for 2015/16 – 2019/20*, Federal Supreme Court, June 2015, p. iv.

¹⁰¹ *Ibid.*

¹⁰² *Id.*, p. 2.

¹⁰³ *Ibid.*

¹⁰⁴ *Id.*, p. 5

¹⁰⁵ *Ibid.*

strategy and government efforts toward success in judicial reform. Under such circumstances the challenges can easily cancel out the opportunities in case this is caused by regression in political commitment. Yet, constitutional principles should be able to render sufficient protection to the independence of the judiciary. As noted in Transparency International's Global Corruption Report 2007 "there are two types of corruption that most affect judiciaries: political interference in judicial processes by either the executive or legislative branches of government, and bribery".¹⁰⁶

The strategic plan for federal courts makes comparisons of opportunities and challenges with regard to the economic, social and technological environment.¹⁰⁷ The Strategic Plan further makes institutional assessment on the responsibilities and duties of courts, the strengths and weaknesses in leadership, human resource, structure and operations (during the preceding Strategic Plan period).¹⁰⁸ The assessment also identifies stakeholders and analyzes their needs in detail.¹⁰⁹

The gaps identified are "inadequate awareness of vision and mission, gaps in planning and inadequate monitoring and evaluation of performance, gaps in effective system for transparency and accountability, inadequate staff for research, and gaps in overall implementation".¹¹⁰ The Strategic Plan notes the need to address these gaps so that courts can duly play their role in the realization of GTP II. To this end, eight strategic directions are identified.¹¹¹ The core themes of these strategic directions are in short reformulated as:

¹⁰⁶ Transparency International (2007). Global Corruption Report 2007, *Corruption in Judicial Systems* (Cambridge University Press), p. xxii.

¹⁰⁷ *Strategic Plan of Federal Courts*, *supra* note 100, p.5.

¹⁰⁸ *Id.*, pp. 6-11.

¹⁰⁹ *Id.*, pp. 14- 22.

¹¹⁰ *Id.*, p. 23.

¹¹¹ *Ibid.*

They are:

- i. Human resource development;
 - ii. Reform in institutional structure and operations:
 - a) Enhance effectiveness and efficiency in performance,
 - b) Enhance the judicial independence, transparency and accountability,
 - c) Combat and control rent gathering (corrupt) attitudes and practices,
 - d) Enhance coordination in performance;
 - iii. Ensure rule of law;
 - iv. Enhance the participation of citizens;
 - v. Strengthen accessibility;
 - vi. Improve change communication (የለውጥ ኮሎ-ኒ.ኤ.ሽን? ማሻሻል)
 - vii. Enhance capacity in using ICT by supporting the judicial reform by ICT
 - viii. Implement cross-cutting issues.
-

- “judicial independence, transparency and accessibility,
- enhance efficiency and effectiveness of judicial services,
- enhance access to judicial services,
- enhance quality of services,
- enhance capacity building activities,
- strengthen the sustainability of change management,
- ensure good governance, and
- enhance popular participation and change communication”.

These directions are categorized into three pillars of excellence namely: (a) excellent judicial services, (b) elevated performance and goodwill, and (c) good governance.¹¹² In the course of pursuing these strategic directions and pillars of excellence, the *vision* of Ethiopian Federal Courts is to “attain high level of public confidence in 2022/23 (በ2015 ያደገ የሕዝብ አመኔታ ያለው ፍርድ ቤት ሆኖ መገኘት)”.¹¹³ The *mission statement* reads “rendering judicial services which ensures rule of law (የሕግ የበላይነትን የሚያረጋግጥ የዳኝነት አገልግሎት መስጠት)”.¹¹⁴ The strategic plan of Ethiopian Federal Courts further states the following fifteen values:¹¹⁵

- i. Independence and accountability (ነፃነትና ተጠያቂነት)
- ii. Impartiality (ገለልተኝነት)
- iii. Transparency (ግልጽነት)
- iv. Equality (እኩልነት)
- v. Integrity (ታማኝነት)
- vi. Confidentiality (ምስጢራዊነት)
- vii. Fairness (ሚዛናዊነት)
- viii. Sustained professional competence (ሁልጊዜ ራስን ማብቃት)
- ix. Responsiveness (ምላሽ መስጠት)
- x. Quality Service (የአገልግሎት ጥራት)
- xi. Readiness for change (የለውጥ ዝግጁነት)
- xii. Participatory (አሳታፊነት)
- xiii. Rapid and equitable judicial decisions (የተፋጠነና ፍትሐዊ ዳኝነት)
- xiv. Rule of law (የሕግ የበላይነት)
- xv. Punctuality (ቀጠሮ አክባሪነት)

The Strategic Plan defines the values listed above in order to enhance clarity.¹¹⁶ The mission, vision and values of Ethiopian federal courts reflect the mandate entrusted in Ethiopian courts by virtue of Articles 78 to 82 of the

¹¹² Id., pp. 27, 28.

¹¹³ *Federal Courts Annual Plan* for the 2015/2016, June 2015, Addis Ababa, page 1.

¹¹⁴ Ibid.

¹¹⁵ Strategic Plan of Federal Courts, *supra* note 100, p. 24.

