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Topic: **Judicial Reform in Ethiopia**

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Acronyms

AASCP	Addis Ababa Social Courts Proclamation
ADR	Alternative Dispute Resolution
Art.	Article
ARS	Amhara Regional State
CARP	Court Administration Reform Program
ASCP	Amhara Social Courts Proclamation
CC	Civil Code
CJSRP	Comprehensive Justice Systems Reform Program
ComC	Commercial Code
Const.	Constitution
CPC	Civil Procedure Code
CrPC	Criminal Procedure Code
EACC	Ethiopian Arbitration and Conciliation Centre
EPRDF	Ethiopian Peoples' Revolutionary Democratic Front
FEAAC	Federal Ethics and Anti-Corruption Commission
FDRE	Federal Democratic Republic of Ethiopia
FFIC	Federal First Instance Court
FFICL	Federal First Instance Court Lideta Branch
FHC	Federal High Court
FJAC	Federal Judicial Administration Council
FSC	Federal Supreme Court
JAC	Judicial Administration Council
JSRP	Justice Systems Reform Program

MC	Maritime Code
MoJ	Ministry of Justice
NGO	Non Governmental Organizations
ORS	Oromiya Regional State
OSCP	Oromiya Social Courts Proclamation
PC	Penal Code
PDRE	People Democratic Republic of Ethiopia
PFE	Prison Fellowship Ethiopia
PM	Prime Minister
PMAC	Provisional Military Administrative Council
Proc.	Proclamation
SJAC	State Judicial Administration Council
SNNPR	Southern Nation and Nationalities and People's Regional State
TDR	Traditional Dispute Resolution
TRS	Tigrai Regional State
TSCP	Tigrai Social Courts Proclamation

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1. INTRODUCTION

1.1. Imperatives for Judicial reform

The government of Ethiopia has started a program on judicial reform. This initiative to reform the judiciary is part of an overall effort to overhaul the justice system through a Comprehensive Justice Systems Reform Program (CJSRP). The program aims at examining all the institutions and processes that have a direct impact on the administration of justice. As such it includes within its ambit the law making process, legal education, law enforcement agencies, justice information and the judicial process. Ethiopia is relatively a late comer to the idea of judicial reform. Many other countries have already embarked on judicial reform earlier as part of their efforts for development. Efforts to modernize legal process in many countries have, in part, been a result of the increasing pressure resulting from the expansion and liberalization of the national and international commerce. (Chodosh 2003:866)

Globally, there is a tendency to give the judiciary greater focus than in the past. This renewed interest on judicial reform has been ignited by the increasing recognition that good governance is essential for economic growth (Messick, 1999:1)

The relationship between the judiciary and economic development was a subject of thorough study by many scholars. Many discuss this subject within the context of enforcement of contracts. The 16th century English philosopher Thomas Hobbes indicated that without a judicial system traders will be hesitant to enter in to contracts because of fear of the breach of promises In his own words "he that perforemth first has no assurance the other will perform after because the bonds of words are too weak

to bridle men's ambitions avarice, anger, and other passions without the fear of some coercive power". (Messick, 1999:8).

This basic premise of Hobbes has been revived by 20th century development economists. North argues that "the most important source of both historical stagnation and contemporary underdevelopment in the third world" is non-existence of low cost system of enforcing contracts. (North 1990:54) Williamson likewise argues that the absence of a well-functioning judicial system results in a higher transaction cost or a "low-performance economy" as the failure of the judiciary to enforce contracts will make a disproportionately large number of transactions to take place in the spot market where there is less likelihood of breach of contract. As a result, long-term contracts which are needed for a high-performance economy would not take place in systems where the judiciary is weak. (Williamson 1995).

Surveys conducted in a number of countries support the arguments of these scholars. The survey conducted in Ghana for example has proved that the absence of a sound judicial system could result in higher transaction costs by introducing network of traders who serve as go-betweens. Similarly, survey conducted in Peru has shown that about a third of those responding have said that they would not change a trusted supplier and go to a new one for fear that the new supplier may not honour the terms of the contract. (Dakolias 1996; Pinheiro 1996) Likewise a survey in Ecuador indicates the unwillingness of businesses to invest in that country because of the insecurity of contracts and the long time it takes to enforce them. Brazilian entrepreneurs have also suggested the possibility of a 10% increase in investment if

the Brazilian judiciary could give as good services as those in the advanced market economies. (Pinheiro 1996)

The relationship between economic development and the judiciary is not limited to the enforcement of contracts. Economic development requires protection of the property rights of domestic and foreign investors and the operation of the executive branches of government within a predictable framework of rules, in addition to the proper and timely enforcement of contracts. (Dakolias 1996) This point of view allocates a more prominent place to the judiciary in economic development as it thinks that "the judiciary is in a unique position to support sustainable development by holding the other two branches accountable for their decisions underpinning the credibility of the overall business and political environment" (The World Bank 1997:100)

This argument which draws a link between economic development and the rule of law was raised by many others earlier. John Fortescue, Max Weber, Adam Smith have somehow examined the impact of the rule of law on economic development. (Messick, 1999:7) The 19th century German sociologist Max Weber particularly gave a detailed explanation of the relationship between the rule of law, economic development and a well functioning judiciary. (Trubek, 1972) Weber analyzed the role of legal systems in the emergence of western civilization and emphatically stressed the elements in laws that are important for the functioning of a market system. These included "universal rules uniformly applied, which generates predictability, and allows planning: a regime of contract law that secures future expectations, and property law to protect the fruits of labor" (Trubek, 1972) Max

Weber's thesis of the role of law in economic development was "the analytical and philosophical 'godfather' for many of the legal reform exercised in the 1960s". (Ofosu-Amaah, 2002:555)

The empirical findings of Scully who undertook studies in 155 market economies strengthen this position. The research conducted by Scully shows that, "politically open societies, which bind themselves to the rule of law, to private property, and to market allocation of resources" are three times faster in growth; that the efficiency of countries with good institutional frame-work is twice that of those with bad institutions; that the efficiency of countries with poor institutions declines continuously, as opposed to those with good institutions which have captured all the gains of efficiency (Scully 1988:9)

Only well functioning legal systems and judiciaries stimulate technological progress and investment. The ability of the judiciary to enforce contracts properly is particularly pronounced in long-term and in highly specialized contracts. Economic agents tend to make long-term and highly specialized investments only when they are assured that contracts that support their economic activities will be enforced properly. This results from the very nature of such economic activities. Specialized investment usually needs assets that are specific for that production and cannot be salvaged for other purposes. This limits the ability of the parties to exit from contracts that support such activities. The parties' freedom to dispose of the assets used in such production lines may also be limited by law. On the other hand, the parties cannot possibly foresee and address all the contingencies that can arise during the lifetime of the contract. (Makler 1996:4) In all such cases one or all parties will have the tendency

to seek self interest during the implementation of the contract. A well functioning judiciary is necessary to reduce the contractual hazards that may come when the parties use their discretion during the life time of long term contracts. (Pinheiro 1996) The country studies that have been conducted by Levy and Spiller show that a strong and independent judiciary is a necessary condition for sectors with specific investment. (Levy and Spiller 1994) Timely and predictable enforcement of contracts stimulates economic agents to increase their market in number as well as in geographical spread by reducing transaction cost. The proper functioning of courts would, therefore, have a market enlargement effect, which in turn brings about technological spill over and diffusion of knowledge through the transmission of sound marketing, financing and managing practices. (Levy and Spiller 1994; Pinheiro 1996:10) By so doing an effective judicial system contributes to the creation of an environment that is conducive for free market economies. The performance of the judiciaries also affects growth through its impact on the rate at which factors of production accumulate. Higher risk of expropriation or a poor enforcement system reduces value of property and the rate of investment which is related to it. (Pinheiro 1996:11)

The role of the judiciary in societies is related to the nature of the interactions upon which they are built. Life in modern societies depends on innumerable complex, impersonal cooperative interactions between individuals who pursue self-seeking objectives but operate on incomplete information about the behaviour of other actors. This complexity of relationships coupled with the incompleteness of the information at the disposal of the economic agents, forces people to rely more on institutional framework than used to in traditional societies. Reliance on effective third party

enforcement, therefore, becomes a necessity to get the gains from modern societies that are characterized by specialized and interdependent trade. The reliance on third party enforcement would increase with the increment of the complexity and specialization of relationships because of the greater need to reduce the degree of uncertainty about effective cooperation. (Garcia 1998:1294)

The importance of adjudication is, therefore, higher in modern societies than it is in traditional societies. Personal relationship and interchange is more important in traditional societies which are characterized by repeat dealings, cultural homogeneity, and self enforcing mechanisms derived from dense social interaction networks. The institutional structure of modern societies has made the need for third party enforcement at low transaction costs of a greater importance. (Garcia 1998:1294-5) Judiciaries must therefore, play a greater role in our times by providing "cost effective, impartial, and neutral third party in charge of resolving disputes according to generally predictable rules and principles that are publicly available" (Garcia 1998:1295)

To ensure the confidence which individuals and organizational economic agents in a free market economy require the enforcement of claims must be done at low transaction costs. The cost of judicial enforcement is associated with the time and resources spent by a party to have his claims enforced through a judicial decision. One should not be expected to spend more resources for the enforcement of claims than the value of the rights in litigation. (Garcia 1998:1296)

Enforcement would become easier only if it is in the interest of the other party to keep the terms of the agreement. “Enforcement poses no problem when it is in the interest of the other part to live up to the agreement. But without institutional constraints, self-interested behaviour will foreclose complex exchange, because of the uncertainty that the other part will find it in his or her interest to live up to the agreement.” (North 1990:33) The Enforcement mechanism that is in place should therefore, have attributes which make breach of contract more to the defaulting party than living up to the terms of the contract (North, 1990)

Besides, the legal framework must provide certain protections which include, adequate protection of property rights with some guarantees against arbitrary alienation, allowing substantial activity, a substantial freedom for the formation of companies and adequate rules for the orderly dissolution when the need arises. (Sherwood et al: 6)

In her studies about the Central and Eastern European countries Gray argues that a legal system which is friendly to a market economy must have four characteristics: It must define property rights, it must have the means to commercialize private property, it must set clear rules on how to enter and exit from productive activities and finally, it should oversee the market structure and behaviour to promote competition. (Gray 1993)In other words in market economies the legal system should provide the rules of the game and the mechanisms individuals may resort to enforce their rights. (Pinheiro 1996)

Rule of law partly indicates the people would be in a position to structure their economic activities by taking the legal system in to account. This process would definitely require learning what the legal rules say, using these rules to structure economic transactions, obtaining compensation or seeking to punish those who break the rules and using public institutions such as courts to have the rules enforced. (Hay et al, 1996:559)

Sherwood et all add the following in this connection.

> "In market systems, the legal framework (ideally at least) will establish durable property rights which are difficult to alienate arbitrarily and provide means to assure those rights are clearly assigned across all property; allow substantial activity; substantial freedom for association in forming companies and, by allowing for limited liability, both encourage the raising of capital and provide for orderly dissolution of associations, firms joint ventures and so on." (Sherwood et al, 1994: 6)

The effectiveness of such a legal system requires an effective conflict resolution and enforcement mechanism. The search for an ideal judicial system is bound to fail in light of the differences between legal systems in the world. Defining an ideal judicial system precisely is difficult not only because it involves subjective judgments, but also because "the line between a legal system and its judicial system is not self evident". (Pinheiro 1996:3) The difficulty to come up with an acceptable definition of a good judicial system has forced some writers to suggest some other alternatives. As a result the qualities of an effective judicial system have been defined in different ways by different scholars. Sherwood thinks that assured access, predictable outcomes, timely outcomes and adequate remedies are the basic elements of an

effective judicial system which supports optimal market activity. Sherwood focuses more on the results of the judicial process to measure its quality. Hay et al on the other hand argue that the quality of a judicial system can be measured by the magnitude to which people use the judiciary as opposed to other methods of conflict resolution. (Hay et al, 1996:560) Williamson gives even a more indirect measurement when he says that "the quality of a judiciary can be inferred indirectly: a high-performance economy (expressed in governance terms) will support more transactions in the middle range than will an economy with a problematic judiciary. Put differently, in a low-performance economy the distribution of transactions will be more bimodal—with spot-market and hierarchical transactions and fewer middle-range transactions" (Williamson 1995:181-2) Pinheiro on the other hand argues that "low cost access, fairness, and predictable and timely outcomes" are the basic properties of a well-functioning judicial system. (Pinheiro 1996) It has to be noted, however, that regardless of the approaches to identifying the qualities of an effective judicial system, at the end of the day the effectiveness of the justice system will also depend on the quality of the laws and contracts they apply. The fairness, timeliness and predictability of the decisions of the courts will depend, to a large extent on how sensible, well written the laws are, and the extent of their consistency with other laws and business practices. (Pinheiro 1996:3)

On top of that the elements mentioned above require inputs to produce them. Amongst other things these outputs would require the existence of impartial and competent judiciary, allocation of sufficient resources for the judicial organs, balanced procedures, availability of public information, well conceived and clearly

written laws, and a defined and broadly understood expectation of what court are to do.'' (Pinheiro 1996)

An effective judicial system forces civic responsibility on all members of a society. That provides a platform from which inter-personal relations with strangers can be undertaken with some confidence. Effective judicial arrangements offer every individual the opportunity to secure private rights and expect to have them sustained in case of conflict or challenge, state interference, invasion, or other attacks. From the perspective of economic activity, impersonal commercial transactions have more prospect of flourishing. Activity need not be confined within social circles, ethnic groups, local communities, enlarged firms clans or family connections. A base for a highly sophisticated division of labor across all segments of a society results, which in turn leads to high levels of widespread economic activity. (Sherwood et al, 1994:8)

An effective judicial service would understandably require a trade-off between the requirements of due process and the need to make the judicial process efficient. The requirements of justice to reach a correct decision which sets an appropriate remedy after the proper identification of the law, a thorough determination of the facts, is in constant tension with the need to do all these things in a shorter time and less cost both to the public and private actors. The tension between the two could lead to imperfect outcomes. (Sherwood et al, 1994:9)

The tension between the quality of justice and efficiency notwithstanding, the impact of a poorly functioning judiciary on economic performance of a country should never be underestimated. We have seen earlier that a properly functioning judicial system

should give timely, predictable and fair decisions at a relatively low level of cost to the system. A dysfunctional judicial system would have problems in all or some of these elements thereby affecting the environment under which the market economy would operate.

A malfunctioning judiciary hampers economic growth by stimulating inefficient use of resources and technology. An inefficient judiciary entails high transaction cost and high risk thereby distorting resource allocation. The inability to enforce contracts and to protect property rights, will also force some economic agents not to pursue some of their activities thereby depriving them of an opportunity to specialize and to make use of the economies of scale. (Pinheiro 1996:13)

An inefficient judiciary hampers the efforts to maximize efficiency by raising the sum of the two costs involved in litigation: 'error costs' and 'direct costs'. An erroneous judicial decision raises the social costs (the error costs) by defeating the very purpose of the substantive laws which aspire to increase economic efficiency. (Posner 1974:275) An error cost is incurred when liability is imposed on the wrong party or where the right party is rendered liable for the wrong amount. (Cooter and Ulen, 2000:376) Besides, delay in the process of litigation raises the direct costs. Reduction of delay in the judicial process is obviously the main focus of many judicial reform initiatives as it is the most important point that affects efficiency. The very nature of judicial processes requires some degree of delay and therefore, all delay is not necessarily an evil. Delay should become a concern only when it is an excessive delay which can only be measured by comparing the costs and benefits of various types of delay. (Posner 1974:336) Delay also raises the error cost because the

decay of evidence through time increases the probability of an erroneous decision and the application of legal rules to changed set of circumstances is retarded. "Delay also raises error costs by widening the gap between damages and judgments that is rendered by the fact that the legal interest rate is lower than the market rate and interest is usually allowed not from the date of the event giving rise to the suit but only from the date of judgment." (Posner 1974:337)

1.2. Concept for a Thesis

The title of the thesis is "Judicial Reform in Ethiopia". This is so chosen to try to analyse the theoretical aspects and practical implications of the reform initiatives that are being implemented in Ethiopia. To make the research manageable, however, the main focus will be the formal courts in Ethiopia although other aspects will be discussed as they indirectly affect the performance of the courts. As aspects of reform are very many a choice had to be made as to what the central focus of the research should be. As a result the research has focused only on three aspects of the reform program. The first one relates to the problems on efficiency and how the reform program should handle them. The second one relates to the issue of access to justice, its barriers and the possible remedies. The third one examines the twin concepts of independence and accountability and raises some points which should be picked up by the reform program.

1.3. Research Decisions

Having designed the theoretical framework under which the reform issues in Ethiopia should be addressed, and conceiving various problems questions it was then necessary

to plan a research methodology to answer those questions. Research decisions had to be made, methods for data collection adopted and analysis of the data undertaken and conclusions arrived.

The judicial reform program in Ethiopia covers all the courts, federal as well as state. To arrive at tenable findings and conclusions collection of data that is representative enough of many of the courts was necessary. The Federal Courts are taken as the basic source of data for this research. This choice had to be made because the reform program started in the Federal Courts before it was expanded to the State Courts. Besides the Federal Courts have a well organized data-base system that generates reliable data for several years. Another important explanation is that many cases that are initiated in the state courts join the federal judiciary through the cassation division. On top of that the judicial process in Ethiopia is governed by the same procedural rules, and the problems they face are very similar. As a result it is believed that the findings in the Federal Courts could be relevant to the State Courts also. In appropriate instances the thesis addresses issues which may be peculiar to the states.

1.4. Relevance of Research

Programs are designed and being implemented at several stages with the intent of bringing about change in the justice sector in Ethiopia. However, there has never been a study about the Ethiopian judiciary addressing the basic components of the reform program. Particularly no study has been conducted based on empirical data collected from the courts. This research will therefore be of great relevance to the reform programs that are underway in Ethiopia. Besides it will also contribute to the scholarship on judicial reform which will be important to other systems as well.

1.5. Research Design

1.5.1. Literature Research

Having formulated the problem questions, and decided on which areas to focus study of relevant literature had to be conducted about Ethiopian judiciary on the one hand and literature about the judiciary with a particular emphasis on reform on the other. Relevant articles and books were collected from different libraries and through search engines. As a part-time researcher much of the literature was collected from various journals using the research engine made available by the university. I also made a couple of stays in Birmingham to identify books and other materials that turned out to be relevant. Many other direct resources and other materials were also collected from different libraries in Addis Ababa.

1.5.2. Research Methodology

To answer many of the questions that emerged during the literature review and relate them to the Ethiopian context data collection was necessary. Given the current limits on the literature about the Ethiopian judiciary I decided to rely heavily on statistical data which is available in the courts. As part of the court Administration Reform Program (CARP), the Federal and many other State Courts have changed their record keeping system. As part of the initial CARP the record keeping system in all the Federal Courts is automated. As this system has been operating for several years now much of the data which it generates is used by the courts to manage their day to day activities and to prepare reports for other institutions. Taking the level of its reliability and its capacity to generate reports the research has relied on the reports generated by this database. In situations where some questions could not be answered

through the reports generated by the database system, interviews with some relevant individuals were conducted. These interviews were however used only for limited purposes.