¹¹⁶ Id., pp. 25, 26.

FDRE Constitution. The strategic directions and the three pillars of excellence indicated above are further transposed to strategic goals in the third part of the Strategic Plan.¹¹⁷

The indicators of performance in the fifth part of the strategic plan are meant to be used in the monitoring and evaluation of performance. To this end, each annual plan evaluates performance of the preceding year. For example, the evaluation in the Annual Plan of Ethiopian Federal Courts (2008 EC, i.e. 2015/16) shows the performance of federal courts in deciding cases during a period of seven months that were covered in the evaluation. “The Federal Supreme Court has rendered decision on 7,489 cases during the seven months that were evaluated while the number of decisions expected during the period were 6,748”; its performance percentage is 110.98%.¹¹⁸ The decisions that were expected from federal high courts and federal first instance courts during the same period of seven months were 18,417 and 47,691 respectively. The decisions rendered in federal high courts were 11,189 (60.8% of target), while federal first instance courts rendered decisions in 78,319 cases (thereby attaining a performance percentage of 164.2%).¹¹⁹ The number of decisions that were planned for the budget year at the three levels of federal courts were 9,640 (Federal Supreme Court), 26,310 (federal high courts) and 68,130 (federal first instance courts).

These figures indicate case loads of federal courts, and they also give insight into case loads in regional state courts. One of the values of Ethiopian Federal Courts is “*Rapid and equitable adjudication*”, and this envisages not only rapid judicial decisions, but also considers the quality of the decisions. This renders the other values of rule of law, judicial independence, accountability, impartiality, transparency, equality, integrity, etc. expedient. The number of cases decided during the period indicated above and the need for quality decisions are related with human power, budget, resources and remuneration of judges and other staff in courts. While some elements of the reform such as judicial independence need political will and commitment to the FDRE Constitution, various dimensions of the reform require budget, including autonomy and efficiency in resource management:

... There is increasingly growing concern about the level of competence in many courts which can be attributable to the unsatisfactory remuneration and other factors which need to be addressed so that judges with exemplary competence and integrity can be retained. ... The judiciary can hardly attract and retain such judges under the current remuneration scale and prevailing

¹¹⁷ Id., pp. 27-38.

¹¹⁸ Federal Courts Annual Plan, *supra* note 113, p. 5.

¹¹⁹ Ibid.

non-financial incentives. ... This raises the issue whether a country's treasury should generate revenue from court fees, or whether such fees can be ploughed back to the judiciary. ... In the realm of non-financial incentives, there is the need to enhance rule of law, the independence of courts as enshrined in the Constitution and the tenure of judges....¹²⁰

5. The Notion of 'Developmental State Judicial Policy' in the Earlier Draft GTP II (April 2015 Version)

As indicated in Section 2.2, "establishing a stable democratic and developmental state" was stated as an overall strategic direction in GTP I. Meanwhile, GTP I states 'the independence, transparency and accountability of courts, and of the judicial system as a whole'. In effect, the context in which the notion of the *democratic developmental state* was used in the strategic direction of the justice sector in GTP I was consistent with Article 79(3) of the FDRE Constitution which provides that: "Judges shall exercise their functions in full independence and shall be directed solely by law."

Any policy or law which infringes this constitutional provision is void, and in effect, it was improper for the April 2015 version of Draft GTP II to make the pledge (indicated in Section 3.2.1) towards "research and its implementation in the creation of a judicial institution and formulation of a judicial policy in a manner that can serve the demands of a developmental state, developmental investors and citizens, and in tune with the concept of the developmental state"¹²¹.

This pledge is duly omitted in GTP II.¹²² Yet, the issue deserves a brief discussion. Reference to various parts of the earlier April 2015 version of Draft GTP II gives insight into how the developmental state was perceived. For example, the last sentence of Item 3.12 in Subsection 3.4 (titled *Popular Participation, Democratic System Building and National Consensus*) reads "substitution of neo-liberal curriculum by developmental democratic curriculum; and applying the same in the fields of legal education and economics" (የኢ.ዮ. ሲ.ብ.ራ.ል ካሪኩለም በልማታዊ ዲሞክራሲያዊ ካሪኩለም መተካት፤ የሕግና የኢኮኖሚክስ መስኮችም በዚህ እንዲታኙ ማድረግ)¹²³. The same sentence had

¹²⁰ Hailu Burayu, Elias N. Stebek & Muradu Abdo (2013). "The Judicial Protection of Property Rights in Ethiopia", *Mizan Law Review*, Vol. 7. No. 2, December 2013, p. 367.

¹²¹ Draft GTP II, April 2015 version, *supra* note 91, p. 173. The original Amharic version reads "የልማታዊ መንግሥት፣ የልማታዊ ባለሀብትና የዜጋውን ጥያቄ ሊያስተናግድ በሚችል አግባብ እንዲሁም በልማታዊ መንግሥት ጽንሰ ሐሰብ የተቃኘ የዳኝነት ተቋም ለመናጠርና የዳኝነት ፖሊሲ ለመቅረጽ የሚያስችል ጥናት ተካሂዶ ተግባራዊ ይደረጋል".

¹²² GTP II, *supra* note 88, pp. 40,41, 168, 169.

¹²³ Draft GTP II, April 2015 version. *supra* note 91, p. 177.

reappeared in the last sentence of Item 3.16¹²⁴ which had envisaged revision in the curricula for the media, communication and creative arts.

Such pledges are omitted in Section 7.2 of GTP II titled *Building Democratic System* (pp. 169-172). Yet this notion of substituting ‘neo-liberal curriculum by developmental democratic curriculum’ deserves a brief clarification regarding the risks of using the word ‘developmental’ in the contexts of ambiguity and ambivalence.

Clarity in meanings requires the synchrony between the *referent*, the *reference* and the *symbol*. In the absence of harmony between this triadic interface, any word or phrase (i.e. *symbol*) can represent different feelings, thoughts, actions or events (*referent*) unless the *reference* made to a word or phrase has uniform meaning for all members of a target audience. Such reference is said to be valid when the reference made to a word or phrase (*symbol*) by the speaker or writer is given the same meaning by any other person. In the absence of such validity in meaning, words become ambivalent and vague because they can conceal motives and intentions that may contradict the meaning they purport to represent. For example, an investor, a public office holder or a judge who claims to be ‘developmental’ can, under such settings of ambiguity in meaning conceal acts of bribery, embezzlement or nepotism in the course of his/her acts, decisions or orders that depart from laws, processes and procedures.

One of the features of a developmental state is that its pursuits and the outcomes of development speak for themselves. The word developmental is a designation used by academics and researchers in making reference to the model of state intervention in South Korea, Singapore, Taiwan, etc. (in *post facto* narrations and analyses). The developmental states of the 1960s and 1970s were not thus concerned with the label, and merely focused on their pragmatic policy content which harnessed extremist market deregulation and at the same time facilitated development through private sector empowerment (as opposed to private sector substitution).

On the contrary, predatory states overuse the ‘development’ label to conceal corrupt practices in the name of ‘development’. Evans distinguishes developmental states from ‘predatory’ states. The latter, according to Evans “control the state apparatus” and they “seem to plunder without any more regard for the welfare of the citizenry than a predator has for the welfare of its prey”.¹²⁵

¹²⁴ Ibid.

¹²⁵ Peter B. Evans (1989). ‘Predatory, Developmental and other Apparatuses: A Comparative Political Economy Perspective on the Third World State,’ *Sociological Forum*, Vol. 4, No. 4, pp. 562 & 563.

Evans considers the Newly Industrialized Countries (NICs) of East Asia as developmental states, and Zaire [of the late 1980s] as the ‘predatory state’.¹²⁶

The notion of the ‘developmental state’ is not an economic theory or philosophy. Nor is it an economic system. It merely rectifies the downsides of laissez-faire deregulation, and it meanwhile avoids the Marxist model of paternalistic over-regulation through command economy. The developmental state model is a *post-facto* narration and analysis of the entry points, the nature, consequences, and the exit points of the state’s regulatory intervention in the operation of market forces. In fact, the success of a developmental state marks its *exit point* because the enhancement of the private sector and institutions bring about a steady decline in authoritarian policy interventions and it marks an *entry point* into mature levels of free market and democratic systems.

As Korea’s experience indicates, there is a phase of obsolescence of the developmental state during which its role in enhancing economic development outlives its usefulness because wider state intervention in the economy eventually becomes undue patronage and red tape, as marked by the massive labour unrest of the 1980s and Korea’s 1997 economic crisis.¹²⁷

The limits of the developmental state are caused by the contradictions inherent in the model. The capitalist class which steadily grows in the course of the state interventions at a certain stage regards the interventions as unnecessary and red tape.¹²⁸ The role of the state as provider of long-term goals declines upon the success of the developmental state.¹²⁹ The state also loses its autonomy due to the gradual fusion of economic interests between the economic actors and the political elite.¹³⁰

The policy interventions of a developmental state, *inter alia*, relates to the coordination of investment plans, the role of the state in facilitating development through visionary national development, and the state’s tasks of institution building to cause vibrant economic development.¹³¹ However, such interventions and other features of the developmental state are different from the Leninist-Stalinist model of intervention. Developmental states of the 1960s and early

¹²⁶ Ibid.

¹²⁷ Elias N. Stebek (2013). “Overview of Country Experience in Land Rights and Developmental Statehood”, *Mizan Law Review*, Vol. 7, No, 2, December 2013, p. 218

¹²⁸ Eun Mee Kim (1993). “Contradictions and Limits of a Developmental State: With Illustrations from the South Korean Case” *Social Problems*, Vol. 40, No. 2 (May, 1993) p. 231-232

¹²⁹ Ibid.

¹³⁰ See id., pp. 232-233.

¹³¹ See, Ha-Joon J Chang, (1999). ‘The Economic Theory of the Developmental State’ in Meredith Woo-Cumings (ed.), *The Developmental State*, Cornell University Press, pp. 182-199.