The data-bases uses the Ethiopian fiscal year which starts on July 11 and ends on July 10. As the Ethiopian calendar year is 7 years behind the Gregorian calendar and starts counting from September 11, the best option available was to use the data as it is but convert the years into Gregorian calendar. This explains the reason for using range of years in the charts.

2. THE JUDICIARY IN ETHIOPIA: GENERAL BACKGROUND

2.1. Historical Background

2.1.1. Introduction

Ethiopia is a country with a long history. It is a country that has always maintained its independence. It was not colonized by the European powers except for a five year occupation by Italy.(Bahru Zewde, 1991:160) As a result unlike many other African countries Ethiopia did not have a foreign system of law imposed on it by another European power.(Singer, 1970:73) It was also secluded from the other parts of the world for a long period of time as the result of which there was no chance for other legal systems to significantly influence the development of its institutions during the earlier periods of its history. The impact of this seclusion is given different interpretations. Some scholars argue that Ethiopia had a well developed legal tradition for a long period of time with specific features of its own.(Sedler, 1964 :59) Some others contend that Ethiopia did not have a legal system worthy the name until recently.(David, 1963 :188)

There is a great shortage of written materials on the history of the Ethiopian legal system. Although a number of books have been written on the history of Ethiopia in general, very few of them give a detailed account of the features and development of the legal tradition. From the very scanty work that is available, the following points can be taken as points of departure regarding the development of law and its legal institutions which are relevant to judicial reform initiatives.

One important feature of the legal tradition in Ethiopia is the existence of multiple customary laws that claimed greater legitimacy than the imperial edicts and the state law for many centuries. Ethiopia existed as an empire for many centuries up to the fall of Emperor Haileselassie in 1974 and had state laws beginning from the 19th century (Vanderlinden, 1966-1967 at 248). The customary laws of the different ethnic groups, however, existed independently and were in many cases more important to the people than the state law. Much of the history of Ethiopia is therefore characterized by pluralist legal institutions as a result of which the citizens were subjected to different legal norms. A number of studies conducted on different ethnic groups show that in spite of some similarities in some aspects the customary rules are distinct and constitute legal systems by their own right. (Shack, 1969)

These customary laws have been an important source of law for a long period of time in Ethiopian history. (Vanderlinden, 1968) It must be noted, however, that Ethiopia does not have a single indigenous customary law that was uniformly followed by all the other ethnic groups. The customary rules are as diverse as the ethnic groups although many of them are not properly studied and documented. There was no single custom that had a uniform application in all parts of the country. In other words there is no such thing as Ethiopian customary law. Many of the writings in Ethiopian history referring to Ethiopian customary law are, therefore, misleading in the sense that customs which appear as 'Ethiopian' are only customs of one or the other ethnic group. This confusion of some customary laws with Ethiopian state law or presentation of some customary law as 'Ethiopian" customary law, is partly a result of the political dominance of the Amhara Core The Amhara ethnic group has been associated with the history of the Ethiopian State which existed for many years. The

Amharas dominated in ruling the monarchical kingdom of Ethiopia. As a result, the customary law of the Amharas, the majority of whom are followers of Coptic Christianity, was relatively better studied, documented and through time presented itself as Ethiopian customary law. Even if there are many nationalities in Ethiopia, participation in political affairs always required some degree of assimilation with prevailing values of the Amharas which in turn required, among other things, ability to speak the Amharic language and being a follower of the Coptic Christianity. (Clapham, 1988) The Empire's bureaucratic ruling mechanism was operated by the Amhara and the Amharized feudal and tribal leadership which constituted the Amhara elite.(Krylow, 1994) At times the customary law of this ethnic group was also incorporated into state law thereby giving the semblance that state law gives recognition to customary law of all the other ethnic groups in the country. Some studies have indicated that the Codes that were adopted by the Emperor in the 1960s during his efforts of modernization reflect customary laws. (Krzeczunowicz, 1963) The customary law that was reflected in the Codes is, however, a custom of the Amhara ethnic group. While some rules of the Amhara ethnic group were incorporated in the Codes in one way or the other, all other customary rules were denied recognition.

Literature on Ethiopian law reflects such misrepresentations, one of which is presented below.

> There were three types of devices of crime investigation or detection under the old procedural law of Ethiopia. These were known as *leba shay, Afärsata*, and the investigations undertaken by the "market

guards"(*arada zäbägna*) and secret guards (*mist'r zäbägna*).(Jembere, 2000:244)

This author begins by the assumption that there was a single body of law that can be characterized as Ethiopian indigenous law. Based on this wrong premise, he presents the *Leba Shay*[1] and the *Afärsata*[2] as indigenous criminal investigation devices under the old law of Ethiopia. These devises are indeed indigenous. Their development as well as their application has, however, always been limited to the Amhara ethnic group in the northern part of the country. [Fisher, 1971:711-712] The other ethnic groups had their own devices which are in many respects different (Donovan and Getachew, 2003) Such wrong assumptions have negatively affected the development of the other indigenous customary institutions, which, in turn, is reflected in the administration of justice in the country today. Any attempt at reform of the justice system in Ethiopia must begin from a rectification of the historical mistake of attributing a customary law of one ethnic group to all the other ethnic groups in the country.

Another important feature in the Ethiopian Legal history is incremental non-recognition of customary law by the state law on the one hand and the prevalence of customary law over state law on the other. This competition between these two sets of rules has been observed since the importing of the *Fetha Nagaest* (the Law of the Kings) as a codified form of law earlier in Ethiopian history. Although there is a growing consensus that this is the first influence of foreign legal systems on Ethiopian indigenous law the exact time when this legal document was imported into Ethiopia is

[1] The *Leba shay* was a device which uses an intoxicated young boy to identify the suspect of a crime. A person on whom the drugged boy lays hands is considered a suspect and taken to court.
[2] The *Afärsata* was a device by which all the male members of a community will be detained until a person is named as a suspect for a crime that has been committed in their locality.

not known. Some relate the timing to King *Zerá Yakob* (1434-68), while others contend that it was only imported during the reign of Emperor *Eyasu* (1682-1706). (Abba Paulos ,1968:xvii) It is believed to have been there at least since the beginning of the 16th Century. (Vanderlinden, 1966-1967).

Many writers indicate that the *Fetha Nagast* which was given special reverence in Ethiopia since its arrival had its origin in another document that written in Arabic by an Egyptian who was a follower of Coptic Christianity. (Abba Paulos, 1968) Except for the preface and the annexes, the *Fetha Nagast* is a translation of this document. The second part on the other hand was related to secular matters and had some roman influence. (Sand, 1980). The text of the *Fetha Nagast* was originally drafted in the thirteenth Century for the followers of the Coptic Church in Egypt. As a result, its content is substantially based on the doctrines of Christianity. Once it was introduced to Ethiopia, the document was translated into Geeze, which was then the language of the church, although there are uncertainties as to when this was done. (Abba Paulos, 1968) The doctrinal background of the Fetha Negast facilitated its acceptance by Ethiopians who were already Christians long before its arrival. As a result it was held with high esteem. Not only was it referred to in judicial proceedings at the highest level (Abba Paulos, 1968) but it was also used as a source for the teaching of legal science by the Ethiopian schools of the olden days, the churches. (Vanderlinden, 1967)

The doctrinal basis of this ancient law was, however, irrelevant to the non- Christian population in Ethiopia. The *Fetha Neguest* was was available only *Geez* language, a liturgical language spoken only by a few people in Ethiopia. Although this Code is

said to be an important source of l aw up to the 20th Century the Amharic version was published only in 1965. As a result it was accessible only to a few people, which had some sort of church education. In spite of claims for its sanctity and reverence, the *Fetha Nagast* was rarely applied even by the ordinary courts. It did not have much of an impact in governing social relationships. "The introduction of the *Fetha Nagast* did not overthrow the customary legal systems of Ethiopians. It was widely known only in Christian Ethiopia, and was never applied in *toto* even there." Abba Paulos, 1968:xxi) So the first imported piece of law which survived for more than 400 years did not manage to break the customary rules of the various ethnic groups in Ethiopia.

The conflict between the customary law which people use and the state law which is not home grown was also observed in recent developments. Emperor Haileselassie's attempt to modernize Ethiopia was implemented through the process of codification which was spearheaded by foreign experts (Vanderlinden, 1966-1967:257) with little involvement of the local elite and no participation of the majority of the population. (Singer, 1970:122) The drafters of these Codes obviously did not have adequate knowledge of the customs of the different ethnic groups in the country. That this is so can be gathered from some of the comments they provided. Rene David, the drafter of the Civil Code for example explained that the rules on obligations in the CC will face no difficulties because "the Ethiopian society of yesterday did not know the concept of contract". (David, 1963:54) The drafter of the Commercial Code Jean Escarra, likewise, stated that "until now there have not been local commercial customs in Ethiopia". (Escarra, 1972:90-91) Partly departing from the wrong understanding of the legal framework that existed long before the Codes, the process of codification tried to solve the conflict between the constituents of the pluralist

system by adopting a few customary values of one ethnic group and denying legal recognition to all the others which made some scholars rightly characterize the Ethiopian private law which repeals customary laws as "fantasy law" (Schiller, 1969:193)

The fusion of administrative and judicial functions is another feature that characterizes the greatest part of Ethiopian legal history. Recorded history shows that the Emperor was seen as a source of justice in Ethiopian history. Thus, adjudication of disputes was considered a duty of the Emperor. The Emperor had judges who would hear cases unless the case is very important in which case it would be heard by the king himself. Even when the Emperor travels, as was often the case, he would have the *Sequela* (the tent of justice), where he would hear cases when he encamps, close to the main tent. (Sedler, 1967-1968:60) In the Ethiopian Imperial tradition the Emperor was thus considered as the ultimate source of justice which included the power to review a decision of other tribunals. (Sedler, 1967-1968:61) This legal tradition survived for many centuries and was abolished in 1974 when Emperor Haileselassie was deposed.

Ethiopia is undoubtedly a country with a very long history and rich tradition. Paradoxically development of many of the legal institutions as we see them today is relatively recent. Until the beginning of the 19th century, the structure of courts and the process of litigation was governed mainly by traditional and customary arrangements than by formal legal enactments. The formal structure of the courts was only introduced into the country in 1942. Legal education was even introduced into the country at a later stage. The first law school in the country was established in

1963 and Ethiopia did not have degree graduates trained in the country until 1966. (Vanderlinden, 1966-1967:261) A few Ethiopians were sent to other countries to study law, but many of them were absorbed by the administration and did not practice either as judges or barristers. Legal training in Ethiopia was therefore basically conducted by the churches for a long period in its history. The main source for the training in law provided by the churches before the establishment of the law schools was the *Fetha Neguest*. (Vanderlinden, 1966-1967: 254) Many of the courts in Ethiopia, as a result, were staffed by people who did not have proper legal education until recently. The relatively recent development of modern legal education in Ethiopia also affected the availability of literature on the development of the legal institutions and the availability of lawyers. Vanderlinden describes the situation by saying that "as far as the legal literature was concerned, the vacuum was total; as for lawyers… they were four and came from Continental countries, to wit Russia Italy, Greece and Germany". (Vanderlinden, 1966-1967:256) Beckstrom likewise states that as recently as 1974 "the great majority of judges have received education only to the fifth grade; and there is a small and relatively informally educated attorney population" (Beckstrom, 1974:704)

In the Ethiopian legal structure there are different sources from which the laws emanate. The customary or the unwritten law has been the major source of law for centuries (Vanderlinden, 1966-1967). Many argue that even to date customary laws remain to be the primary source of law through which relationships are governed. Thus the formal enactments in the 1960s which by explicit legal provisions tried to by and large scrap customary law from the Ethiopian legal scenario seem to have very little impact. Studies conducted after the introduction of the new Codes in the 1960s

confirmed that attempts to modernize the Ethiopian legal system through imported laws have been superseded by customary practices which existed long before the Codes themselves and are better comprehended by the people. (Beckstrom, 1973:557) Robert Seidman aptly summarized the situation by saying that "Ethiopia is still Ethiopia, Professor David's Code notwithstanding". (Seidman, 1972)

2.1.2. The Judiciary in Historical Perspective

1. Before 1942

The organization of courts in the early periods of Ethiopian history is a mixture of traditional arrangements and state institutions. As this period covers many centuries of history which affected the administration of justice in Ethiopia, discussion in this section will only highlight the basic developments during this period. Very little is known about the earlier periods of Ethiopian legal history both as regards the traditional arrangements and the state institutions. But much of the literature that is available demonstrates that both the traditional and state institutions played an important part in the administration of justice. There was very little legislative activity in the earlier periods of Ethiopian history. If there were a few ones, they were usually included in religious documents and chronicles of travellers. Neither could one find organized presentation of customary law which was prevalent during those days. Legislative enactments became more frequent towards the end of the 19th century both in qualitative and quantitative terms as a results of which one finds more written materials for the period beginning from 1908. This phenomenon is related to the first attempt of modernization by Emperor Menilik who issued successive legislative enactments which were the early beginnings of the current form of the

judiciary (Vanderlinden, 1966). It is only from this time onwards that formal legal enactments emerged as important sources of law.

In earlier periods the most important sources were customary law on the one hand and the *Fetha Nagast* on the other. Whether or not the *Fetha Nagast* served as a legal instrument or as a document for legal science is disputed. As this document was referred to during judicial processes since the time of *Sersa Dangal* (1563-1597) in civil proceedings and criminal proceedings, some contend that the document served "not only as a source of learning of legal science, but also as functioning law". (Abba Paulos, 1968:xxix). On the other hand in spite of the great influence this document had in Ethiopia for many centuries there is no evidence showing its promulgation by concerned authorities. As a result it is sometimes considered as a quasi-official source of law in Ethiopia. (Vanderlinden, 1966)

These differences notwithstanding, there is clear evidence that the *Fetha Nagast* was incorporated into formal legislations since 1908. In the proclamations establishing the Ministry of Justice which was issued in 1908, it is indicated that the "Minster of Justice must diligently make supervision to assure that every judgment is made according to *Fetha Nagast*" (Mahtama-Sellassie, 1942:71). Incorporation of the *Fetha Nagast* into formal legal instruments continued after Menilik. Some of these showed more direct incorporation as the Regulation issued in connection with executions by the then Crown Prince Teferi declared that capital punishment could be imposed only when the *Fetha Nagast* so prescribes. The *Fetha Nagast* is also believed to have inspired, and used as a justification for, the adoption of the first Penal Code of Ethiopia which was enacted in 1930. (Mahtama-Sellassie, 1942) It must be noted,

however, that during the early periods the customary law continued to be the major source of law even after the acceptance of the *Fetha Nagast* by the Emperors. The customary laws of the different nationalities in Ethiopia are however hardly studied and known to date including by those who administer justice. (Aberra, 2000:64)

These different sources of law in Ethiopia were administered by basically two types of institutions during this period, the informal courts and the traditional institutions. Before 1908, justice was not administered by formally established courts. Justice is said to have been administered by the rulers at the local level. But there was a possibility of appeal to the Emperor. There was an informal hierarchy which may stretch from a village elder at the bottom up to the Emperor's *Zufan Chilot* at the apex. (Paul and Clapham, 1971) As primary sources which depict the structure of the traditional court system are not available, some authors had to reconstruct the court structure from secondary sources. Stanley Z. Fisher, who tried this reconstruction, believes that the traditional court structure of Ethiopia had four tiers. In his opinion the Empire had a chief by the name of a *chika shum* who undertook the functions of a judge at the bottom of its structure. On top of that one finds the next court official at the Woreda (district) level who was given different names in Ethiopian tradition. This official is believed to have entertained appellate cases that come from the *chika shum*. Further avenue for appeal from the decisions of the Woreda court was available to the provincial courts and then to the Emperor in his Imperial bench. With the exception of the *Afe Negus*'s Chilot (The Supreme Court), all other courts were under the authority of the Regional chiefs. Thus the judges at the lower levels of the hierarchy were appointed by the governors of the province. (Fisher, 1971)

At the apex of the court structure there was what was then called the Appellate Court of the Chief Justice. Until 1908 the only judge of the Appellate Court of the Chief Justice was the Chief Justice himself. Judicial power of the Supreme Court of the land as well as the administrative responsibility of the court was thus exclusively exercised by the chief justice. Apart from these ordinary courts, Ethiopia had also the Crown Court which was called the *zufan chilot*. This was the court where the Emperor himself sat to review civil and criminal judgments rendered by the Supreme Court. Anyone who felt aggrieved by the decisions of the lower courts could petition the crown court for review.

Some changes were introduced to this mode of operation when Emperor Menilik launched modernization efforts in 1908. Beginning from 1908, Menilik issued a number of legislative enactments the first of which related to the establishment of a government structure based on European style. The reform efforts that were conducted by Emperor Menilik in the administration of justice were mainly achieved through the Establishment of the Ministry of Justice, the Ministry of Interior and appellate tribunals called *Wonbers* (literally meaning chairs but denoting judges. (Singer, 1970:76)

This initiative by Emperor Menilik affected the administration of justice in a number of ways. First, the year 1908 marked an initiative to centrally control the recruitment and assignment of court officials throughout the country. This was administered through the Minister of the Interior who had the power to deploy governors who would also double as judges in the provinces. Unlike the previous period where administration of justice was primarily a responsibility of the local chiefs, the

adjudication of cases became a responsibility of the administrators whose appointment and removal was within the control of the central government. Thus, apart from their routine responsibilities of ensuring peace and discharging other administrative functions, these appointees carried out adjudicative functions in their respective territories. Second an appellate tribunal was established in Addis Ababa to hear appeals coming from lower courts. In this connection the country was made to constitute six districts. Two judges were appointed for each district. Unlike the other courts whose judges were assigned by the Minister of the Interior, the judges for this tribunal were appointed by the Emperor himself. After the establishment of these tribunals appeals were not anymore directly submitted to the *Zufan Chilot*. Third, the position of the *Afe Negus* (mouth of the King) whose earlier responsibility was advising the Emperor was changed. The *Afe Negus* became the Minister of Justice and as such retained the power to decide whether or not any decision rendered by the newly established Wonbers deserved further review by the Emperor's bench. (Singer, 1970:76)

Side by side with these traditional court structures existed different types of customary institutions which administered justice in their respective localities. Although thorough studies were not conducted about the majority of the customary institutions in Ethiopia, the few studies that have been undertaken demonstrate that many ethnic groups had their own traditional institutions whose powers included administering justice. (Shack, 1969, Aberra, 2000) Some of the traditional institutions that operated starting from this period not only have elaborate rules for organizing the institutions but also procedures for pleadings, trial and appeal. The Kanchi Administration of justice in Tigrai, The *Aba Geda* system of the Oromo

people, The *Chiqa Shum* of the Amhara people, and the *Sanga Nenay* of the *Kunamas* are some of the customary institutions that have been instrumental in the administration of justice in different ethnic groups in Ethiopia. (Aberra, 2000).