1970s did not mechanically combine certain elements of communism with other elements of free market economy. In spite of their wider interventionist policies in the path of development, they remained within the landscape of market economy. As Chalmers Johnson observes:

The achievements of the Japanese developmental state were inconvenient to both sides of the debate. They illustrated to the West what the state could do to improve the outcome of market forces, and they illustrated to the Leninists that their big mistake was the displacement of the market rather than using it for developmental purposes.¹³²

Developmental states did not thus substitute market economy but rather facilitated its effective performance. Their salient features include a strong private property legal regime, robust private sector, meritocratic and depoliticized state apparatus, national consensus, and autonomy of the state structure from opportunistic benefits in economic activities while at the same time being embedded¹³³ in the economic life of the societies through regulatory interventions.

Japan pursued interventionist policies during the 1950s and 1960s without, however calling itself a developmental state. In spite of such policy intervention to regulate market forces, “courts in Japan had formal power to review legality and constitutionality of administrative actions and laws” regarding the “protection of property rights against arbitrary governmental interference”.¹³⁴ Kahase cites Ginsburg¹³⁵ and states:

Kings of Japan ... started to give the judiciary an autonomous role ... since early twentieth century with the aim to promote economic predictability and generate revenue. [FN 181]. The judicial power in the protection of property rights and enforcement of contracts also continued during Japan’s decades of developmental statehood. [FN 182]¹³⁶

In Japan, the role of the judiciary “in the economic domain and the relative stability of property rights and contract enforcement regimes indeed led authors

¹³² Chalmers Johnson (1999). ‘The Economic Theory of the Developmental State’ in Meredith Woo-Cumings (ed.), *The Developmental State*, Cornell University Press, p. 49.

¹³³ The principle of ‘*embedded autonomy*’ refers to the balance that developmental states maintain in being autonomous from opportunistic economic gains of office holders while retaining the state’s supportive link with all economic actors (owners, managers and labour unions).

¹³⁴ Kahase Gebrehiwot (2014). *The Role of the Judiciary in Developmental States*, LL.M Thesis, Addis Ababa University School of Law, Unpublished, June 2014, p. 46, (citing Article 81 of the 1947 Constitution of Japan).

¹³⁵ Tom Ginsburg, ‘Dismantling the Developmental State; Administrative Procedure Reform in Japan and Korea’, *American Journal of comparative Law* (49), 2001, pp 585-622 at pp 590.

¹³⁶ Kahase, *supra* note 134, p. 45. Footnotes omitted.

to note that developmental state pursuits in Japan demonstrated liberal legalism in the economic sphere".¹³⁷ Likewise, the experience in South Korea (in the 1960s and early 1970s) indicates judicial autonomy even during the decades of authoritarian economic policy interventions:

An assessment of practical experience of courts of South Korea ... shows that the judiciary in South Korean developmental state enjoyed genuine autonomy in enforcing regimes of property rights and contracts between individual actors when they chose it [FN 244]. In spite of the authoritarian nature of governance in ... Korea, the 'economy put first' policy [FN 245] of leaders induced them to be credible to economic predictability allowing courts to decide civil and commercial disputes without any fear and interference.¹³⁸

Ethiopia pledges to pursue the policy of a democratic developmental state. The word 'democratic' is meant to distinguish the policy from the elements of authoritarianism that were manifested in the degree of state intervention in South Korea, Taiwan and Singapore during the 1960s and early 1970s. This is because the level of authoritarianism in the 1960s that was 'tolerated' by the international community in the midst of the East-West polarities of the cold war does not fit to current global realities. As the strategic directions of GTP I (indicated at the beginning of this section) shows, Ethiopia's pledge to pursue the policy of a democratic developmental state is required to be in conformity with the FDRE Constitution thereby rendering any act of encroaching on the independence of the judiciary unconstitutional.

Botswana is a democratic developmental state whose ranking in Africa with regard to political rights and civil liberties shows that its developmental pursuits are not tradeoffs to the rule of law including the independence of the judiciary:

Democracy as well as development are processes, which require constant attention. To date, however, Botswana has a commendable record in the African context. In the Freedom House Index of political rights and civil liberties there are, as of 2009, only two African democracies (Cape Verde and Ghana) in the top group of free countries which have a higher rating than Botswana; and Botswana in 2009 continues to be ranked as the least corrupt country on the African continent according to the Corruption Perception Index (CPI) published annually by Transparency International, ... [ranking

¹³⁷ Id., p. 47, citing, for further reading: Stephan Haggard, Andrew MacIntyre, and Lydia Tiede, *Rule of Law and Economic Development*, California University Press (2008), p. 209; Tom Ginsburg, *supra* note 130 and Katharina Pistor and Philip A. Wellons.

¹³⁸ Id., p. 55 (citing FN 244: James Palais, *Politics and Policy in Traditional Korea*, Cambridge, Harvard University Press, 1976 pp 22; FN 245: Huck-ju Kwon, *Advocacy Coalitions and the Politics of Welfare in Korea after the Economic Crisis*, *Policy & Politics*, Vol. 31, No.1, 2002, pp.69-83 at pp 74.