Thus during this period the tribunals which administered justice applied different types of rules. Although the most prominent document which was applied by the higher tribunals during this period was the *Fetha Nagast,,* as it was not readily available for many of the judges that were dispensing justice in the country, and there were very few other legal enactments which they could refer to in legal proceedings, many of them relied on customary rules for guidance to dispose of cases brought to them. Therefore the informally organized judicial institutions were also applying customary law no less than the traditional institutions (Sedler, 1967-68)

As noted earlier, in the early periods the concept of separation of powers was not clearly seen in the administration of justice in Ethiopia. At the top the emperor who makes the laws had the power to interpret them, give judgments and appoint the judges. (Bereket Habte-Sellasie, 1966) At the lower level the judges in the courts were at the same time the governors of the administrative units either at the provincial, the district or the local level. Apart from that, during this period cases at all levels were handled by a single judge. Some Governors of the provinces had additional judges of their own choice in their courts, but this was a discretion which they exercised when they though feet.

This arrangement continued even after the enactment of the first written Constitution of 1931. This Constitution had 55 Articles 5 of which were about the judiciary. The

Constitution outlined that judges conduct their judicial functions in accordance with the law in the name of the Emperor. It did not provide the procedure for appointment of judges nor the powers of the judiciary. It only mentioned that judges would be appointed from those who have the experience of judgeship. (Art. 51, Cons, 1931) The Emperor was the sovereign in the whole legal framework and as such he had the power to appoint and dismiss all officials in the system as well as fix their salaries. (Art. 11, Cons, 1931) Judges therefore were appointed by the Emperor and served at his whim. The process of litigation and the structure of courts was not basically changed in spite of the provisions in the first written Constitution.

2. 1942-55

After the liberation of Ethiopia from the Italian occupation some changes were introduced to the administration of justice. A full court system was officially established for the first time. The first proclamation concerning the courts which was issued in 1942 established four tier court system namely, The Supreme Imperial Court, The High Court, the Awraja (Provincial court) Court, and the Woreda (Regional) Court. (Proc. 2. Of 1942, Art. 2) The Supreme Imperial Court was composed of the *Afe Negus* and two judges from the High Court. The *Afe Negus* who was the president of the Supreme Imperial Court was therefore the only judge who was appointed on a permanent basis for the Supreme Court. The other judges were nominated to the Supreme Court on an *adhoc* basis to hear appeals from the High Court. One Supreme Court and one High Court were established for the whole country but there were as many provincial and regional courts as the number of provinces and districts. It is important to note that under the new law all the benches

were constituted of three judges and could give a decision only if there is a majority of the members of the panel. This was a clear departure from the past where all the benches were constituted of one judge.(Aberra, 2000) Unlike the previous period where the provincial courts were staffed by governors deployed by the Ministry of Interior, after 1942 all judges that were sent to the provinces were appointed by the Emperor. When judges were not available the governors acted as such. Even in situations where there were judges assigned by the Ministry of Justice, the governors retained the power to intervene as the presidents of the court. (Singer, 1970:79)

The number of appeals available was also limited under the new legislation. Thus, litigants dissatisfied with the decision of the court of first instance could make only one appeal to the next court. This meant that cases that started in the *Awraja* courts could not reach the Supreme Court, as the decision of the High Court would be final. The new arrangement increased the number of judges sitting to hear a case from one to three, but reduced the number of appeals to only one.

It is also interesting to note that the Presidents of the Supreme Court and the High Court were given the power to issue Rules of Court with the approval of the Minister of Justice with regard to the following matters.

I. "Regulating the administration of the Court, and the institution, conduct and hearing of proceedings therein.
II. Regulating the admission, conduct and discipline of legal practitioners.
III. Regulating the selection and duties of assessors
IV. Regulating the committal of criminal cases from lower courts to higher courts
V. Regulating the imposition and recovery of fines, the award of imprisonment, in default of payment, and the procedure relating to execution and attachment

VI. Prescribing forms

VII. Fixing fees

VIII. Regulating the general administration of justice. ". (Art. 20, Proc.2/1942)

The *Afe Negus* (Reg. 155 of 1943) and the President of the High Court issued Rules of Court in 1943 and 1945 respectively for their respective courts on the basis of the power given to them under this law. The rules on court fees which are still operational were issued in 1945 by the President of the High Court. (Reg. 176 of 1945)

The president of the High Court also doubled as the Judicial Advisor of the Emperor. He served as the Chairperson of the Consultative Committee which had the duty to draft laws under the direction of the Emperor or to review draft of *any* proposed law. "No law shall be submitted to Us [the Emperor] for enactment unless it is accompanied by a certificate signed by a majority of the members of the said Committee certifying that the law to which the certificate relates is not repugnant to natural justice and humanity and is a fit and proper law to be applied without discrimination to Ethiopians and foreigners alike". (Art. 21, Proc. No.2/1942)

In addition to the judges that were appointed by the Emperor every court was given the discretion to have two or more assessors. The assessors were given the right to ask any question to a witness and to give their opinion on the facts in issue at the conclusion of a hearing. The opinion of the assessors was not, however, binding on the court and neither was their presence during any trial. (Art. 19, Proc. 2 .1942)

Traditional courts were allowed to operate even after the establishment of the regular courts to hear and settle minor disputes in any manner 'traditionally recognized by Ethiopian law until such time as regular courts can be established for the hearing of such disputes'. (Art. 23, Proc. 2 of 1942) The new proclamation contained no repeal provision as regards traditional courts apart from this provision. One may however infer from the provision that the intention of the new arrangement was to make dispute resolution by the regular courts the primary mode of dispute settlement.

Side by side with these developments it is important to note that there were some endeavours during this period to incorporate the customary law into the central system through the establishment of small claims tribunals which were called the *Atbia Dagna* (local judges). (Singer, 1970-1971:312) The *Atbia Dagna* was given the power both to conciliate and to adjudicate matters within its material jurisdiction. (Art.3, Pro. No 90, 1947) In civil cases the jurisdiction extended up to claims of 25 Birr and in criminal cases where the punishment does not exceed Birr 15. (Art.3, Pro. No 90, 1947) These small claims tribunals were however abolished when the CPC was enacted as their jurisdiction was transferred to the ordinary courts that were newly established. Their jurisdiction in criminal cases, on the other hand, continued after the enactment of the CrPC because the latter recognized their operation as regards 'minor offences of insult, assault, petty damage to property or petty theft where the value of the property stolen does not exceed Birr 5".(Art. 223, CrPC) In spite of their potential to integrate customary law to the central system these initial attempts were considered a total failure by some studies as the people hardly submitted their claims to these tribunals. Other local methods were frequented than these institutions created by the central government. (Singer, 1970-1971:320)

3. 1955-74

The adoption of the Revised Constitution in 1955 ushered in a new beginning in the development of Ethiopian legal history in general and the administration of justice in particular. Not only did the Revised Constitution enshrine principles that were of fundamental importance to the administration of justice, but it also was the landmark legal instrument that was followed by many other attempts to modernize by the Emperor. For the first time in Ethiopian history, the new Constitution declared in no uncertain terms that judges are independent in the conduct of their judicial functions. (Art. 110, Const., 1955) It established one Imperial Supreme Court and indicated that other courts will be established by law. (Art. 109, Const., 1945) The Constitution declared that judicial power is vested in the courts (Art. 108, Const., 1955).

It must be noted, however, that even if the Constitution contained some values including the independence of the judiciary and the separation of powers, these were substantially weakened as "law was unable to prevent the intervention of the traditional political system". (Scholler, 2005, 64) The principle of separation of powers under the Constitution was in conflict with the provisions which furthered the overarching participation of the Emperor at all levels of government activity. As this conflict was resolved by traditional political power, separation of power existed only in those areas where the Emperor wanted not to intervene, in areas that are below his authority. Thus, in spite of the declarations that judges shall submit to no other authority than the law in Article 110 of the Constitution, judges were considered as appendages of the bureaucracy. (Scholler, 2005: 66)

It should be noted that until the 1950s Ethiopian law was mainly an amorphous mix. Although there were statutes here and there, like the Constitution of 1931, the Penal Code of 1930, and the Court Proclamation of 1942, the biggest part of relationships were governed by customary and traditional arrangements. "Taking Ethiopia as a geographical whole, by far the major *de facto* source of rules governing social relations was found in the various tribal ethnic and religious groupings."(Beckstrom, 1973:559) Even at times where regular courts existed, they applied traditional procedural and substantive laws side by side with the imperial enactments. This situation continued long after the enactment of the two consecutive Ethiopian Constitutions.

After the adoption of the 1955 Constitution on the process of codification to modernize the Ethiopian legal system began. From 1957 up to 1965 six Codes were drafted and enacted. All the Codes were of western origin and there was little space for the traditional arrangements. In fact the general attitude towards customary law was negative. (Fisher, 1971:708) Therefore, the codes did not incorporate much of the Ethiopian customary law. The attitude of the codes towards the customary law was sweeping in some cases, and very subtle in others. The CC of 1960 repealed all customary law that was inconsistent with the provisions contained there under. It states thus: "Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this Code and are hereby repealed." (Art. 3347, CC 1960) Likewise, the CCP of 1965 declared that "all rules, whether written or customary, previously in force concerning matters provided for in the Civil Procedure Code of 1965 shall be replaced by this Code and are hereby repealed". (Sub Art. 3, CPC, 1965)

Detailed procedural rules were enacted in the CPC and CrPC which were intended to replace the traditional and customary procedures completely. The previous court structure was replaced by a new hierarchy of courts both for civil and criminal proceedings. The canonical and traditional rules were replaced by new rules of western origin. The Commercial Code, the Civil Code, The Maritime Code, and the Penal Code were enacted one after the other in a span of a few years. In the preface to the CC of 1960, the Emperor mentioned his intentions for codification.

> The Civil Code has been promulgated by Us at a time when the progress achieved by Ethiopia requires the modernization of the legal framework of Our Empire's social structure so as to keep pace with the changing circumstances of the world of today. In order to consolidate the progress already achieved and to facilitate yet further growth and development, precise and detailed rules must be laid down regarding those problems which do not only face the individual citizen but the nation as a whole. The rules contained in this Code are in harmony with the well-established legal traditions of Our Empire and the principles enshrined in the Revised Constitution granted by Us on the occasion of the Silver Jubilee of Our Coronation, and have called as well, upon the best systems of law in the world.
>
> …In preparing the Civil Code the Codification Commission convened by Us and whose work We have directed has constantly borne in mind the special requirements of our Empire and of our beloved subjects and has been inspired in its labours by the genius of Ethiopian legal traditions and institutions as revealed by the ancient and venerable *Fetha Neguest*. (Preamble of the CC)

Rene David, the drafter of the CC explains that Ethiopia had no law until the adoption of the Codes in the 1960s. "Only ten years ago there existed in that country neither a collection of jurisprudence nor a doctrinal work of the civil law; neither were there any laws except some very fragmentary dispositions contained in a law on loan, a law

on nationality and an ordinance of prescription" (David, 1963: 188) This opinion was shared by some other scholars as there were many others who opposed it. When writing about the civil and common law influence on Ethiopian law in 1967, Vanderlinden starts by saying that "the main characteristic of the contemporary Ethiopian Legal system is that it does not exist as such"(Vanderlinden, 1966-1967:250). In the absence of an already existing law and legal system in the country, the need for Ethiopian development and modernization "necessitate the adoption of a 'ready made" law system; they force the reception of a foreign system of law in such a manner as to assure as quickly as possible a minimal security in legal relations".(David, 1963:189)

The prevailing framework was, therefore, that importing good laws from the west will speed up the development of Ethiopia. It was believed that if the laws are good somewhere they will only do well to Ethiopia. Although this thinking was dominant among the ruling elite at that time, many had expressed doubts if this approach will indeed modernize Ethiopia. (Beckstrom, 1973)

The drafters of the new Codes attempted to include customary law into the new Codes, either by incorporating the customary rules or by allowing people to use their custom to regulate some relationships specifically provided in the laws.(Krzeczunowicz, 1965)The prevailing attitude was, however, that all customary rules, written or unwritten will eventually be replaced by the state law. René David again explains that "Ethiopians do not expect the new Code to be a work of consolidation, the methodical and clear statement of actual customary rules. They wish it to be a program envisaging a total transformation of society and they demand that for the most part, it set out new rules appropriate for the society they wish to

create". (David, 1963:193) Thus René David took account of customary law "only to the extent that they correspond to a profound sentiment of the Ethiopian people, and conform to that which is felt by them as being just" (David, 1963:194). Many of the customary rules were thus denied legal recognition as they were deemed to have failed this test.

Although the new Codes changed the structure of the courts and the rules for dispute resolution, the administration of justice remained primarily the same until 1973. In 1973 the first JAC was established. (Proc. No.323, 1973) This new commission had the Minister of Justice as its chairperson and the *Afe Negus* (the President of the Supreme Court) as the vice-chairperson and had a total of seven members, namely, the Minister of Justice, the *Afe Negus*, the High Commissioner of Public Service and Pension, the President of the High Court, the Attorney General and two other members appointed by the Emperor. The Commission's powers included the power to:

1. Select for appointment as judges persons who qualify for judgeship
2. Make recommendation for the promotion of judges from the lower courts to the higher ones.
3. Regulate transfer of judges
4. Determine the code of judicial ethics
5. Determine the standards of good behaviour and competence
6. Take disciplinary measures including removal of judges. (Art. 5, Pro. No. 323, 1973)

This ushered in a new era in the administration of justice in Ethiopia. Although the power to appoint judges remained with the Emperor, the power to nominate, discipline and remove judges' nomination was given to the JAC. The independence of judges was also declared in no uncertain terms. "Judges shall be completely independent in the exercise of their functions, and in the administration of justice they shall submit to no other authority other than the law". (Art. 11(1), Pro. No. 23, 1973) The beginning for a new era whereby the tenure of judges was legally guaranteed also started after this legislation. The grounds for removal were clearly provided in the law and it was also declared that judges cannot be removed from office except as provided by the law. The president and the Vice-President of the Supreme Court as well as the president of the High Court followed a different procedure. The presidents did not have security of office and could be removed under the recommendation of the Minister of Justice. (Art. 8(1), Pro. No. 23, 1973)

It must, however, be noted that all along the Crown Court was retained although it was not mentioned in the Revised Constitution of 1955. The Chilot (the Crown Court) was not part of the ordinary courts but the Emperor sat as a judge to review decisions of the ordinary courts. Some scholars argued that the existence of such courts was justified as it was inherent in the sovereign character of the Emperor, and did not violate the Constitution which provided that judicial power is vested in the courts. (Sedler, 1964)

4. <u>1974- 1991</u>

In 1974, there was a change of government in Ethiopia as a result of which the Emperor was deposed and the revised Constitution of 1955 was suspended. (Proc. 1, 1974)

The Provisional Military Administrative Council (PMAC) ruled the country without a Constitution for 13 years. During this period a number of measures which undermined the proper administration of justice were taken. Special Courts were established (Proc. 215, 1981) to prosecute suspects under a Special Penal Code (Proc. 214/81), many of the procedural safeguards that were at the disposal of the ordinary courts, like habeas corpus, were suspended. All rural land was nationalized; (Pro. 47, 1975) all extra houses were confiscated, private banks, insurance companies and many other privately owned enterprises were also nationalized. (Proc.47, 1975 Nonetheless the PMAC allowed the ordinary courts to function. (Girma, 1982)

The PMAC issued a proclamation for the establishment of a JAC. The content of this legislation was not significantly different from what was enacted by the Emperor during his last days. Many of the Articles of this law were verbatim copies of the previous one. There were, however some changes which are worth noting.

1. Except in the Supreme Court any other bench would be fully constituted by one judge. In the High Court a bench could be constituted by three judges for criminal cases where the offence is punishable with death or rigorous imprisonment. (Art.4, Pro. 52, 1975)

2. The power of the JAC was extended to cover public prosecutors and registrars. Before the new legislation, court registrars and public prosecutors were treated the same way as the other public servants.

3. The number of members of the JAC was raised from seven to nine. The Commission had nine members only two of whom, the Presidents of the Supreme Court and the High Court, were from the judiciary. The remaining seven members were drawn from different sectors. The commission, like its predecessor, was chaired by the Minister of Justice. And like its predecessor, the Ministry of justice had the power to issue regulations for the new JAC. The power to appoint judges was vested in the President of the country, who was the head of state and the chairman of the PMAC. (Proc. 1, 1975) The power to nominate candidates was shared between the Ministry of Justice and the Commission. The power to nominate the President of the Supreme Court and the President of the High Courts was given to the Minister of Justice while the nomination of other judges remained with the Commission. The content of the new legislation was, therefore, basically the same as the one that was issued by the Emperor a year before he was deposed. The powers which the Emperor had as regards appointment or removal of the court presidents were transferred to the Chairperson of the PMAC, who was also the head of state

In 1987 the third written Constitution in Ethiopian history was adopted. This Constitution introduced a new arrangement into the legal system. Judicial Authority was vested in one Supreme Court, Courts of Administrative and Autonomous Regions and other courts established by law. The Supreme Court was declared to be the highest judicial organ and was given the authority to supervise the judicial functions

of the other courts in the country. (Art. 100, Const. PDRE) While the appointment and removal of judges to the Supreme Court was outlined in the Constitution, the matter of all other courts was left to subsidiary legislation. Under this Constitution the President, the Vice Presidents and the judges of the Supreme Court were elected by the National *Shengo* (which was the law making organ) upon presentation by the President of the republic. (Art. 23 (4(e)), Const., PDRE)Election of judges to the High Court and other lower courts was given to the *Shengos* of Administrative or Autonomous Regions. The President of the Republic had the power and duty to "ensure that the Supreme Court, the office of the Procurator General, the National Worker's Control Committee and the Office of the Auditor General discharge their responsibilities". The term of office of judges was the same as that of the Shengo which elected them which was five years. (Art. 101, Const., PDRE) The Shengo had the power to recall judges elected by it before the term of five years ends. (Art. 100, Const., PDRE)

Under Proclamation 9 of 1987, the President of the Republic was given an exclusive power to nominate judges of the Supreme Court. The Ministry of Justice which, earlier on, had the power to nominate judges to the Supreme Court and the High Court lost this power during this period. Not only did the President of the Republic have the power to nominate judges, but he also had the power to request their removal by the parliament if it is in session. (Art. 100, Const., PDRE) Sub Article 4 of Proclamation No. 9/87 went further and gave the President an unlimited power in the appointment and removal of judges. It provided that "pending the decision of the National Shengo on the recommendation of removal of judges the President of the Republic may

suspend or dismiss judges of the Supreme Court and appoint new judges". (Art. 4, Pro. 9, 1987)

Under the PDRE Constitutional framework the President of the Republic had all the powers to nominate, to request the removal of, or to remove and replace, Supreme Court judges by new ones as he deemed fit. The tenure of judges which was proclaimed to be up to retirement age in 1975 was shortened to five years in 1987. The term of the National Shengo was five years and so was the term of office of the Supreme Court judges. When one considers that the President of the Republic had the power to remove the Supreme Court judges before the lapse of their term, one can easily see the extent of power which the president had over the highest court of the land. Besides, although the power to appoint judges to the Supreme Court was given to the National *Shengo*, the president had powers to appoint new judges to the Supreme Court pending the decision of the same. This obviously circumvented whatever limited powers the National *Shengo* had to appoint judges to the Supreme Court. During this period the legal framework for the judicial independence was eroded to the greatest extent.

On the other hand one notices an apparent attempt to decentralize the appointment and removal of judges during this period. The only court whose judges were directly appointed and removed by the authorities at the centre was the Supreme Court. Judges of all other courts were appointed by the *Shengos* that were established in the Regions.

In 1991, the government that was in power under the PDRE Constitution was overthrown by the Ethiopian People's Revolutionary Democratic Forces (EPRDF); a Provisional Government was established which was later on expanded into a Transitional Government through a Transitional Period Charter. (Pro. 1, 1991) The Constitution of the People's Democratic Republic of Ethiopia was suspended together with the institutions established under it including the National *Shengo* and the *Shengos* of the Regions. The transitional government that came out with a new decentralized arrangement for the organization of courts in Ethiopia removed many of the judges that were appointed under the previous regime. During the transitional period two court systems were established. The Central Government established Central Courts and the Regions established their own administration of justice, including Regional Courts. In 1994, the Constitution for the Federal Democratic Republic of Ethiopia (FDRE) was ratified by a constituent assembly on the 8th of December 1994 and entered in to force on the 21st of August 1995.

2.2. The Current Judicial System

After the adoption of the Constitution of the FDRE in 1994, the judicial organization of the country was changed. Not only did the Constitution introduce a federal system of government and a dual form of court system, but it also introduced some basic elements to the legal framework for judicial independence.

The FDRE comprises of the Federal Government and the nine member States (Art. 50(1), Const.) which are enumerated in the Constitution. Member States of the Federation are the States of Tigrai, Afar, Amhara, Oromiya, Benshangul/Gumuz, Southern Nations, Nationalities and Peoples, the Gambella people, the Somali People

and the Harari People. These states have wide ranging legislative, executive and judicial powers vested on them under the Constitution.(Art. 54, Const.) The powers of both the Federal Government and the States as well as concurrent powers of both are enumerated in the Constitution. Any power that is not specifically given exclusively to the Federal Government or concurrently to the Federal Government and the States is reserved to the States. (Art. 52, Const.) While the Constitution in principle envisages a dual court system, the only Federal Judicial organ that is established by the Constitution is the FSC. The Constitution allows the Federal Government to establish the FHC and the FFIC in any part of the country or in some States. Their establishment, however, requires a two-thirds majority vote by the parliament. Pending the establishment of the FHC and the FFIC through this procedure, the Constitution has delegated the jurisdiction of the Federal High and FFICs to the State Supreme and State High Courts respectively. (Art, 78, Const.). The Federal High and the FFICs are however established through an act of parliament that was issued subsequent to the adoption of the Constitution. (Pro. 25, 1994) The Federal Parliament has established Federal High and First Instance Courts for Addis Ababa, Diredawa and four other States (Benshangul Gumuz, Gambella, the State of Southern Nations, Nationalities and Peoples Gambella and Afar) through a two-thirds majority vote as prescribed in the Constitution. The Federal Constitution empowers the States to establish a Supreme Court, a High Court and a First Instance Court. The States have as a result established these courts through their respective Constitutions

The Constitution of 1994 declares that judicial power is vested in the courts. The FSC is vested with supreme federal judicial authority on federal matters whereas the State

Supreme Courts are supreme judicial authorities on state matters. (Art. 78, Const., PDRE)

2.2.1. The Jurisdiction of Federal and State Courts

The jurisdiction of the Federal Courts is outlined in the Constitution and the Federal Courts Proclamation. The guiding principle is stipulated under Article 80 of the Federal Constitution. Judicial authority is based on whether matters are federal or state. The FSC is given the highest and final judicial authority over federal matters whereas the State Supreme Courts are the highest and final judicial authorities in their respective territories on State matters. (Art 80, Const.) As mentioned earlier the powers of the Federal Government are restrictively enumerated in the Constitution and any power that is not given to the Federal Government is reserved to the States. Thus the ambit of federal matters as opposed to State matters will be decided based on the division of powers between the Federal Government and the States in the Federal Constitution. The Constitution delineates the powers between the federal and the state judiciary based on whether or not the point at issue is federal or state matter.

Although the State Supreme Courts are the highest and final judicial authority in their territories, the Constitution makes an important exception to this principle. The FSC "has a power of cassation over any final court decision containing a basic error of law" (emphasis added).(Art. (3(a) Const.) The State Supreme Courts, likewise, have cassation powers, but the power is limited to "any final court decision on state matters which contains a basic error of law. (Emphasis added). (Art. 3(b), Const.) The FSC's power of cassation, therefore, extends to State matters as the Constitution empowers it to review any final decision, whether or not it is rendered by the federal courts. The FSC has the power review state matter through its cassation division if it is convinced that it contains a basic error of law. What constitutes a basic error of law is defined neither by the Constitution nor by the subsequent acts of parliament. Its definition

and scope remains to be developed by the decisions of the judicial organs. The legal arrangement has an impact on the organization and workload of the FSC.

Apart from these general principles regarding the jurisdiction of courts in Ethiopia, details are found in the Federal Courts Proclamation. This proclamation puts the general principle as regards jurisdiction of the Federal Courts under its Article 3 stating that "the Federal Courts shall have jurisdiction over:

1. cases arising from the Constitution, Federal Laws, and International Treaties
2. Parties specified in Federal Laws
3. Places specified in the Constitution or Federal Laws".(Art. 3, Pro. 25, 1996)

From the basic principle laid down under this Article one would get the impression that the jurisdiction of the Federal Courts extends to a wide range of issues arising from the Constitution, federal laws and International Treaties. The general principle seems to have been diluted by many exceptions in the Federal Courts Proclamation and other Federal laws enacted by the Federal Parliament. Apart from the FSC which has the highest judicial authority over federal judicial matters, the jurisdiction of the FHC and FFIC does not necessarily embrace all matters arising from the Constitution, Federal laws and International Treaties. A closer scrutiny of the Federal Courts Proclamation reveals that much of what looks to be under the jurisdiction of the Federal Courts at first glance falls within the jurisdiction of the State Courts. As the enactment of the Penal Code is within the competence of the Federal Government under the Constitution (Article 55(5), Const.), the Federal Courts should have

jurisdiction in all criminal cases based on Article 3 of the Federal Courts Proclamation 25/96. Article 4 of the same Proclamation however limits the criminal jurisdiction of the Federal Courts to a few categories of offences. The criminal jurisdiction of the Federal Courts is limited to.

1. Offences against the Constitutional Order or internal security of the State;
2. Offences against foreign states;
3. Offences against laws of nations;
4. Offences against the fiscal and economic interest of the Federal Government;
5. Offences regarding counterfeit currency;
6. Offences regarding forgery of instruments of the Federal Government;
7. Offences regarding security and freedom of communication services operating within more than one Region or at an international level;
8. Offences regarding the safety of aviation
9. Offences regarding foreign nationals
10. Offences regarding illicit traffic in drugs
11. Offences falling under jurisdictions of different Regions or jurisdictions of both Federal and Regional Courts as well as concurrent offences;
12. Offences committed by officials and employees of the Federal Government in relation to their official duties. (Art. 4, Pro. 25, 1994)

Although the Penal Code is a federal law, adjudication of criminal cases is not necessarily within the jurisdiction of the Federal Courts as their jurisdiction is limited to the categories offences listed above. All other criminal cases are handled by the State Courts.

The jurisdiction of the Federal Courts in civil litigation does not extend to all disputes that involve federal laws either. The jurisdiction of the Federal Courts is based on two basic criteria, the nature of the dispute and the nature of the parties to a dispute. All civil cases that involve the Federal Government or foreign nationals fall under the jurisdiction of the Federal Courts regardless of the law that may apply to resolve the dispute. Likewise, disputes between persons permanently residing in different states and disputes regarding the liability of officials or employees of the Federal Government in connection with their official duties fall under the jurisdiction of the Federal Courts. (Art. 4, Pro. 25, 1996) From the wide range of federal laws which fall within the competence of the Federal Government, only the following categories of cases fall within the jurisdiction of the Federal Courts.

1. Suits involving matters of nationality
2. Suits regarding business organizations registered or formed under the jurisdiction of the Federal Government
3. Suits relating to negotiable instruments
4. Suits relating to literary and artistic ownership rights
5. Suits regarding insurance policies and
6. Application for habeas corpus. (Art. 4, Pro. 25, 1996)

Thus, although the commercial law is within the competence of the federal government, (Art. 55, Const.) jurisdiction of disputes pertaining to its application does not necessarily fall under the jurisdiction of the federal courts with the exception of items 2 and 3 above or unless there is some other federal legislation that gives them jurisdiction.

From the foregoing, one can gather that the majority of disputes in Ethiopia under the current arrangement are handled by the State Courts. Even in cases where Federal Courts have jurisdiction, the State Courts will assume jurisdiction if the event or the transaction takes place within the territory of the States. (Art. 78 (2), Const.)

2.2.2. Organization of Courts

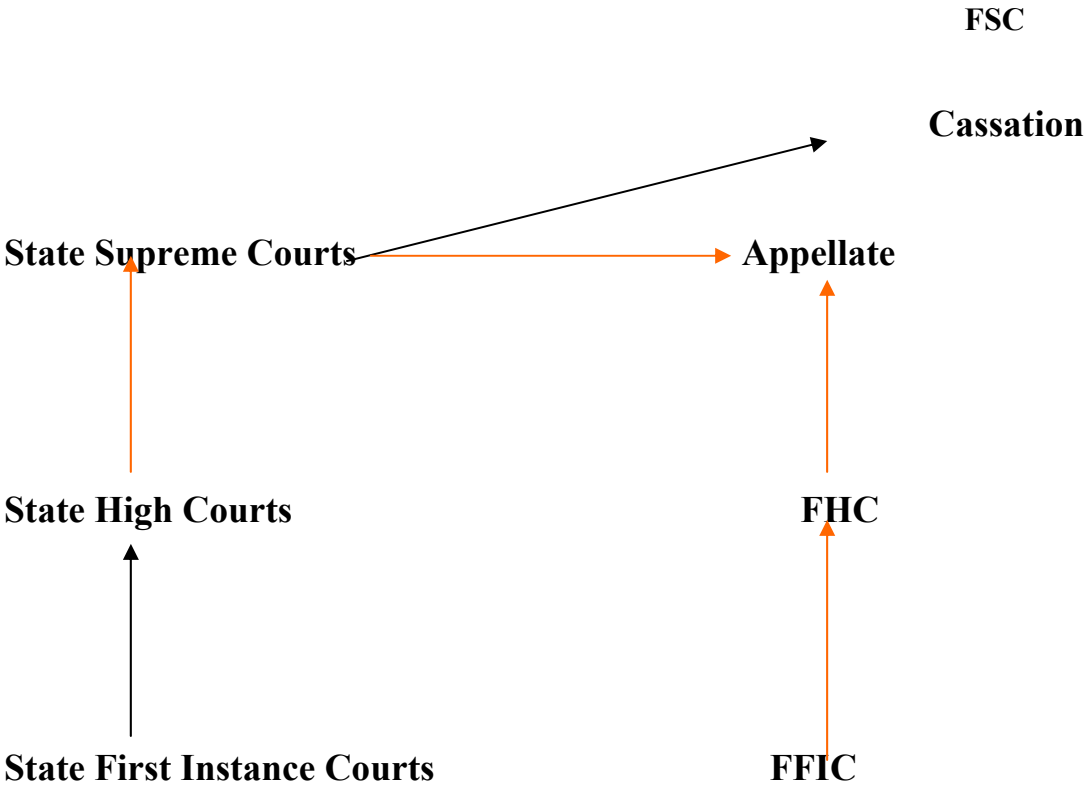
Both the Federal and State Courts are organized as a three tier court system, with the First Instance Courts at the bottom, the High Courts (sometimes called Zonal Courts in the States) in the middle and the Supreme Courts at the apex. The jurisdiction of each court within the hierarchy is determined by federal laws for the Federal Courts and state laws for the State Courts. The FSC has first instance, appellate and cassation jurisdictions. (Art.8-10, Proc. 25, 1996) The FHC has appellate and first instance jurisdictions, whereas the FFIC has only first instance jurisdiction. (Art. 11-15, Proc. 25, 1996) The first instance jurisdiction of the High Court and the First Instance Court depends on the seriousness of the offence in criminal cases and on the amount in controversy in civil cases. In civil Cases the FHC has first instance jurisdiction if the amount involved is more than 500,000 Birr. (Art. 11(1), Proc. 25, 1996) Any claim less than this amount falls within the jurisdiction of the FFIC, unless it is less than 5000, in which case it falls within the competence of the jurisdiction of the Social Courts. (Art. 14, Proc. 25, 1996) The FHC hears appeals from the FFIC (Art. 13 Proc 25, 1996) and its decision is final if it confirms the decision of the lower court. The FHC also hears appeals from decisions rendered by other tribunals with quasi judicial powers. Thus decisions from the Tax Appeal

Commission (Proc233/2001), Labour Board (Proc. 466/2005), and Election Board (Proc. 438/2005) are taken on appeal to the FHC.

The First Instance jurisdiction of the FSC is limited to criminal cases where Federal Government Officials are charged of criminal offences in connection with their official responsibilities, cases involving members of the diplomatic community and applications for change of venue (Art. 8 Proc. 25/95). It's appellate and cassation jurisdictions reflect the division of judicial powers outlined by the Constitution. It has appellate jurisdiction from decisions of the Federal Courts. Right of appeal is automatic from the decisions of the High Court on its first instance jurisdiction. Decisions of the High Court on its appellate jurisdiction are, however, final unless the court has varied the decision of the lower court and, therefore cannot be seen by the appellate division of the FSC. The FSC, however, can also hear appeals from the State Supreme Courts when they decide on federal matters that have been delegated to them by the Constitution (Art. 79 Const). On such matters, the State Supreme Courts exercise the jurisdiction of the FHC and the appeal goes to the FSC. The cassation jurisdiction of the FSC extends to all cases, federal or state, in so far as they are final and one can show that they contain a fundamental error of law (Art 14 Proc 24/94).

The structure of Courts in Ethiopia can be illustrated by the following diagram, with the black arrow showing the flow of state matters and the orange colour that of the federal matters.

Figure 1: *Structure of Courts in Ethiopia*



Social Courts (small claims tribunals)

The structure of the State Courts is similar to that of the Federal Courts with some notable exceptions. Many of the State Courts have appellate jurisdiction from the small claims tribunals which are called Social Courts and operate in all the States including Addis Ababa, which is a chartered city. The requirements for appeal are not also exactly the same as that of the Federal Courts. In some States there in no limit to the number of appeals and in some others the power of cassation is exercised at the High Court level for cases that start from the Social Courts. The composition of the benches is not the same in all the courts either. Whereas benches in the FHC are constituted by one judge, except in criminal cases that carry more than 15 years of imprisonment the State High Courts have benches composed of three judges. (Pro. 30, 1997, State of Tigrai)

2.2.3. Administration of Courts

The administration of courts in the Federal Government and the States is divided between three different institutions, namely; the Supreme Courts, the JACs and the Plenum.

1. The Supreme Courts.

The administrative authority of the FSC is partly reflected in the Constitution itself. The FSC has the Constitutional authority to draw up its own budget and implement it when approved by the Federal Parliament. (Art. 79(6), Const.) The FSC also has the power to administer the other Federal Courts in accordance with the law. (Art. 16(1), Pro. 25, 1996) The powers of the State Supreme Courts are governed by State Constitutions and other laws. The essence of the laws is, however, the same with the Federal Courts. All matters related to the day to day activity of the courts are within the competence of the Supreme Courts.

2. The Judicial Administration Commissions (JACs)

JACs are not established by the Federal Constitution but their existence is envisaged and some of the powers are also enumerated in it. The powers of the JACs to nominate judges for appointment (Art. 81, Const.) and to initiate the process for removal of judges from office (Art. 79, Const.) are constitutionally recognized powers. The other powers of the JACS emanate from other Federal or State subsidiary legislations. Though the powers of the councils are similar, the composition of the members is different at all levels.

The Federal Judicial Administration Commission (FJAC) was established in 1996. (Pro. 24, 1996) This commission is responsible for the selection of judges except the President and the Vice-president of the FSC, the issuance of a Code of Conduct, disciplining, fixing the salary and benefits and the transfer of judges. It also has the power to give its opinion on the suitability of judges that are nominated for the State High and Supreme Courts. (Art.4, Pro. 24, 1996)The President and the Vice-President of the FSC are directly nominated by the Prime Minster and appointed by the House of People's Representatives (the Federal parliament) (Art. 55(13), 74 (6), Const.) the FJAC therefore is not involved in their appointment. The FJAC has nine members and is chaired by the President of the FSC. The Commission is composed of the following members.

1. The President of the FSC (Chair)
2. The Vice-President of The FSC
3. The President of the FHC
4. The President of the FFIC
5. The most senior judge of the FSC
6. A representative from the FHC judges
7. Three members of the Federal Parliament. (Art3, Pro. 24, 1996)

3. The Plenum

The Plenum of the FSC is another body that has some specific responsibilities in the administration of justice in Ethiopia. This is an institution that is entrusted with the responsibility to

1. Deliberate on problems encountered in the administration of justice,
2. Examine and approve directives and decisions that help to improve the judicial practices of the Federal Courts.
3. Submit proposals to the Parliament for the enactment or repeal of laws
4. To issue regulations for that are necessary for the proper implementation of its duties.

The plenum of the FSC consists of all the Presidents of the Federal Courts, all the Presidents of the State Supreme Courts and the Judges of the FSC. The Minister of Justice is a nonvoting member of the Plenum. (Art. 34, Pro. 25, 1996)Other appropriate institutions may also be invited to participate in the Plenum without having the right to vote. Such an organ does not exist in the State Courts.

2.3. Other Courts

The administration of justice in Ethiopia is not handled by the Regular Courts only. There are many other courts and tribunals that involve themselves in the administration of justice in a number of ways. They can be classified into three broad categories; traditional courts, administrative tribunals and small claims tribunals.