37th out of 180 countries], followed by Mauritius (42nd) and Cape Verde (46th).¹³⁹

Transparency International's 2014 Corruption Perception Index (CPI), shows Botswana's improved rank (31st out of 175 countries), thereby maintaining its ranking as the least corrupt country in Africa. It is followed by Cape Verde (another democratic developmental state in Africa) which is 42nd in world ranking and is considered as the second least corrupt country in Africa.¹⁴⁰ Ethiopia's ranking in Transparency International's 2014 Corruption Perception Index is 110th out of 175 countries.¹⁴¹

Botswana's standing among *free* democracies¹⁴² is also commendable. In contrast, the performance of various Sub-Saharan African countries in the Freedom House Index, including Ethiopia, evokes concern. The themes that are used in assessing performance in the Freedom House Index include political rights and civil liberties under which (a) electoral process, (b) political pluralism and participation, (c) functioning of government, (d) freedom of expression and belief, (e) associational and organizational rights, (f) rule of law, and (g) personal autonomy and individual rights are assessed.

In spite of Botswana's commendable achievements since its independence in 1966, there are yet outstanding issues such as minority rights, fragmented opposition parties and relative weaknesses in civil society activities (attributable to the performance of civil societies rather than legal restrictions). Although "Botswana does not constitute the best practice model" in all aspects of the democratization process, there are general lessons such as the role of "*a ruling political party to direct the trajectory of economic development*".¹⁴³ Cases in point are Botswana's "decision to nationalize mineral wealth" and extract "rents from the mineral sector to found a developmental state" and "a sound development planning and budgeting regime and institutions".¹⁴⁴ Botswana has meanwhile developed "*a legal-institutional framework of mineral wealth*

¹³⁹ Peter Meyns and Charity Musamba (eds.), *The Developmental State in Africa Problems and Prospects*, INEF-Report, 101/2010 (Institute for Development and Peace), p. 55.

¹⁴⁰ Transparency International <<https://www.transparency.org/cpi2014/results>>, Accessed: 22 November 2015.

¹⁴¹ Ibid.

¹⁴² Freedom House, *Freedom in the World 2015* <freedomhouse.org/regions/sub-saharan-africa>, Accessed: 22 November 2015

¹⁴³ Emmanuel Botlhale (2015), *The Building a Democratic Developmental State in Botswana* Regional Conference on Building Democratic Developmental States for Economic Transformation in Southern Africa (20-22 July 2015, South Africa)

¹⁴⁴ Ibid.

management” thereby demonstrating that “resource blessings need not degenerate into resource curses”.¹⁴⁵

Alongside the creation of a public service based on merit, Botswana’s political leadership also had an interest in ensuring the autonomy of the bureaucracy so as to allow it to pursue the country’s developmental objectives. Holm asserts that Botswana’s first two presidents, Khama and Masire in particular, ‘protected the civil service from most political interference’ (Holm 1996: 101) thereby shielding it from corruption and guaranteeing its professionalism, and turning it into a powerful agent of development.¹⁴⁶

The nature of the judiciary in a democratic developmental state can be observed from Botswana’s experience. “The Judiciary is independent from other arms of government; that is the executive and the legislature” and to “further reinforce the independence of the Judiciary and to ensure that it is insulated from interference from the other arms, the Constitution creates the Judicial Service Commission” that is entrusted with the responsibility of assessing and recommending appointments for Judicial posts”.¹⁴⁷ Judicial Independence is indeed a right that citizens in Botswana “demand and enjoy”.

Thus, the concept of democratic developmental state does not envisage intervention in the independence of the judiciary in the name of ‘developmental state judicial policy’ as it was envisaged under the earlier draft of GTP II, April 2015 version. The risk of such ‘policy’ is its propensity to avail discretion to office holders to intervene in the independence of the judiciary in violation of the FDRE Constitution, and it goes against the independence of the judiciary in democratic developmental states such as Botswana. In fact, such policy would have repeated the fatal errors of the former Soviet Union and various Leninist regimes whose misperception about the convergence of the law and the state, led them to gross encroachments on the independence of the judiciary.

6. Public Trust and Confidence in the Judiciary

Three core problems were identified in the 2005 Comprehensive Justice System Reform Program in relation with the justice system including the judiciary. As stated in Section 2.1, these problems are (a) gaps in accessibility and responsiveness to the needs of the poor, (b) the need for “serious steps to tackle corruption, abuse of power and political interference in the administration of

¹⁴⁵ Ibid.

¹⁴⁶ *Peter Meyns and Charity Musamba (eds.), supra* note 139, p. 47.

¹⁴⁷ Republic of Botswana, Government Portal
<<http://www.gov.bw/en/PrintingVersion/?printid=1854>> Accessed: 20 November 2015.

justice”, and (c) “inadequate funding of the justice institutions” which “aggravates most deficiencies of the administration of justice”.