2.3.1. Traditional and Religious Dispute Resolution Institutions (TDR)

As mentioned earlier, the TDR existed and have always been competing with the formal state law. In spite of that, much of the traditional law did not have legal recognition. The formal denial of their existence by state law did not make the traditional institutions less effective.(Beckstrom, 1973, Bussani, 1996) Recent studies under the aegis of the Ministry of Justice have only confirmed that the traditional institutions are still intact and in some cases more effective and better accepted by the community. (Alula and Getachew, 2008) At any rate the move for modernization in the 1960s has wiped out traditional law from the formal legal regime to a great extent. Thus the traditional law existed in fact but did not exist in law. The approach of the FDRE Constitution towards traditional law is different. The point begins with Article 39 of the Constitution which gives unconditional right of self determination to what it recognizes as nations, nationalities and peoples. Article 39 reads in part that

1. Every nation, nationality and people in Ethiopia has an unconditional right to self determination including secession.
2. Every nation, nationality and people in Ethiopia has the right to speak, write and develop its own language; to express, to develop and to promote its culture and preserve its history.
3. Every nation, nationality and people in Ethiopia has the right to a full measure of self-administration which includes the right to establish institutions of government in the territory it inhabits and to equitable representation in State and Federal Government.

Besides, the Constitution allows adjudication of family and personal matters based on customary law if the parties agree to the process. (Art. 34(5), Const.) Article 78 also provides that the Federal and the State Parliaments "can establish or give official recognition to religious and customary courts. Religious and customary courts that had state recognition and functioned prior to the adoption of the Constitution shall be organized on the basis of recognition accorded to them by this Constitution." The impact of these changes in the administration of justice will be discussed in greater detail in connection with access to justice. Suffice it to mention at this stage that the Constitution recognizes the pluralist nature of the Ethiopian society and gives wider room for the customary laws and their institutions.

Sharia courts have had a *de facto* existence in Ethiopia for a long time. They became *de jure* in 1942 by the Kadis' Court Proclamation.(Zaki, 1973, 138) This Proclamation provided for a two-tier system of Mohammedan Courts— a Kadis' Court and the Court of Sharia.

The legal status of the *Sharia* courts has been questionable as the CC and the CPC repealed all laws that are inconsistent with them in the 1960s. Currently their existence is not only explicitly recognized by the Constitution, but the Federal Parliament has issued a proclamation in 1999 for the consolidation of the Sharia Courts. Administration of the Sharia Courts is under the FJAC (Proc. 188, 1999). The Sharia Court' jurisdiction relates to marriage and family matters and can be exercised if the parties expressly consent to their jurisdiction. (Art. 4, Pro. 188, 1999) The Coptic Church also has its own courts which deal with religious matters Orthodox Christianity was a state religion under the 1955 Constitution (Art. 19 Const. 1955).

2.3.2. Administrative Tribunals

Ethiopia does not have a separate hierarchy of administrative courts as it is usually the case in civil law countries. There are, however, a number of tribunals established by the State outside of the regular courts which get involved in the administration of justice. Some of these agencies include, the Tax Appeal Commission, The Labour board, the Pension Commission and Electoral Board. The agencies have the competence to adjudicate matters that fall within their powers. The number of institutions that have quasi-judicial powers is growing in Ethiopia today. Recently, the Federal Parliament has empowered the Housing agency to evict tenants who failed to discharge their obligations without any need to go the court of law. The relationship between these tribunals and the regular courts is not well defined. In some cases appeal is allowed to the ordinary courts[3] in other cases their decision is final[4]. The structure of the tribunals is not uniform. Neither is their composition and decision making process. Although these institutions adjudicate matters there is no clearly set procedure which they are bound to follow.

2.3.3. Small Claims Tribunals

Small claims tribunals are established in all the States and entertain a sizable number of cases every year. These courts are established by the States to handle minor disputes in their localities. There are thousands of these tribunals operating in Ethiopia now. The jurisdiction of the social courts is limited to relatively small amount of money. The Federal Social Court in Addis Ababa can handle disputes up

[3] Appeal is permitted from the decisions of the Labor Board, Tax Appeal Commission, Public Service Court and the Election Board.
[4] Decision of the Pension Commission is final

to 5000 Birr whereas the Social Courts in the Amhara State cannot exceed 1500 Birr. In the Tigrai state their jurisdiction is not only higher as it goes up to 2500, but they are also entrusted to handle disputes relating to marriage that arise within their localities regardless of the amount of money involved. In the Oromiya state, on the other hand, they do not have the jurisdiction to entertain marriage disputes but have the jurisdiction to handle disputes that are related to land use rights. Details of how these institutions are organized, and the problems they face will be discussed in connection with access to justice.

3. ACCESS TO JUSTICE IN ETHIOPIA

3.1. Access to Justice

3.1.1. Introductory Remarks

The brief introduction to the Ethiopian history outlined above shows that there is pluralism in the administration of justice. The country has western styled formal courts on the one hand and deeply rooted customary laws and institutions on the other. Any study on access to justice demands a proper understanding of the interface between these two elements of the pluralist justice system. As a bigger part of the Ethiopian population resorts to customary institutions for dispute resolution, the reform agenda on access to justice will be incomplete if sufficient attention is not given to address the place and fate of these institutions. This chapter will try to examine the issue of access to justice from two different perspectives. The primary focus will be the examination of the accessibility of the formal courts which administer justice in Ethiopia. But as accessibility of the formal courts does not necessarily imply accessibility of justice to those who resort to the customary institutions, the last section will briefly consider the role which these institutions play in the administration of justice.

As administration of justice in the formal courts is governed by procedural rules that have many features in common with other western countries, examining the literature on the issues of access to justice is relevant as far the formal courts are concerned. That the literature is relevant does not, however, mean that the problems as well as the solutions for access to justice in those countries are in all respects the same as in Ethiopia. The points which this author believes are particularly important for access

to justice in connection with the formal courts in Ethiopia will be discussed in the sections following the general introductory remarks.

3.1.2. The Nature of Access to Justice

Addressing the issue of access to the regular courts should be one of the main areas for judicial reform in Ethiopia. To properly identify the problems in access to justice and come up with recommendations which would work, it is imperative to understand its conceptual basis and the obstacles which hamper its proper implementation.

The primary point of departure for the concept of access to justice is ensuring equality before the law. The recognition of formal equality was, however, found to be inadequate as the citizens ability in real life to recognize and make use of their rights depended on many factors other than the legal recognition of those rights. (Sackville, 2004) Although this problem was noticed at an earlier period, the dominant thinking was that the state's primary obligation is to recognize the natural rights of the individuals and to make sure that their rights are not infringed by others. The state, therefore, did not have an active role in addressing the actual capacity of individuals to make their rights effective. The state simply remained passive to many of the problems which individuals faced to realize their rights recognized by the state. (Cappelletti and Garth, 1974)

> "Reliving "Legal Poverty"- the capacity of many people to make full use of the law and its institutions- was not the concern of the state. Justice, like other commodities in the laissez-faire system could be purchased only by those who could afford its costs, and those who could not were considered the only ones responsible for their fate. Formal, not effective, access to justice- formal, not effective, equality- was all that was sought." (Cappelletti and Garth, 1974)

Incorporating the basic rights into formal legal instruments has been an important move in terms of protecting the rights of individuals. This trend has, however, been criticized at later stages for failing to ensure effective enjoyment of those rights It was argued that for people who do not have the capacity to enjoy them for economic, social or cultural reasons, political and civil rights became empty promises. Thus, to enhance the fundamental importance of these basic rights, some more rights had to be advocated within the package of social rights, amongst which is found the right of access to justice. (Cappelletti, 1992)

The movement of access to justice was developed primarily as a reaction to the formalistic and dogmatic approach which identified law and the legal system only with norms to the exclusion of the process, the institutions and the people that are involved in the process.

> "the access perspective is intended to add, and indeed to give a place of honour, to the consumers' perspective, that is, the perspective of the addressees- the consumers- of law and justice, hence, to the individuals and groups, in a word, to civil society. Thus pre-eminence, is given to the problems to the needs to the aspirations and of course to all those economic cultural, psychological, linguistic and racial obstacles which so often make it difficult or impossible for so many 'consumers' to have access to the law-producers, and thus to the law, statutes, judgment and administrative acts to which theoretically they would be entitled"(Cappelletti, 1992: 38)

The concept of access to justice, therefore, goes beyond formal recognition of rights and addresses the problems that hinder the effective implementation of those rights. The concept of access to justice embraces the ideal that every person in society should have effective means for the protection of the rights and entitlements provided in the substantive law. (Sackville, 2004: 86) Access to justice focuses on the effective equality of citizens and not just on the symbolic equality which may result from the formal recognition of rights.

This understanding of access to justice as a search for a system that ensures effective enjoyment of rights gives reform initiatives the perspective to examine the real problems in real life and to explore possibilities for addressing these problems. It encourages scholars and reformers of justice systems to recognize that legal techniques serve social functions, that courts are not necessarily the only intuitions through which disputes may be resolved and to look for some other alternatives. It advocates that procedural rules have an impact on how substantive laws are enforced. It examines to what extent, to whose benefit and at what cost substantive laws are enforced. (Cappelletti and Garth, 1974) It also underscores that changing rules does not necessarily make results effective. "The system has the capacity to change a great deal at the level of rules without corresponding changes in every day patterns of practice or distribution of tangible advantages. Indeed, rule change may become a symbolic substitute for redistribution of advantages."(Galanter, 1974)

The concept of access to justice demands a new thinking that addresses these limitations in making rights effective. This thinking has a number of advantages for reform programs in that it demands the exploration of different types of reform which

range from changing the forms of procedure to restructuring the courts. It explores possibilities for involving lay persons in the process, possibilities for modifying the substantive law to avoid litigation or to ensure speedy disposition and to encourage mechanisms for resolution of disputes other than the formal courts. It also underscores that all disputes are not necessarily the same and demands that the process must relate and adapt to the type of dispute that is submitted for resolution. (Cappelletti and Garth, 1974)

3.1.3. Barriers of Access to Justice

The concept of access to justice as a search for effective enjoyment of rights calls for a continuous identification of the reasons that impede the achievement of its goals. Much as the aspirations to ensure effective enjoyment of rights by the majority of the population is noble, studies indicate that there are many barriers which hinder the proper and effective implementation of those rights. The barriers of access to justice can either be subjective or objective depending on their nature. Objective barriers of access to justice refer to those constrains which limit citizen's ability to make use of the formal justice institutions. Subjective barriers of access to justice refer to those barriers that relate to the attitudes and knowledge of citizens about the legal system and its institutions. (Macdonald, 1990,) The nature and magnitude of some of these barriers will be discussed in the following sections.

A. Economic Barriers

Of all the barriers of access to justice, the economic barriers have attracted the greatest attention in access to justice studies. Economic barriers comprise direct institutional cost (filing fees, cost of expert, witnesses, court costs) and lawyers fees

as well as indirect costs which include costs incidental to the process such as lost wages, opportunity cost and expenses for transport and lodging.(Macdonald, 1990: 301)

Economic disparity between litigants is believed to have an impact on their capability to make use of the judicial process. Marc Galanter has come up with an impressive finding on how the ones with better economic resources make better use of the judicial process than the have-nots. Galanter divided litigants into two main categories: litigants who resort to the courts occasionally and litigants who get involved in similar litigation over time. He called the first ones one-shotters and the later repeat players.(Galanter, 1974) Galanter explains how repeat players have an advantage in the litigation landscape by virtue of their resources, their economy of scale, access to specialists and their low start-up costs for any one case. He also explains how the nature of the legal institutions raises the advantages of the repeat players. The passive nature of the legal institutions, in the sense that they must be mobilized by the claimant and that once started the burden is on the litigant to proceed with his case, augment the advantages of the repeat players. He argues that the assumption that parties are endowed with similar resources, investigative opportunities and legal skills does not hold true in reality. He further states that the "broader the delegation to the parties, the greater the advantage conferred on the wealthier, more experienced and better organized party"(Galanter, 1974:121) As the institutional resources available for adjudication are far less compared with the number of claims, the resulting overload accentuates the advantages of the economically powerful.(Galanter, 1974)

A recent study conducted in the United Kingdom by Lord Woolf has brought to the fore similar conclusions. The report has identified cost as one of the key problems barring access to the civil justice system in the United Kingdom. (Woolf, 1997:709) The magnitude of the cost involved in litigation is said to have deterred people from defending their claims. The high cost of litigation, according to this report, affects not only individual litigants, but it also affects big corporations and the general public. Businesses find it cheaper to pay up than to defend an action regardless of its merits. The high cost also affects the public through rising legal aid resources, and the costs which consumers have to pay when commercial companies pass on litigation costs to them. Rising litigation cost also affects the people who could have been eligible for legal aid. The higher the cost of litigation, the fewer would be the people who would be assisted, making the larger proportion of the population out of the legal aid scheme. According to Lord Woolf, not only was the cost of civil litigation excessive and unaffordable, but it was also disproportionate. The cost of litigation is considered proportionate when there is some balance between the result that is obtained and the money and time that invested to achieve the result. He observed that the cost of litigation in the UK was disproportional, particularly in smaller claims, because the cost of litigation exceeded the value that was at issue. (Woolf, 1997:712)

Another survey conducted in the UK has shown that the adverse effect of litigation cost on access to justice is felt more by people having smaller cases. The study conducted by Hazel Genn has confirmed that costs for litigation are disproportionate at the lower end of the scale, where the cost of litigation for one side alone is as much as or more than the amount that is claimed. (Genn, 1999)

Previous studies in other countries have likewise indicated that the cost of litigation is higher for the smaller cases than the larger ones. The study conducted as far back as 1958 in Germany by Kaplan, Von Mehren and Shaefer showed that the ratio of the cost of litigation ranged from 4.1% for the larger cases to 54% in the smaller ones. A research about the Italian situation is even more alarming. While the cost of litigation in bigger cases was 8.4%, the cost for a case of less than 1, 600 dollars was between 51% and 60% The cost goes up to 170% when the amount in dispute was only 160 dollars. Another study about Spanish litigation indicated similar pattern, where the cost for big cases was 8% and for the small ones it runs up to 80%. (Cappelletti, 1970-1971:873)

In disputes involving low priced goods, services or credit the cost associated with redress are often much higher than the benefits that may be obtained through recovery. Besides, as the redress will be obtained only at some point in the future, the value of the recovery needs to be discounted to its current value. Depending on the value which one attaches to time, it may be irrational for some claimants to lodge a claim for redress if there is a high risk that the claim may not succeed. The usual assumption that claimants engaged in redress are risk averse exacerbates the symmetry between the costs that are invested for redress and the value of expected recovery. (Finkle and Cohen, 1993)

Other studies have indicated that the cost of litigation can also affect the perception of the citizens about the fairness of the justice system. Ken-ichi Ohbuchi et al have proved in an empirical study conducted in Japan that the evaluation of people in the judicial system and their perception about the fairness of processes is explained by a

combination of factors one of which is low economic and temporal cost of litigation. (Ohbutchi et al, 2005) This study was based on, and confirmed, previous researches on litigation. Research conducted previously found out that the degree of satisfaction increases with the perception of fairness of procedures. (Allen and Tyler, 1988) The fairness of procedure in turn depends on the level of satisfaction of the disputants about the degree of their participation, the respect they experience in the process as well as the trustworthiness and neutrality of the third party. (Tyler, 1997:882)

Dispute resolution through the formal court system is an expensive venture in many legal systems. Although governments subsidize the process by covering the salaries for judges and other members of the court, by providing buildings and other facilities necessary to adjudicate cases brought to court, a great proportion of the other costs are covered by the parties themselves in varying degrees. This high cost which parties have to incur to vindicate rights or to defend themselves has become a powerful barrier of access to justice for which many legal systems have sought solutions. (Cappelletti and Garth, 1974: 11) This barrier of access to justice has been addressed in many legal systems depending on the cause for which the cost is primarily incurred.

The rules on the recovery of cost that apply in different legal systems have differing effects on access to justice. Reform programs thus have addressed the cost barrier by trying to address the financial incentives of the parties in the litigation process.

The two predominant rules on recovery of costs, the American rule and the loser pays rule, (sometimes also called the indemnity rule, cost shifting rule, cost following the

event, winner-takes it all etc (Rickman, 1995) affect the incentives in litigation in different ways. In those systems that follow the 'American rule' of recovery of costs, the parties primarily cover their own costs. In exceptional situations where the losing party is obliged to cover the costs, the winning party's reimbursement of expenses does not include the fees paid to the lawyers, which in many legal systems is considerable. (Cappelletti and Garth, 1974: 11) Under the loser-pays principle, on the other hand, the financial cost of both parties incurred during the litigation process is covered by the losing party. These two different procedural devices on cost provide different financial incentives to litigants. The loser pays principle provides greater incentive for optimistic plaintiffs to sue than the American rule. This happens because the party with greater probability to win would expect to have less cost as it will be covered by the other side. Under the American rule on the other hand, the plaintiff will cover his own cost whether he wins or not, thereby making the pursuit of litigation less profitable under the American rule. (Rickman, 1995) On the other hand the loser pays principle creates greater disincentive for plaintiffs with nuisance suits from going to court than the American rule. (Rosenberg and Shavell, 1985) This happens because the plaintiff with a weak case, not only would cover his own costs but that of the defendant as well. Besides, as the defendant likewise expects to be reimbursed by the plaintiff at the end of the process, he is more likely to defend himself as it would not ultimately cost him much. (Rickman, 1995) It must be noted, however, that the English rule does not necessarily deter plaintiffs with small value from bringing their case to court (assuming that they cover the initial cost) in so far as they are confident that they will win the case. In situations where there is a prospect of winning and an assurance that the costs will be covered by the other party, the case does not have to be worth the cost for its vindication. (Snyder and Hughes, 1995) The

implications of these rules on the probabilities of settlement by the parties during trial are immense. The incentives to settle which these rules create on the parties have been studied in connection with the perception of the parties about the outcome of the litigation. The English rule creates greater range for settlement and greater settlement when both parties to the litigation are not optimistic about the outcome of the disputes, i.e., when both parties think that they will lose. The American rule on the other hand provides greater incentive to settle when both parties have confidence about winning the case. This difference is a result of the basic condition for settlement in both rules that the amount which the plaintiff expects to get by going to trial should be less than the amount which the defendant expects to pay in the dispute. As a result when the litigants are both pessimistic about the outcome they could believe that they are likely to have to cover the other's costs. This makes the defendant expect to pay a bigger amount and the plaintiff to get less at trial. If both parties expect to win, under the English rule they would also expect to be able to recover their costs from the other side making settlement less likely under these rules relative to the American rules. (Rickman, 1995)

The financial incentive of lawyers during the process of litigation should also be taken as an important factor that can potentially contribute to the economic barriers of access to justice. Although the interest of lawyers in litigation includes the pursuit of justice, it is not wholly altruistic. They get financial remuneration during the process and as a result have an interest at stake. Apart from the overall issues of justice, they have an interest to further their own financial benefits. Whether paid by the hour or based on the complexity of the case, lawyers do not have the incentive to economize in the provision of services. Instead, lawyers earn more money when litigation is

protracted which gives them an incentive to complicate and prolong the process. This desire of the lawyers to earn more money through lengthy judicial processes is compounded by the clients' usual inability to resist the decisions because of lack of information about the process. (Zuckerman, 1995,: 64)