The 2005 Comprehensive Justice System Reform Program also notes the low public perception regarding the independence of the judiciary and indicates that the power entrusted on court presidents who “act both as judges and administration officials accountable to the President of the Supreme Court” compromises their independence. The Study further states the gaps in the transparency of “the process of selection and promotion of judges” and their performance evaluation which according to the Study “lacks inputs from other legal professions”.¹⁴⁸ There are some improvements in the transparency of selection processes upon initial recruitment at the level of lower courts. However, the achievements attained should be seen in light of the aspirations and promises of the Justice System Reform Programme. For example, “complaints from the business community with regard to gaps in the justice sector, *inter alia*, relate to contract enforcement”.¹⁴⁹ Moreover, “corruption is a major factor that is being raised by the business community; there are also complaints regarding the need to enhance the efficiency of court procedures in order to make them business friendly”.¹⁵⁰

As stated in Transparency International’s 2007 Report, a corrupt judiciary harms economic development because “it diminishes trade, economic growth and human development; and, most importantly, it denies citizens impartial settlement of disputes with neighbours or the authorities”.¹⁵¹ The report underlines that “Judicial systems debased by bribery undermine confidence in governance by facilitating corruption across all sectors of government, starting at the helm of power. In so doing, they send a blunt message to the people: in this country corruption is tolerated”.¹⁵²

Although the Anti-Corruption Commission, the Ethiopian Human Rights Commission, the Ethiopian Institution of the Ombudsman and the Auditor General have significant contributions to good governance, the challenges of corruption and maladministration are still issues of concern in various sectors. As one of the external assessors of this article duly observed, “the level of concern expressed by authorities on the problem of judicial corruption in Ethiopia is very high. However, a robust and targeted program of action to tackle it as part of the reform agenda is yet to come”.

¹⁴⁸ CJSRP, *supra* note 2, p. 14.

¹⁴⁹ Interview with Fekadu Petros, Assistant Professor, Addis Ababa University School of Law, and Expert at Ethiopian Chamber of Commerce and Sectoral Associations, 25 November, 2015.

¹⁵⁰ *Ibid.*

¹⁵¹ Transparency International (2007), *supra* note 106, p. xi.

¹⁵² *Ibid.*

In Cressey's Fraud Triangle there are three factors that are conducive to corruption. They are *motivation* (pressures), *opportunities* and *rationalization*.¹⁵³ In the context of a judge, low levels of remuneration and benefits under settings of steadily rising inflation can bring about *pressures*. Any form of executive intervention in the judiciary can then widen the *opportunities* and *rationalization* of discretion. For example, a judge whose decision is influenced by any direct or indirect intervention from an executive official (which in the Soviet Union was labelled as 'telephone justice') can gradually incline to use such discretions as *opportunities* and *rationalizations* toward doing the same for a relative, a friend or an acquaintance. At an advanced level of ethical decline, bribery can set in by gradually corroding the level of integrity required in the profession. At this stage, corruption usually starts as facilitative corruption (speed-up bribery) to merely render rapid decision in accordance with the law, which can then gradually, with regard to some judges, develop toward corruption that circumvents judgements.

At the Workshop on Indicators to Combat Corruption in Ethiopia's Justice Sector, Ato Ali Suleiman, Commissioner of the Federal Anti-Corruption Commission stated that a corrupt justice system cannot provide equal treatment to citizens thereby affecting contract enforcement which is the core foundation for free market; and he stated that Ethiopia cannot attain the economic development it aspires and attract the desired level of investors in the absence of a judiciary free from corrupt practices.¹⁵⁴ He noted that the justice system is the ultimate forum to combat corruption, and if corruption becomes widespread in this sector, all anti-corruption efforts will be ineffective.¹⁵⁵ The workshop included participants from the Federal Supreme Court, Federal High Court, First Instance courts, prison administration, federal police, Addis Ababa Police Commission, public prosecutors and other institutions.

The Commissioner underlined that if justice organs are not protected from various forms of corrupt practices, and unless their activities are rendered transparent for the public along with their accountability in the event of failure to comply with the processes and procedures stipulated by the law, the problems will go beyond the control of the justice system and can bring about national crisis.¹⁵⁶ With regard to the independence of the judiciary, he remarked that

¹⁵³ Donald R. Cressey, in Joseph T. Wells, *Principles of Fraud Examination*, Wiley, 2008.

¹⁵⁴ Ali Suleiman, Opening Remarks at the Workshop on Indicators to Combat Corruption in Ethiopia's Justice Sector, A research conducted by Justice and Legal System Research Institute, Ghion Hotel, October 20, 2015. (ጥቅምት 9 ቀን 2008 ዓ.ም. «በኢትዮጵያ ፍትሕ ዘርፍ ሙስናን ለመከላከል የሚያስችሉ የፍትሕ ዘርፍ አገልግሎት አሰጣጥና አፈጻጸም አመላካቾች»), *The Reporter*, Amharic Version, 21 October 2015, Reported by Tamiru Tsige.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

“interpretation of the law is the mandate entrusted on judges” and “intervention to promote individual interest in the guise of public interest should cease”.¹⁵⁷

After the Commissioner’s opening speech, the researchers¹⁵⁸ who conducted the study (initiated and sponsored by Justice and Legal System Research Institute) presented their research findings and recommendations. They underlined the need to render court operations efficient, enhance the ethical standards of court employees, ensure accountability, enhance transparency, ensure the independence of the judiciary, and address the problems related with inadequate remuneration which create pressures toward corruption. They further noted the need for qualified staff, better information and document management, monitoring schemes, avoiding conflict of interest and dealing with the causes of corruption identified in the study.¹⁵⁹