The issue of whether or not the cost of civil litigation should be covered by the parties to the dispute or by the tax payers has to be addressed by reform programs. If the tax payer bears the cost, it means less cost to the party in dispute. Although less cost means more access to justice, it may also have the adverse effect. Low costs encourage litigation, which, if not paralleled by increment of resources and productivity result in congestion and delay in the process which are barriers of access to justice by themselves. (Zuckerman, 2001) This delicate balance between access to justice and cost of litigation has been resolved in different legal systems in a variety of ways. Some systems, like Spain (Gimenez 2001) and France (Cadiet, 2001), have abolished court fees altogether thereby providing free justice to its citizens as far as court fees are concerned. In other legal systems fees which litigants have to pay as security at the beginning of the process have been declared by courts as unconstitutional. In still other countries the court fee structure has been used as an instrument to discipline the process by creating incentive devices for the parties and an instrument to control the flow of cases into the courts as in Germany. (Gottwald, 2001)

B. Procedural Barriers

As mentioned earlier, the concept of access to justice recognizes that the procedural rules have an impact on how, for whose benefit and at what cost substantive laws are enforced. As a result, many reform initiatives have focused on procedural issues to

address the barriers of access to justice and their undesirable effects. The theoretical foundations of access to justice have been changed into reform projects through reform of procedural rules. (Cappelletti and Garth, 1974)

Procedural rules affect access to justice in a variety of ways. The economic barriers discussed in the previous section are partly a result of the procedural architecture and can be addressed by changing those areas that cause the cost of litigation to rise. Studies indicate that the procedural design can result in a denial of access to justice by making the process complex, expensive and inefficient. The study conducted by Lord Woolf in England and Wales concluded that the high cost of litigation is a result of the excessive adversarial nature of the litigation, which if not controlled by the judges, gives the lawyers an incentive to invest more in the process. (Woolf, 1997:710) The civil justice reform Act in the United States attributed the cost and complexity of litigation partly to the procedural rules. On the other hand the German procedure controls the financial incentive of lawyers by fixing the time for payment of the fees at predetermined intervals. Besides, lawyers' fees are fixed by law, lowering their incentive to want the litigation to continue. The rules in England and Wales, on the other hand, allow lawyers to be paid by the hour creating an incentive in prolonged process. (Gottwald, 1997)

The procedural rules on *locus standi* are relevant for access to justice, and as a result should be a focus of reform. Traditional procedural rules which were based on individualistic conception of litigation were found to be inadequate to address the rights of people who were affected by mass wrong doers. Modern societies are characterized by an economy where production, labour, exchange and consumption

have become mass phenomena. In the light of these developments the individual has become powerless to enforce claims which emanate from mass-wrongdoers. The individual lacks the incentive to proceed with his claims, as the claim may be too small to bring an action against a powerful defendant. The procedural rules did not provide enough protection for a private individual who lacks the motivation, information or economic strength to fight against a powerful defendant. Even when an individual decides to proceed against the mass-wrongdoer, the individual victory would not be deterrent enough as it is only a fragment of a bigger whole. Procedural devices had to be devised to remedy the "organizational poverty" which stood on the way of access to justice. New concepts of standing were developed to create an "ideological plaintiff" who represents a group, category or class that had the organizational poverty. Although the problem in this regard was felt in all the systems, the solutions were not uniform. What was uniform was the effort to change millenary procedural designs so that they would allow individuals or associations in cases that could possibly involve thousands of persons. (Cappelletti, 1971:31-32)

Likewise, the roles which legal systems give to their judges or judicial organizations have an impact on access to justice. Excesses of adversarial litigation have been attacked in many systems because of their adverse effect on access to justice. Systems which leave litigation mainly under the control of the litigants or their lawyers create a greater incentive for the parties to prolong the litigation process as a result of which costs escalate. This trend is partly a result of the procedural design and access can be enhanced by changing the rules to give more power to the judges in controlling the process or creating different tracks for cases depending on the amount or complexity of the case. (Woolf, 1997:720)

Some procedural barriers emerge in connection with the nature of and method used by adjudication to resolve disputes. Although adjudication aims at rectitude of decision, it relies on biased information forwarded by the parties to achieve it by ignoring suspect decisions preceded by cognitive biases. (Resnik, 2003:183) The procedural barrier also emerges due to the limited nature of the solution which the formal justice system provides. The solution which is provided by formal courts by way of judgments may not be the optimal solution in some controversies. (Cappelletti, 1971, 33) Procedural design which encourage fighting for one's rights has its limits. The right-wrong solution which courts normally provide may exacerbate conflicts instead of resolving them in situations when the disputes arise between people who have continuous and repeat relationships. (Menkel-Meadow, 1996:27) In such cases "a conciliatory or co-existential justice could often be much more effective. It might lead to an approximation of positions or solutions in which there is not inevitably a winner and a loser, but a reciprocal understanding with a mutual adaptation of behaviour". (Cappelletti, 1971:33) The inherent assumption of the adjudication model on the relative equality of the combatants who have the resources to engage in combat has also given rise to a potential barrier in the process particularly for those who cannot have lawyers of their own. (Resnik, 2003:185)

C. Delay

Delay in the judicial process affects access to justice in a variety of ways. Delay in proceedings escalates the cost of litigation; thereby putting the have-nots in a disadvantaged position as they would be forced to withdraw from the process, or to settle for less optimum terms. Delay affects access to justice by increasing the

workload of the institutions, raising the average duration time and the overall backlog of cases. This discourages litigants from using the judicial institutions to vindicate their rights. (Macdonald, 1990: 301) Failure to render judgments within a period of time, where lapse of time makes the remedy provided thereafter of a little help, makes recourse to the judicial process of little or no use to the citizens. In such situations delay undermines the practical utility of the judgment regardless of its correctness. Procedures which allow delay to erode the utility of a judgment by depriving them of any practical utility affect access to justice. This aspect of delay is referred to as the incremental effect of delay to show the decreasing utility of remedies over the course of time. (Zuckerman, 1999: 7-8)

Delay affects access to justice by influencing rectitude of decisions. Delay in the process allows evidence to disappear or deteriorate thereby inducing error. Disputes that rely on oral testimony are particularly affected when longer time is allowed to elapse before the trial, as the probability of the memories fading increases with time. Reform programs that try to give greater access should therefore strive to put in place procedural devices that ensure adjudication of disputes when the evidence is fresh. (Zukerman, 1999: 7)

Because of the central role of speed in ensuring access to justice, basic human rights instruments have come up with basic standards which states are bound to achieve. The International Covenant on Civil and Political Rights provides that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release". (Art. 7(3), ICCPR) The European Convention on Human Rights gives the temporal aspect of the process a wider scope by making it

applicable both to civil and criminal matters. It provides that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law" (Art. 6, ECHR)

D. Subjective Barriers

Subjective barriers of access to justice refer to those barriers that relate to the attitudes to and knowledge of citizens about the legal system and its institutions. Some of the impediments to the achievement of equal access to justice include such attributes as age, ethnic background, and socio-cultural background, physical or intellectual deficiency. Many a time legal systems are designed with some stereo types in view and consider the young, the poor and the disabled not as important aspects of the system but as deviations from it. This creates a psychological barrier towards access to justice. (Macdonald, 1990: 299)

An equally significant subjective barrier of access to justice is lack of information and knowledge about the legal system and its institutions, which can affect all citizens alike. If the a big percentage of those for whom the systems are designed do not know about the existence of the system, or do not have adequate information on how to make use of them those systems mean nothing to them even if they are the best in terms of their content. At the heart of this subjective barrier is the truth that information is power and that empowerment should begin from reform programs that ensure equal access to information. (Macdonald, 1990:300) The subjective barrier of access to justice is manifested in either of two ways. The first is related to the knowledge on whether a right exists. This barrier affects more the disadvantaged

groups in society but can affect all citizens depending on the nature of the right. The second relates to the knowledge on how one can have those rights enforced. The knowledge and information base about these two points is low in many societies, including in those sections of society that are relatively more educated. (Cappelletti and Garth, 1974: 16) Reform efforts can, therefore, succeed in enhancing access to justice if, in addition to those objective barriers, these subjective barriers are taken in to account.

3.1.4. Schemes to Enhance Access to Justice

A. Legal Aid

Ensuring access to justice to citizens requires addressing the barriers that are discussed earlier. One of the significant problems which poor people face in vindicating claims is their inability to cover the cost which private lawyers charge for their services. Providing legal aid to those who cannot afford them becomes vital particularly in modern societies where procedures have become too complex and arcane for the ordinary citizens to understand. (Cappelletti and Garth, 1974:22) Introduction of legal aid has been one of the first measures adopted by legal systems to address the barriers of access to justice. This scheme is primarily concerned with the availability of legal experts to poor persons to provide legal advice or legal representation in or out of courts. (Cappelletti, 1992)

The provision of legal aid by the state to those in need is a recent development in access to justice movement. The basic principle that equality before the law requires recognition of the right to counsel was incorporated in many statutory provisions long before a duty to provide legal aid to the poor was imposed on the state. England had

it in 1495, France in 1851, Italy in 1865, and Germany in 1877. None of these systems, however, provided government funding to finance the vindication of rights which they recognized in their laws. (Johnson, 2004) Instead, economic barrier of access to the legal experts was resolved through what was called the honorific duty of the practicing lawyers to provide legal service to the poor without them getting any compensation for their services. Through the *pro bono* solution, a societal responsibility of providing aid to the poor was transferred to the generosity of the legal profession. Through this solution the state recognized the problem of access to justice, but did not take any positive obligation towards solving it efficiently. This approach was typical of the political laissez-faire philosophy that was then prevailing. Both qualitatively and quantitatively, the honorific duty solution turned out to be inadequate to meet the demands of effective representation for the poor. As a result, some other solutions, which included partial compensation from public funds to the services provided by lawyers, were introduced in a number of legal systems including Germany, England, Holland France and Italy. These reform programs accepted the positive obligation of the state to compensate the private legal aid lawyers for the services they provided. This was the first legal aid model which is called judicare. (Cappelletti, 1992:29)

This positive obligation of the state to pay for the legal aid of the poor was implemented through some other models in other jurisdictions. The primary ones were what Mauro Cappelletti calls the staff-attorney model and the mixed model. The staff attorney model which was first introduced in the United States of America in 1965 provides publicly salaried attorneys to assist, give advice and represent the poor instead of compensating the private lawyer for their services. Other legal systems opted for a third, mixed model solution, because of the disadvantages that are

inherent in the first two models. The main disadvantage of the judicature model is that the private lawyer, in spite of the experience and organization, may not have the experience with the special nature of the legal problems of the poor. Besides, the poor may not have adequate information about the services provided by the private lawyer in addition to the fact that most of the time offices of the private lawyers may not be conveniently located. The staff-attorney model addresses the shortcomings of the judicature model, but suffers another shortcoming; that a very large organization of publicly funded office for attorneys that is big enough to meet all the demands could be established even by the richest of countries. (Cappelletti, 1992:29)

It must be added here that the obligation of the state to provide legal aid to the poor was primarily achieved through judicial interpretation of the Constitutional rights of equality before the law, fair hearing or due process of law. (Johnson, 2004) The Swiss Supreme Court based its arguments on the 'quality before the law' principle in the Swiss Constitution when it declared that poor people in civil litigation have the right to get state appointed counsel in 1937. The judgments of the German Constitutional Court in 1953 and the European Court of Human Rights in 1979, which likewise declared the same duty of the state in civil cases, on the other hand, were based on the right of fair hearing which was a fundamental right in the basic law of Germany and European convention of Human Rights respectively. (Johnson, 2004) The Supreme Court of the United States in Lassiter v. Dep't of Soc. Services of N.C., however, arrived at an opposite conclusion in 1981and held that the due process clause in the Constitution does not provide the right to counsel in civil cases(Lessiter v. Dep't of Soc. Services of N.C., 452, U.S 18, 31-32 (1981, p. 31-32). In the United States the

due process clause was interpreted to give citizens the right to counsel only in criminal cases. (Gedeon v. Wainright)

B. Alternative Dispute Resolution (ADR)

Alternative dispute resolution refers to those mechanisms that are used to resolve disputes without recourse to the institutions of the formal legal system. (Finkle and Cohen, 1993, p. 81) Although ADR does not have generally accepted abstract or theoretical definition, it has a fundamental premise. It aspires to resolve the cost of resolving disputes and to improve the quality of the final outcome. (Lieberman and Henry, 1986:425) Failing a generally accepted definition, some have preferred to provide a working definition for ADR as "a set of practices and techniques that aim (1) to permit legal disputes to be resolved outside the courts for the benefit of all disputants; (2) to reduce the cost of conventional litigation and the delays to which it is ordinarily subject; or (3) to prevent legal disputes that would otherwise likely be brought to the courts". (Lieberman and Henry, 1986:425) ADR, so understood, has existed in many societies and has ancient heritage. Elders, religious or clan leaders resolve disputes without necessarily using law or the ordinary courts in many traditional societies. There is no recourse to formal state-sanctioned legal systems in many customary law situations. (Finkle and Cohen, 1993:81)

In those systems where adjudication was the main model for dispute resolution, the move towards embracing ADR is a result of the dissatisfaction and lack of confidence of the public on the prevailing dispute resolution system. (Lind and Tyler, 1988) The dissatisfaction was mainly a result of the delay and high cost which was associated with the dispute resolution process in the courts. As a result of the recognition by

legal authorities that providing people with timely and affordable opportunities to resolve problems is one important aspect of dispute resolution behaviour, the ADR movement was born in an effort to reduce court congestion, cost and time both to the courts and the litigants. (Lind and Tyler, 1988)

There are stronger theoretical attacks on the goals and methods of the adjudication model which augment the needs for ADR. It is argued that the "binary oppositional presentation of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies". (Menkel-Meadow, 1996) This critique is founded on the post-modern understanding about knowledge that there is no fixed truth and that meanings can only be located provisionally. Those whose responsibility it is to find the truth also have their own interests that affect how they see the world. Related to this is the scepticism of post-modern thinking about objectivity and neutrality on which the adversarial model is based. (Menkel-Meadow, 1996:15) This makes adjudication inappropriate for dispute resolution in terms of its goal and methods raising the need to look for some other alternative ways of dispute resolution.

The limits on the solution which the formal dispute resolution methods provide also gives rise to the need for an alternative method which addresses the central problems of the formal justice system. The remedies that can be provided and the solutions that can be achieved through adjudication are limited because of its binary solution. (Menkel-Meadow, 1996:6) Trying to use the two sided style of the adjudication to resolve many-sided disputes can be worse than "jamming the proverbial square peg into the round hole". (Lieberman and Henry, 1986:438)

The development of ADR can therefore be related to two critiques of the adversary model which attack the premises on which it is based. The first challenge is that the conditions for the fulfilment of the ideal of the adversary model cannot be met in reality. The adversary system cannot live up to its ideal because parties to the dispute will not have equal resources, the self-interested pursuit of profit by lawyers distorts their loyalty and zeal and the decision makers are unavoidably affected by bias. (Kruse, 2004-2005:391) Contrary to its ideal, the adversary system tolerates results that do not go along with its goals. Instead of truth and justice, the system comes up with obfuscation and strategic manipulation. The lawyer's training is such that the interests of clients are framed into legal issues which may not necessarily capture their true wishes. "Because adjudication narrows the dispute by restricting discussion to the legally cognizable issues embedded in a particular incident, a trial may resolve the legal case while leaving untouched the underlying relational or structural causes of the dispute." (Wissler, 1995:323)

More profound as a basis for ADR is, however, the second challenge which raises issues on the theoretical validity of the ideals of the adversary system. The basic goal of achieving 'the right result' at the end of the adversarial process is not achievable as there is no single answer to 'what really happened?' The search for a system that replaces the unitary truth as a goal of dispute resolution is therefore the basis for the development of ADR. (Kruse, 2004-2005:393)

The development of ADR is supported by some normative conceptions that elaborate the goals, methods and framework under which it operates. In lieu of the 'right result'

goal, 'just harmony' is forwarded as a viable goal for dispute resolution. This is a new goal against which the operation of procedures in ADR would be measured. (Kruse, 2004-2005:393) Under this system, instead of trying to determine which party's story is factually or normatively correct, the process motivates parties to strive to collaborate to overcome conflict. This is achieved in part, like in mediation, by helping parties to recognize the perspectives of other disputants instead of focusing on their own perspectives of what happened. (Robinson, 2004) Achievement of the just harmony goal of ADR is premised on methods that ensure authentic participation of the parties in the process as opposed to the strategic manipulation which has so characterized the adjudication process. (Kruse, 2004-2005:394) In these processes deliberation is not conducted just for the sake of achieving the 'right results' but to encourage all to hear and to be heard in the process of dispute resolution by allowing transformation of one's own views as much as trying to transform the views of others. (Kruse, 2004-2005:395) Not only will this participatory process allow better results by allowing more perspectives of a problem to be examined, but outcomes will also be perceived as more legitimate by those who were involved in the process. (Kruse, 2004-2005:395) Not only will ADR settle disputes, but it will also settle them justly. The interest of ADR is not, therefore, just ensuring harmony through settlement as there are different factors that may contribute to settlement without necessarily being just (Posner, 1973).

The ADR development does not rule out adjudication as a modality for dispute resolution. It is admitted that some disputes can only be resolved appropriately through the adjudication process as opposed to others which have to go through a different procedure altogether. Opinions are split as to which dispute should go to adjudication and which ones to other alternatives. (Menkel-Meadow, 1996:42) In

resolving this dilemma some have suggested the theory of 'appropriate fit' as a solution whereby "the full panoply of methods for resolving disputes would be available to resolve contested matters, ranging from formal adjudication to informal mediation, and different kinds of deputes would be routed to their most appropriate venue". (Kruse, 2004-2005:394)

ADR has a number of advantages compared to litigation in the ordinary courts. ADR provides a better forum for parties who do not want to strain their future relationship by submitting their disputes to the ordinary courts; it also gives the parties an opportunity to actively participate in the process of dispute resolution; it addresses the privacy concerns of the litigants; and it gives a wider opportunity for parties to directly negotiate about their problems. (Dakolias and Ratliff, 1995) Outcomes are likely to be more predictable in ADR as the mediators or the arbitrators are more familiar with the subject matter in dispute. ADR can be more advantageous when the stakes are high in commercial transactions as it can utilize arbitrators who may have specialized knowledge on the nature of the business than judges. (Dakolias and Ratliff, 1995) ADR creates a better forum for presentation of evidence, interests or arguments as the rules may be set up by the parties to suit them. The range of possible solutions that can be provided to resolve a dispute through ADR is also wider than the remedies that can be obtained in the formal court system. (Finkle and Cohen, 1993)

The role of ADR in cutting the costs of litigation is immense. ADR ensures lower cost in litigation in either of two ways. Some forms of ADR allow non-lawyers to be involved in the process and thereby minimize the fees that would have been paid for lawyers. Besides ADR contemplates methods and institutions that are more friendly,

allowing self representation by the litigants. ADR saves costs by avoiding steps in the normal procedure which might be used by litigants to wear out the other party. In this respect ADR reduces the cost by streamlining procedure through the omission of some of its stages. (Carrington, 1996)

Outcomes in some forms of ADR, like mediation, are likely to be implemented more easily than adjudicated outcomes as they are based on agreements that are reached by the parties. Besides, ADR provides the probes deep into the causes of the dispute, thereby giving the chance for restoring the long-term relationship between the parties. ADR has this virtue because, unlike the adjudicatory process, it does not declare one party to be "right" and the other "wrong". (Garth, 1974) The process of ADR, unlike adjudication, is not bound by the zero-sum game. The parties to the dispute are not limited to the legal definition of their dispute. The solutions which parties in ADR come up with can be far more novel than the remedies that can possibly be provided in adjudication in courts because the parties can creatively solve the problem that gave rise to their disputes. (Lieberman and Henry, 1986)

Empirical Studies conducted in different countries on ADR have proved that some forms of ADR are satisfactory to most of the disputants involved. (Tyler, 1997:882) Disputants evaluate some forms of ADR more favourably than adjudication with regard to the process, outcomes and the role of third party. (Wissler, 1995) "The mediator was seen as warmer, more interested in the dispute, having a better understanding of the dispute, more active and more likely to remain neutral than was the judge". (Wissler, 1995:354) The satisfaction of the participants did not differ widely depending on whether or not they have won or lost in the process. (Wissler,

1995:338) This is consistent with previous research findings that the degree to which people "win" is the least important issue in civil justice. The process by which their dispute is handled is the most important issue to people followed by the fairness of outcome. (Lind and Tyler, 1988)

These advantages notwithstanding, some forms of ADR have been criticized by some scholars on the grounds that they give heavier emphasis to the interests and desires of the disputants thereby undermining the objective quality of decisions reached. In his famous article "Against settlement", Owen Fess argues that settlement as one mode of resolving disputes should be discouraged. Even if settlement helps in streamlining dockets, he argues, it is a "problematic technique" that does not ensure justice. He attacks settlement on the grounds that the imbalance of power between the parties, the absence of authoritative consent by the parties and the absence of the foundation for the involvement of the judiciary at a later stage provide the grounds for unjust outcomes. He argues that:

> The advocates of ADR are led to exalt the idea of settlement more generally because they view adjudication as a process to resolve disputes. They act as though courts arose to resolve quarrels between neighbours who had reached an impasse and turned to a stranger for help. Courts are seen as an institutionalization of the stranger and adjudication is viewed as the process by which the stranger exercises power. …..The dispute-resolution story makes settlement appear as a perfect substitute for judgment… by trivializing the remedial dimensions of a lawsuit, and also by reducing the social function of the lawsuit to one of resolving private disputes: In that story, settlement

> appears to achieve exactly the same purpose as judgment-peace between the parties-but at considerably less expense to society. (Fiss, 1984: 1076)

Some others focus on the 'process dangers" for parties with unequal bargaining power to point out the weaknesses of ADR. (Grillo, 1991)

There are, however, strong points against the critics of ADR. First, the ADR movement does not insist in diverting all claims to alternative forums. As it argues for appropriate fit, it does not necessarily advocate for a non-judicial solution for every legal dispute. Second, settlement of issues does not necessarily foreclose the possibility of seeking judicial answers at a later time when serious issues at stake arise and cannot be compromised. Third, the argument that justice can always be attained through court judgments is doubtful given the practical unattainably of many of its preconditions. (Lieberman and Henry, 1986:433)

C. Small Claims Tribunals

As shown in the previous sections the cost of litigation affects parties with small claims more than others. This situation hinders the enforcement of the rights of those people with a relatively small amount of money. The reform on access to justice has to respond to the special needs of this category of people, who are usually also poor. Establishment of small claims tribunals for resolving the little "injustices" through procedures and devices that fit their demands is a result of the growing concern for looking for procedures that fit the nature of the small claims. (Cappelletti and Garth, 1974)

To attain the avowed objectives of reducing cost and creating an environment that is more conducive for the 'ordinary man' than the regular courts, a different procedural design in the form of small claims tribunals had to be put in place. Some of the measures taken in this direction include using less qualified judges for adjudication, limitations on the rights of appeals, restriction or total prohibition on the representation by attorneys, reduction in filing fees and not allowing reimbursement of lawyer's fees for the winning party.(Cappelletti and Garth, 1974)

Small claims have proved to be instrumental in promoting greater access to justice to the ordinary citizens by reducing distance and providing flexible timing to accommodate their convenience. The procedures for filing claims are less rigid than in the ordinary courts and assistance is provided to the parties on how to draw their pleadings. The adversarial nature of the litigation process in the courtroom is also changed to ensure greater equality between the parties through an increasingly active involvement of the judges in the process and by relaxing the rules of evidence and allowing discretion to judges to match procedures with the nature of the claims. Greater utilization of mediation as a modality for dispute resolution makes these tribunals achieve their purposes than the adjudication method. Studies have proved that that one shot litigants do relatively better than the repeat players in small claims tribunals which use the conciliation method than in those which use the adjudication method. (Cappelletti and Garth, 1974)

Establishment of small claims tribunals is dictated by the proportion of the cost which these claims invest relative to the claim sought. As mentioned earlier, the high cost of litigation affects people with relatively smaller claims as the cost becomes high

compared to the sums sought. Diverting such disputes to other tribunals that are more fit to handle these claims not only helps the formal court system by reducing the workload, but it also creates a better forum to those people who would otherwise have found it difficult to come to the formal court system because of the cost and other impediments. (Finkle and Cohen, 1993)

D. Traditional Dispute Resolution (TDR) Institutions

The role which traditional institutions play in making justice more accessible to citizens should be given special focus. This is particularly imperative in pluralist societies where TDR operates side by side with formal dispute resolution institutions.

Legal pluralism primarily denotes a situation where "a category of social relations is within the fields of operation of two or more bodies of legal norms" This plurality of legal norms has manifested itself in either of two ways in many African countries. In some African countries, the state laws have given recognition and incorporated previously existing customary laws into the state law. In other countries customary law operates in spite of the recognition by the state law. The two varieties of legal pluralism are sometimes referred to as state law pluralism and deep legal pluralism respectively. (Woodman, 1996)

Attempts to wipe out legal pluralism in many African countries did not become practical. The pluralist feature of many legal systems can be abolished either by abolishing the customary law which is competing for legitimacy with the state law or by unification of state law. Either of these two paths is impractical either because the states in Africa are not strong enough to do away with customary law or non

recognition of the customary laws by the state law would only mean continuation of deep legal pluralism, continuation of customary law in spite of recognition by state law. (Woodman, 1996:163)

African societies are pluralistic. In many of these societies indigenous traditional relationships coexist with relationships that are governed by state rules. The main issue of access to justice to many newly emerging African states has been on how to grapple this pluralism on the one hand and ensure integration on the other. (Bush 1074-75:1123) This is particularly true in situations where communities attain political unity before attaining social unity. Under such circumstances, the governments should take into account the characteristics of their communities if they want to avoid the ineffectiveness of laws aimed at achieving integration.(Vanderlinden, 1966-1967)

The operation of customary laws in spite of non- recognition by state law is instructive for access to justice initiatives. Studies in many African countries have shown that the customary laws of many tribes have continued to operate long after the imposition of formal law on these tribes. Traditional court systems have retained their structure and continued to provide their services to the local population even in situations where governments have established formal courts and denied them legal recognition. The members continue using their traditional rather than the formal courts even where an avenue is available to vindicate rights by using the latter. (Shack, 1969:165)

This persistence of customary arrangements could partly be explained by the nature of customary procedures which can be characterized by intelligibility, accessibility, simplicity and informality. (Bush, 1974:1126) Allot aptly summarized the main features by saying that in the African customary procedure,

> 1) Justice was popular. The People could understand the machinery …and in many places participated directly in judicial proceedings. 2) Justice was local and speedy...3) Justice was simple and flexible. There was no elaborate code of procedure or evidence. (Allot, 1965:232)

The impact of pluralism on access to justice is immense. Access to justice is recognized and indeed accepted as an important principle to make the rights of citizens effective. The mechanisms for implementing this principle in pluralist societies, however, demand a proper perspective that takes their specific situations in to account. In pluralist societies, pluralist understanding of access to justice is imperative to implement an equal access to justice. This requires, amongst other things, recognizing that pluralism in society calls for institutional pluralism. Recognition of this pluralism should be supported by an exploration of the range of the needs that prevail among the members of the population seeking justice and the possible range of institutions that are capable of meeting these needs. (Bush, 1974:304) Without this recognition, access to justice would mean "one dimensional response that, in the pluralistic context, is unnecessary, unjust, ineffective, or even 'totalitarian'" (Bush, 1974:308).

3.2. The Constitutional Framework for Access to Justice

3.2.1. Right of Access to Justice

Access to justice is recognized as one of the fundamental rights in the Constitution. Article 37 of the Constitution on the right of access to justice provides that

> 1. Everyone has a right to bring a justiciable matter to, and to obtain a decision or judgment by a court of law or any other competent body with judicial power
>
> 2. The decision or judgment referred to under sub Article one of this Article may also be sought by
>
> a. any association representing the collective or individual interest of its members, or
>
> b. any group or person who is a member of or represents a group with similar interests.

This provision recognizes the fundamental right of everyone to seek a remedy from an ordinary court of law or some other institution that exercises judicial power on matters that are justiciable. The right of access to justice, as articulated in Article 37 of the Constitution, envisages both the ordinary courts and other tribunals in playing a role where there are justiciable disputes. This implies that judicial power could be entrusted to bodies other than the ordinary courts. The experience of other legal systems in this regard is not uniform. Some systems allow judicial authority to be entrusted to non-judicial agencies. Others have very explicit provisions prohibiting this type of arrangement. The difference between systems in this regard is explained by the historical and legal tradition of every system. (Cappelletti, 1973:681) The Ethiopian constitution on the one hand declares that judicial power at both the Federal

and State level is vested in the courts. (Art. 78, Const.) The Amharic version of Article 78 is not exactly the same as the English version. The Amharic version includes a word "*bicha*" which means 'only' conveying the idea that only the courts can exercise judicial power in Ethiopia. Article 37 of the Constitution on the other hand seems to convey the idea that adjudication of justiciable matters may be handled by other duly constituted organs. An examination of the other provisions of the Constitution reveals that it given the power of adjudication to customary and religious institutions which are not necessarily part of the ordinary courts mentioned under Article 78. It would therefore be more plausible if one interprets the Ethiopian Constitution to have allowed entrusting judicial power to other bodies, which is a common practice in Anglo American countries. (Cappelletti, 1972-1973:681)

One can note from the reading of the constitutional provisions quoted above that the right of access to justice can be exercised not only by the individual concerned, but also by some others on his behalf. Associations are allowed to seek access to justice by representing the collective interest of their members. They can also seek access to justice by representing one of their members. The right of access to justice can also be exercised by a group that has similar interests. It can also be exercised by a member of that group in so far as there is common interest. These provisions have widened the rules in the CPC on representative action (Art. 38, CPC). Under the rules in the CPC representative action is permitted if

a. several persons have the same interest in a suit and
b. the persons having the same interest agree to be represented.

The scheme which allows associations to represent private individuals in diffuse interests has been encouraged by the access to justice movement as it tends to exploit private initiative and zeal rather than relying exclusively on governmental agencies to have some rights protected. (Cappelletti, 1992)

3.2.2. Right to Counsel

The right to be represented by counsel in legal proceedings is incorporated as one of the fundamental rights in the Constitution. The Constitution provides that "accused persons have the right to be represented by legal counsel of their choice, and, if they do not have sufficient means to pay for it and miscarriage of justice would result, to be provided with legal counsel at state expense". (Art. 20 (5), Const.) At first glance this gives the impression that in the Ethiopian legal system the state has assumed a positive obligation to cover the expenses that are due for poor litigants. The right to counsel is indeed recognized as a fundamental right and the Constitution does not rely on what is called the honorific duty of the private lawyers to provide legal services without compensation for the poor. The state's obligation to provide legal counsel applies to persons that are charged of criminal offences (Art. 20, Const.), raising doubts on whether the same right in civil proceedings has any constitutional recognition. No state legal aid scheme is explicitly envisaged by the Constitution for people in civil litigation.

As discussed in Chapter three of this thesis, in other legal systems the obligation of the state to provide such services in civil litigation was based on rights to equality, right to a fair hearing or due process of law. The fact that the Constitution has not explicitly imposed an obligation on the state to provide legal aid to the poor in civil

litigation may, not therefore absolve the sate of assuming the same obligation in civil cases based on other constitutional provisions.

3.2.3. Recognition of Customary and Religious Dispute Resolution

The new Ethiopian Constitution is characterized by important pluralist ethos. As mentioned earlier, the predominant attitude in Ethiopia has been replacement of customary law by state law through sweeping repeal provisions in many of the Codes that were primarily based on western values. The Constitution has reversed this pattern to some extent thereby creating more room for legal pluralism. "In what may be called a major departure from the received constitutional tradition of the country, the Constitution of the Federal Democratic Republic of Ethiopia provides the framework for the independent validity of non-state or unofficial law such as customary and religious laws in some fields of social activity." (Fentaw, 2007)

Article 34(5) of the Constitution declares that the "Constitution shall not the adjudication of disputes relating to personal and family matters in accordance with religious or customary laws with the consent of the parties to the dispute." Article 78 of the Constitution also provides in part that "Pursuant to Sub Article 5 Article 34 the House of People's Representatives and State Councils can establish or give official recognition to religious and customary courts".

In the previous legal arrangements although customary and religious laws were used by a significant part of the population to regulate relationships and to resolve disputes, there was no explicit legal recognition of their existence. Legally speaking many of the customary and religious laws did not exist because they were by and large

repealed by the CC. (Art. 3347, CC) There were some places to which the state laws made a reference to customary and religious laws. The incorporation of customary law in the state law was, however, limited. Not only did the state law recognize customary law in limited areas, but its recognition was also limited to the customs of some groups. The customary laws of many of the nationalities in Ethiopia did not have any legal recognition. In marriage relationships for example although the CC allowed celebration of marriage to be conducted on the basis of religious or customary laws, "marriage produces the same legal effects, whatever the form according to which it has been celebrated". (Art. 625, CC)

The explicit recognition of custom and religion in the Constitution has changed this scenario and has given individuals the option to use their customary or religious laws if they so wish. This constitutional provision gives legal recognition to many alternative ways of settling disputes which are effectively working in many parts of the country. The Constitution also envisages the recognition or establishment of religious courts by Federal or State law making bodies. (Art. 78(5), Const.) Religious courts have been established at the Federal and State level. At the Federal level a three-tier Shari 'a court structure, distinct from the ordinary courts is established by the Federal Parliament. (Pro. 188, 1996) The jurisdiction of such courts is limited to personal matters such as marriage, divorce, maintenance, guardianship and succession of wills. (Art. 4(1), Proc. 188, 1999) These courts do not, however, have a compulsory jurisdiction even on such claims. Their jurisdiction is dependent on the consent by the defendant (Art. 4(2), Proc.188, 1999) which has to be explicitly provided lest the cases be transferred to the ordinary court. (Art. 4(3), Proc.188, 1999)

3.2.4. Federal Arrangement and the Right to Self Determination

The right of access to justice has also been enhanced by the federal arrangement which is a recent development in Ethiopia. Not only has the federal arrangement allowed the states to establish their own court structures, but it has also enabled litigants in many parts of the country to use their own languages in court proceedings. Earlier on, all the courts throughout the country used only the Amharic language in courts and translations had to be provided even when the litigants and the judge spoke the local language. After the adoption of the Constitution, the courts in Tigrai, Oromiya, Somali States and the Sidama in the SNNPR use their respective languages in court proceedings. Translations are available to those who do not speak the local language.

3.3. Barriers of Access to Justice in Ethiopia

3.3.1. Delay

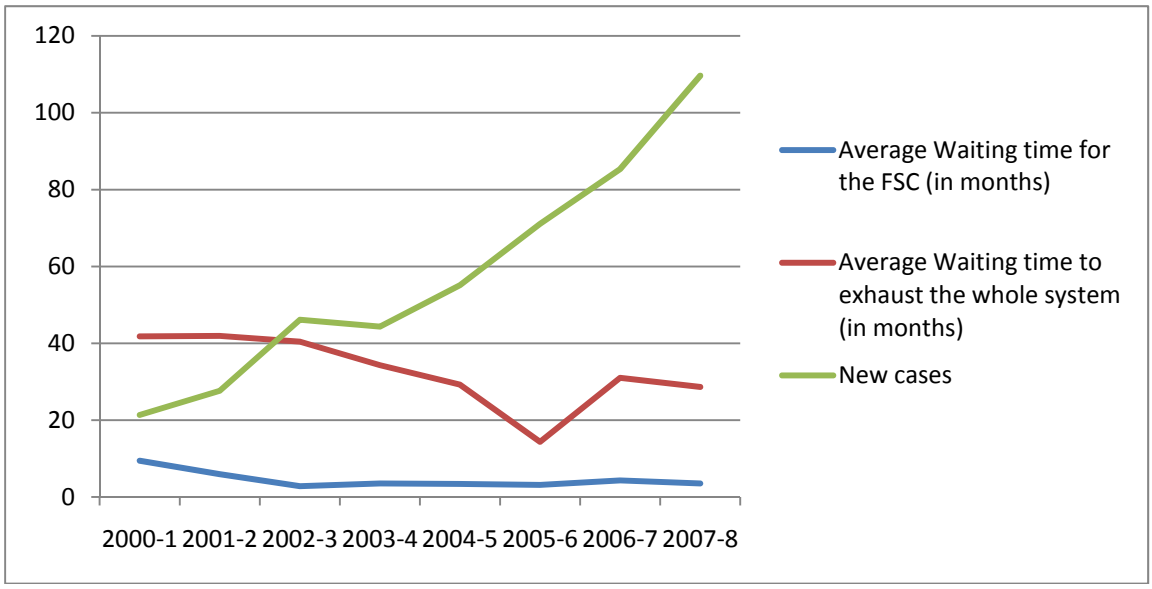
No systematic study has been conducted as to how the speed of litigation in the Ethiopian courts affects access to justice. It is clearly articulated that delay reduction is one of the main objectives of the judicial reform program which has been implemented both at the Federal and State Courts.