The concern regarding the level of corruption in the justice sector was also underlined in the *Joined-up Justice Forum*¹⁶⁰ which was held in Hawassa on November 9 and 10, 2015.¹⁶¹ The Forum included justice sector organs (i.e. courts, Ministry of justice, justice bureaus, Police Commission officers, prison administration, etc.) from the federal city administrations of Addis Ababa and Dire Dawa and regional state stakeholders. In his opening speech at the Forum, Ato Getachew Ambaye, Minister of Justice, stated that the justice sector is expected to contribute to Ethiopia’s pursuits of peace, development and democratization.¹⁶² He recalled the achievements made during GTP I to make the services rendered to the public by the justice sector efficient, transparent and accountable, and he stated that there are still challenges in the sector that require substantial efforts as observed in the evaluations conducted at various levels.¹⁶³

The challenges stated by the minister include gaps in “the initiatives and commitment of the leadership in the justice sector, and weaknesses in goal-orientation, attitudes, professional competence, skills, integrity and other problems at operational levels”.¹⁶⁴ The minister underlined the need for further attention to public grievances that are caused by the exposure of the justice

¹⁵⁷ Ibid. “አገ ሙተርጉም ለዳኞች የተሰጠ ኃላፊነት ነው። ነገር ግን ዳኞች አገን በነፃነት እንዳይተረጉሙ ለአዝብ ተቆቋሪ በመምሰል የግል ፍላጎትን ለማሟላት በዳኝነት ሥራ ላይ የሚደረገው ጣልቃ ገብነት ሊወገድ ይገባል።”

¹⁵⁸ Ibid. Dr. Dejene Girma, W/t. Maereg Geberegiabher and Ato Aron Degol.

¹⁵⁹ Ibid.

¹⁶⁰ In various documents the Forum is referred to as “የፍትሕ አካላት የጋራ መድረክ”, የፍትሕ አካላት የምክክር መድረክ”, or “የፍትሕ ዘርፍ የጋራ መድረክ”.

¹⁶¹ Ethiopian News Agency, November 9 November 2013. Available at <<http://www.ena.gov.et/index.php/social/item/9066-2015-11-10-00-03-16>>, Accessed: 23 November 2013

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

sector to economic rent gathering and poor governance.¹⁶⁵ According to Ato Getachew, focus will be given to adequately respond to the public demand for justice and resolve problems related with good governance during the plan period of GTP II.

President of the Federal Supreme Court, Ato Tegene Getaneh expressed similar concerns at the Forum. He stated that there are many gaps in the delivery of services and good governance at all tiers and noted the need to address the problems of poor governance and rent gathering attitudes in all institutions of the justice sector so that these problems would not hamper development.¹⁶⁶

The discussion above clearly indicates the level of attention which should be given to judicial reform. Indeed, there is the need to enhance judicial independence, resources and facilities including substantial raise in remuneration to attract and retain competent and experienced judges and other staff. Lessons can be drawn from Singapore's experience regarding the positive impact of judicial independence accompanied by substantially high benefit schemes for judges. Unlike economic plans, the budgetary and other resource inputs in the judiciary may not provide visible statistical figures of 'physical growth'. Yet, effective, efficient, predictable and accessible judicial system is inevitable to render the economic, social and governance dimensions of development pursuits functional.

Concluding Remarks

The academic discourse on the relationship between judicial reform and economic development does not deny the importance of judicial reform in development, but rather lies "on what makes for a successful judicial reform project".¹⁶⁷ While "some argue that reform cannot be achieved without a society-wide consensus", there are others who "contend that the reform project can help create this consensus".¹⁶⁸ Hammergren believes that "institutional strengthening should always follow structural reforms and measures to increase access to the judicial system" and "she observes that institutional strengthening can pave the way for broader reforms".¹⁶⁹ Setting aside such debates on the cause-effect relationship between the various components and factors of judicial reform, it is to be noted that institution-level empowerment is one of the key

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

¹⁶⁷ Richard E. Messick (1999). 'Judicial Reform and Economic Development: A Survey of the Issues', *The World Bank Research Observer*, vol. 14, no. 1 (February 1999), p. 117

¹⁶⁸ Ibid.

¹⁶⁹ Id., p. 125, citing Hammergren, Linn A. (1998). 'Institutional Strengthening and Justice Reform.' USAID, Center for Democracy and Governance, Washington, D.C.

factors. Such empowerment does not only relate to judicial reform, because it is not a stand-alone pursuit and its effectiveness envisages corresponding reforms in other components of the justice system as well.

In the realm of its contribution to development, judicial reform “aims to buttress the rule of law and assure entrepreneurs that contracts will be enforced. Yet other institutions within society perform these same functions”.¹⁷⁰ In other words, judicial reform envisages concurrent unfolding of other factors which consolidate and reinforce its pursuits. The same holds true regarding the necessity of judicial reform in pursuits of reforming the justice system. In the course of justice system reform process in various countries, there was “greater familiarity with the sector’s weaknesses” and eventually attention was turned to “measures to strengthen judicial independence, reduce politicization of the appointment process, and increase the professional quality of judges and other officials and staff and to augment the general efficiency of courtroom and system wide administration”.¹⁷¹

As Tamanaha notes, “the Western situations in which legal institutions evolved in sync with advances in capitalism are totally unlike what developing countries face today in their attempt to leap into the global capitalist marketplace while nurturing legal institutions still at a nascent stage”.¹⁷² These developing countries need to enhance their legal institutions, including judicial reform in the context of unfavourable realities such as inadequate resources, weak governance and gaps in the legal profession. Their efforts are also expected to strategically aim at high thresholds of achievement along with engagements in incremental steady pursuits and concrete attainments.

In an interview with the Reporter, Professor Kenichi Ohno who, since 2008, has been in contact with Ethiopia’s high government officials notes that ‘to have a fast going idea is one thing, but we want to see the quality in policy making’.¹⁷³ He added “Japanese are always slow and steady movers. Ethiopians are fast movers. I think we can work together reminding each other of that. The speed as well as the quality is important”. He suggested that these two factors, i.e. speed and quality should interact in a positive way.¹⁷⁴ A similar *caveat* is

¹⁷⁰ Messick, *supra* note 167, p. 128.

¹⁷¹ Andrian Bedner (2008), *Court Reform. Law, Governance and Development, Policy Notes*, Leiden University Press, p. 10.

¹⁷² Brian T. Tamanaha (2009). ‘The Primacy of Society and the Failure of Law and Development’, *Legal Studies Research Papers Series*, St. Johns University School of Law, July 2009, p. 18.

¹⁷³ The Reporter, 16 August 2014, Birhanu Fikade’s interview with Professor Kenichi Ohno and Professor Izumi Ohno, who are Japanese professors of economics and have wide experience in areas of policy formulation dialogues and in advising governments in Asia.

¹⁷⁴ Ibid

expressed in the Ethiopian adage ‘ሲሮጡ የታጠቁት ሲሮጡ ይፈታል’ which warns against ‘running while dressing up’. One of the core conclusions that emerges from the preceding sections substantiates this point regarding the need for due attention to *steady* and *concrete* achievements in judicial reform.

As indicated in Section 2.1, justice system reform, including judicial reform is expected to give prime focus to “measuring *outcomes* and *impact*” which is wider in scope than “mere measurement of inputs” such as premises, number of judges, ICT inputs and number of cases handled. To this end, frameworks such as the five areas of performance noted in Section 2.1, i.e. (a) access to justice, (b) expedition and timeliness, (c) equality, fairness and integrity, (d) independence and accountability, and (e) public trust and confidence¹⁷⁵ can inform assessments in the accessibility, efficiency and quality of judicial services in Ethiopia. These five areas of performance are indeed in tandem with the vision, mission and values of Ethiopian courts highlighted in Section 4.1.

The march of judicial services toward such thresholds is nurtured, honed and enhanced through *steady* and *concrete* pursuits and achievements rather than mere pledges, plans and promises. Attainments or regressions in the realms of such outcomes and impact are self-evident because all these five areas of measurement are easily observable facts thereby becoming apparent public knowledge. The level of *access to justice* is objectively visible in any location and at any court. The same holds true for the *timely adjudication and decision* of cases without undue delay. Any claim or report that negates the reality cannot conceal clearly visible facts that emerge from actual public experience and observations with regard to the level of *impartial and equal treatment* of parties in litigation, *fairness and the integrity* of judges and other staff in a certain court, and regarding the *independence and accountability* of the judiciary. *Public trust and confidence* emerges, grows or regresses depending upon these factors. Unfortunately, the level of public trust and confidence on the judiciary seems to be steadily declining in Ethiopia as briefly highlighted in Section 6.

There is thus the need for a judicial reform programme which is independent but concurrently conducted with reforms in the other components of the justice sector. The independence of judicial reform does not mean seclusion from the other elements of the justice sector reform, but requires management of the reform by the judiciary itself, of course, subject to due harmonization with other components of the justice sector, the Joined-up Justice Forum and the Good Governance Reform Cluster.

As the judiciary is one of the organs of the state, its independent reform needs due attention. Nor should its budget, including remuneration scales, be determined by another organ other than procedures and schemes of transparency

¹⁷⁵ Proceedings, *supra* note 53, p. 76.

and accountability. In addition to its budget, revenue from all court fees can be ploughed back to top-up the resources allocated for the judiciary's projects. This should not, however, denote a judiciary that funds itself, because this would adversely affect access to justice.¹⁷⁶

The problems in Ethiopia's judicial reform pursuits are mainly related with grassroots empowerment in the implementation of reform plans, merit-based judgeship, the need for substantial raise in remuneration, judicial independence and meritocratic judicial support personnel. In the absence of steady, concrete and incremental measures and achievements that address these challenges, the various grand aspirations and pledges for judicial reform may eventually end up in *promise fatigue* and *regression*. _____ ■

¹⁷⁶ Judicial services are rights that can be claimed by citizens and not services to be bought. Court fees are thus incidental sources of state revenue which should not be regarded as sources of budget, but revenue categories, which, analogous to research funds, can be ploughed back to projects of judicial reform that can, for example, be used during the year subsequent to their collection.