Table 1 : *Average waiting time (in Months) in the Cassation Division of FSC (for all cases)*

Year	Number of Cases Disposed	Average Waiting time for the FSC (in months)	Average Waiting time to exhaust the whole system (in months)	Number of New Cases
2000-1	949	9.47	41.81	1068
2001-2	1339	5.94	41.93	1383
2002-3	2060	2.82	40.44	2308
2003-4	2802	3.55	34.31	2218
2004-5	2866	3.42	29.22	2757
2005-6	3625	3.17	14.35	3554
2006-7	4352	4.35	31.03	4266
2007-8	5494	3.52	28.64	5482

Source the FSC database

Figure 2: Average Disposition time and new cases



Key: New Cases are scaled 1 to 50

While the average waiting time that was needed for a case to exhaust the whole system was 41.81 months in 2000-2001, this has been lowered to 28.64 months in the year 2007-2008. As the length of the waiting time which constitutes delay in the process is an important variable, the overall improvement that has been observed in delay reduction can be taken as an important improvement in making justice more accessible. The duration time for the cassation division in the FSC is reduced from 9.47 months in 2000-2001 to 3.52 in 2007-2008. The overall reduction in waiting time for the whole system can only be explained through a reduction of waiting time in all the courts through which the cases included in this data have passed through. As the cassation division of the FSC has competence to hear cases coming from all state

courts, the data is an important indication that there is, on the average, an improvement in waiting time in the whole legal system. During the same period one notices an increment in the demand for judicial services, indicating that the court has become more accessible to a greater number of users. The demand has increased from 1068 in 2000-2001 to 5482 in 2007-2008. As observed in the previous chapters, the shortening of the waiting time by and large, is related to the reduction in the number of appearances during the process. In the cassation division every additional appearance means that the parties have to travel back and forth from the other parts of the country as many of the applications for review come from the Regional States' courts. The reduction in the number of appearances in the cassation division which is located in Addis Ababa results in a big reduction of cost as it means a reduction in accommodation and transportation expenses.

The data shows that the waiting time in judicial services is inversely related to the demand for judicial services which indicates accessibility of the justice system. This is consistent with studies that have been conducted in other legal systems. More people are likely to go to a court system which disposes cases in a shorter period of time than to a court that takes relatively longer. The reform initiatives should therefore maintain the pattern of reducing the average duration time to enhance access to justice to the courts at all levels.

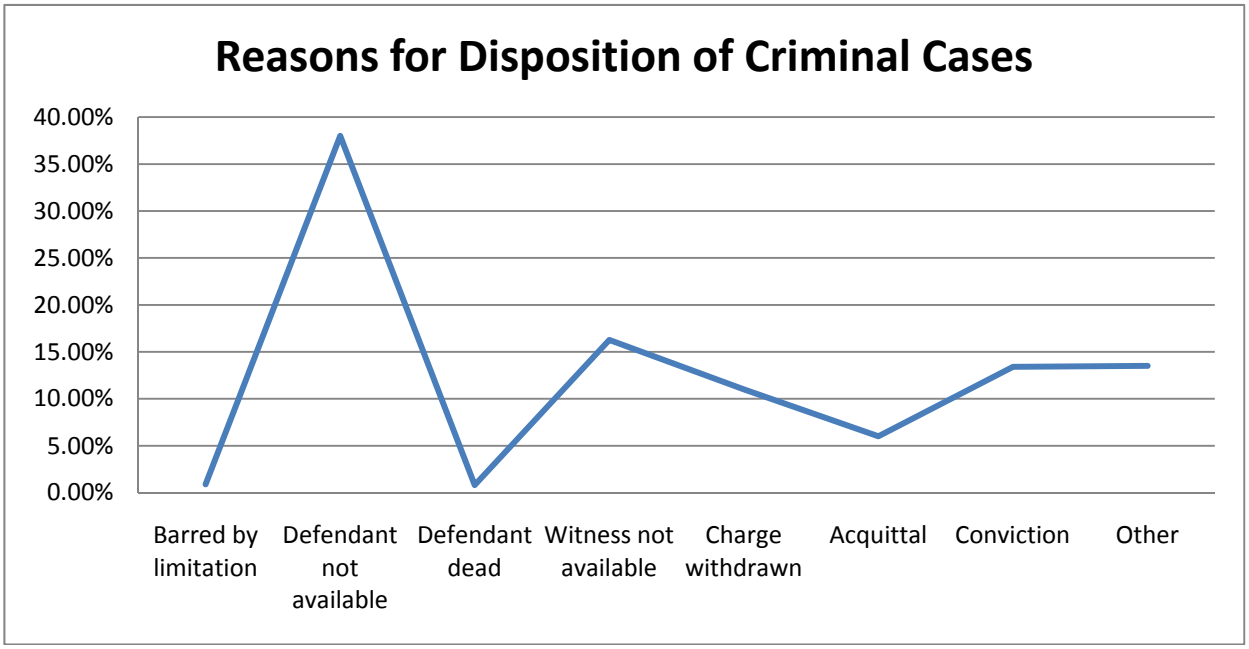
The impact of delay on access to justice is more pronounced in criminal proceedings. Partly because of the delay in processing criminal cases in the courts there is a high degree of attrition rate in criminal cases which is reflected in the termination of many criminal cases for reasons other than final judgment. This has caused a low conviction rate in criminal cases which has a negative impact on access to justice for victims of crime.

Table 2 : *Disposal of Criminal Cases in the FFIC (One Month)*

Court	Total	Barred by limitation	Defendant not available	Defendant dead	Witness not available	Charge withdrawn	Acquittal	Conviction	Other
Abnet	177	1	78	3	26	30	4	32	3
Kera	264	11	151	4	23	24	16	35	
Menagesha	268	1	53	2	88	50	33	13	28
Paulos	198		72	3	22	18	3	52	28
Akaki	406	9	238	6	23	19	3	79	29
Arada	585	2	169	7	38	59	45	54	211
Yeka	416		135	1	92	39	29	22	98
Lideta	869	4	311		206	117	59	139	33
total	3183	28	1207	26	518	356	192	426	430
%		0.9%	38%	0.8%	16.27%	11%	6%	13.4%	13.5%

Source: FFIC

Figure 3: Reasons for Disposition of Criminal Cases in FFIC



Out of a total of 31803 cases that were disposed in one month only 618 (19.4%) reached the trial stage. 54.27% of the cases were terminated because either the defendant or the witnesses were not available. In all these cases the victims of crimes did not see justice being done. Although the role of other factors cannot be ruled out, delay plays an important rule in frustrating the whole process. In pilot benches where criminal cases were processed in a shorter period of time not only did many more cases reach the trial stage and were examined on the merits, but the conviction rate also increased.

Given these empirical data the usual complaint by victims of crime that the justice system is not accessible is understandable. Partly because of the delay in processing the cases, many of the reported crimes remain unaccounted by the legal system.

3.3.2. Costs

The costs which parties are made to shoulder because of the delays in the courts can only be reduced by addressing the basic reasons for delay. The reform initiatives which address the problems of delay would therefore have a positive impact on access to justice. The dimension of court efficiency is therefore directly related to its accessibility.

The number of lawyers in Ethiopia is very small. As a result, many litigants represent themselves during litigation. The impact of this state of affairs on access to justice is understandably negative. Their unavailability, on the other hand, means, however, that litigants do not have to pay lawyer's fees. The prime problem in Ethiopia is not that lawyers are too expensive, but that they are not available.

Neither are court fees a big barrier of access to justice. Not only are the fees relatively small, but litigants can also proceed without having to pay the fees if they can prove that they do not have the means to do so. The process to get the exemption is relatively easy and cheap. Courts are generally lenient in weighing the evidence adduced to show that the claimant does not have sufficient means to pay the fees.

Apart from the direct cost which litigants pay to the courts and attorneys, there are indirect costs in the litigation process which can greatly hamper accessibility of the justice system. The greatest barrier of access to justice is the cost which parties have to incur to travel to the court site. As this cost is the same for all the parties regardless of the amount in controversy it affects the litigants with small claims more than the ones with relatively higher claims. All claims that are above 5000 Birr, which, in

many cases, are handled by the regular courts, go through the same procedure at all levels. In all the state Courts, the First Instance Courts have the competence to entertain cases if the dispute is worth less than Birr 10, 000. Any claim more than Birr 10, 000 falls under the jurisdiction of the High Courts of the states. For such claims the parties as well as their witnesses have to travel to the place where the High Court seats which in many cases is located in the urban centres. The parties should likewise cover these costs if they opt to go on appeal to the next court. Not only does this cause inconvenience to the parties but it also means additional cost to cover transportation and other related expenses.

Table 3 : *Average Cost for a single trip to the High Court in Debreberhan*

Place where the first instance court is located	Distance to the High Court	Transport cost, (round trip)	Three-day Per-diem	Lost income in three days	Expenses for witnesses (average of three)	Total
Mehalmeda	150	50.70	105	105	782.10	**1042.80**
Merhabete	135	56.35	105	105	799.05	**1040**
Ataye	145	54.45	105	105	793.35	**1057.8**
Minjar	265	99.50	105	105	928.50	**1238**
Berekt	380	142.50	105	105	1057.50	**1410**

Source: Semen Showa High Court.

Based on a modest assessment of costs that was made by Northern Showa High Court in the Amhara Regional State, a litigant who travels from one of the outlying villages to the High Court spends between Birr 260.70 and 352.50 to attend a single court hearing. A litigant spends as much for each witness when witnesses have to be heard by the court. A litigant would spend between Birr 1042 and 1058 if the process is finalized in a single appearance after having heard witnesses. The process usually takes longer and the cost keeps rising depending on the number of appearances and the number of witnesses. The costs indicated here are not dependent on the amount of

the claim. The proportion of the cost to the claim would, therefore, be higher to small claims as the number of appearances increases. Given that the jurisdiction of the first instance courts is less than Birr 10,000, the cost to go to the higher courts on appeal can easily constitute a big percentage of the original claim even without including the cost for witnesses. Many a litigant can be discouraged from going on appeal to the next court because of the expenses which have to be covered upfront by the litigant. A party that wants to continue on appeal to the Supreme Court would even have to incur a lot more expenses to vindicate rights as the next hierarchy of courts is located at farther than the High Courts.

To minimize the impact of cost on access to justice many courts in Ethiopia are using Information and Communication Technology (ICT) as one possible way out. The FSC uses video link and E-filing for users who come either on appeal or on cassation from the State Courts. It also provides information to these litigants via Interactive Voice Response (IVR) system which is attached to its database. The High Court in Northern Showa which uses video link to hear appeals from the first instance courts within its territory has reported that it has succeeded in reducing the costs which parties had to incur to travel to the court. This technology saves money and time to the litigants and needs to be expanded to the other courts.

3.3.3. Legal Aid in Ethiopia

One of the barriers of access to justice is the problem which people face in getting legal advice and representation. The solution sought for this barrier of access to justice is the legal aid scheme which takes different forms. As mentioned earlier, the state has a positive obligation to provide legal aid. In criminal cases legal aid scheme is implemented through the public defence services which are established within the court system. Ethiopia has therefore followed the public salaried model for the

provision of legal aid services. The requirements for getting legal aid under the Constitution are that the defendant in criminal cases has no sufficient means to get his own counsel and the likelihood that injustice would result if the process continues without the defendant having an attorney. A person is not automatically entitled to get the services of legal aid by virtue of his being without sufficient means. If it is understood that injustice would not follow even if the defendant proceeds without any legal assistance, legal aid would not be provided. The issue of whether or not injustice would result in any case is left for the decision of judges.

Table 4 : *Legal Aid Service at the FHC*

Year	2001-2	2002-3	2003-4	2004-5	2005-6	2006-7	2007-8
Number of new legal aid cases	137	161	240	196	252	287	**230**
Legal aid beneficiaries	720	625	643	904	707	876	**889**
New criminal cases in the FHC	2075	4105	5018	2964	2962	4262	4873

Source. The Public Defender's Office, FSC

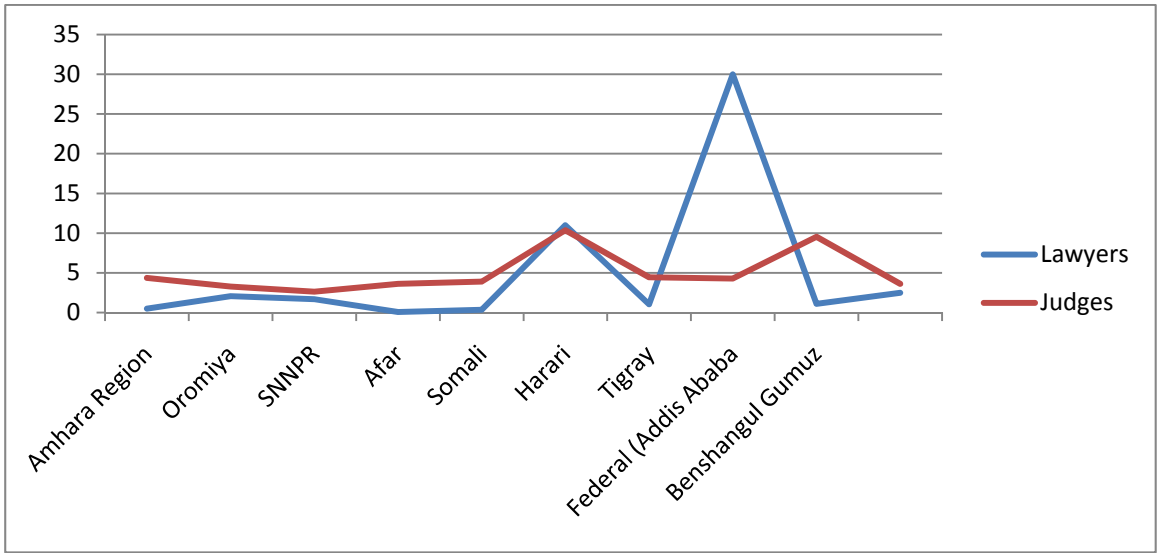
Compared with the number of cases filed to the courts every year the number of people who get legal aid service is low. In 2001-2002 only 6% of those that appeared in criminal proceedings in the Federal High Court got legal aid from government funding. The figure merely increased to 8% in 2007-2008. Data which shows the number of defendants in criminal proceedings who were represented by counsel at their own expense is not available. Data is however available in regarding people who have been convicted. A survey that was conducted in sampled prisons in the Amhara State indicates that a big percentage of the prisoners (31%) were convicted by the courts without having proper legal representation. Of those prisoners that had attorneys during the process 51% of them had state appointed attorneys. (Mohamed 2004)

Table 5 : *Number lawyers and judge*

No	Region	Population	Number of Lawyers			Average	Ratio per 100,000 inhabitants	Number of Judges	
			2005	2006	2007				
1.	Amhara Region	17,214,056	81	95	101	92	0.5	750	4.4
2.	Oromiya	27,158,471	468	712	505	562	2.07	889	3.3
3.	SNNPR	15,042,531	379	192	192	254	1.69	394	2.6
4.	Afar	1,411,092	8	9	10	9	0.06	51	3.6
5.	Somali	4,439,147	14	17	17	16	0.36	173	3.9
6.	Harari	183,344	19	20	21	20	11	19	10.4
15	Tigray	4,314,456	49	48	43	47	1.04	192	4.5
8	Federal (Addis Ababa	2,738,248	786	813	837	812	30	117	4.3
9	Benshangul Gumuz	670,847	8	6	6	7	1.1	64	9.5
	Total	**73,136,281**	**1814**	**1914**	**1734**	**1821**	**2.49**	**2649**	**3.6**

Source; National statistical Authority

Figure 4: Ratio of Judges and Lawyers per 100,000



Legal aid is constrained by the small number of attorneys in the country. As could be discerned from the figures the proportion of private lawyers to the total population is very small in all the Regional States. The private lawyers who could provide legal services are mainly concentrated in Addis Ababa which accounts for a small percentage of the total population. Of the lawyers that are practicing, 44.6% of them serve in Addis Ababa. The remaining 55.4% of them are distributed unevenly throughout the country where 96.3 % of the population lives. The ratio of lawyers per 100,000 inhabitants for the whole population is only 2.49 indicating that there is much to be done in this field.[5] For some of the states it is even less. The ratio is less than one for the Amhara , Afar and Somali States. Given this ratio, people can hardly get representation. Leaving the poor litigants aside, even those who can afford to have lawyers may not get the required legal counsel because of the unavailability of private lawyers in many parts of the country. One notices that in all the States other than Addis Ababa and the Harari State there are more judges than lawyers. This will have

[5] The highest figure in Europe for 2004 was 319 and the lowest was 6.4. For England and Wales the corresponding figure was 200.7. European Commission for the Efficiency of Justice, Report on European judicial systems- Edition 2006 (2004) data: an overview

a negative effect on the reform initiatives to enhance access to justice. In some of the States where the ratio is too small the availability of lawyers is offset by the dominance of the TDRs which may not need the presence of lawyers at all.

When attorneys are available the level of their training is usually low. Of those registered as attorneys in the Federal Ministry of Justice and the Amhara State some of them do not have formal legal education at all. In the Amhara State 35% of the attorneys do not have any formal legal training. The figure for such attorneys at the federal level is 11.5%. This affects the quality of representation which individual litigants can get from the market.

Table 6 : *Professional qualification of attorneys*

Qualification	Federal	Amhara
PhD	4	0
LLM	47	0
LLB	358	13
Diploma in law	283	21
Certificate in law	29	18
No formal legal education	94	43
Total	**808**	**95**

Source. Ministry of Justice Archives

Partly because of the paucity of attorneys and other economic constraints of many litigants there have recently been some attempts by NGOs to feel in the lacuna. Apart from the legal aid services provided by paid private attorneys and public defenders legal aid is also being provided by some NGOs both at the Federal and State level. Unlike the legal aid provided by the government, the legal aid that is provided by the NGOs is not limited to criminal cases. The Ethiopian Women Lawyers' Association

which operates both at the federal and state level provides legal aid to women both in civil and criminal cases. Besides, unlike the legal aid provided by the government which can be obtained by the indigent only after commencement of the criminal proceedings in the courts, EWLA provides legal advice to the needy even before formal charges are brought to court. Such initiatives are important in feeling in a felt gap in the provision of legal aid to litigants in the judicial process, particularly in those areas where attorneys are not operating in sufficient number.

Table 7 : Free legal aid provided by EWLA in Addis Ababa (Jan-Dec, 2007)

Case	No.	Given Legal Advice	Summonses Issued	Reconciled	Maintenance provided	Pleadings written to court	Letters sent to police or other authority
Divorce/ Matrimonial Property	2547	1203	691	240	54	642	10
Paternity and Maintenance	468	191	188	16	4	88	1
Employment Disputes	21	82	17	6	-	22	-
Succession	140	78	12	-	-	50	-
Rape	119	117	-	-	-	-	2
Murder	49	19					
Bodily harm	87	87	1				
Abduction	4	3					
Others	463						
Total	**3898**	**1780**	**909**	**262**	**58**	**802**	**13**

Source: EWLA

3.4. Traditional Dispute Resolution

Under this section the t, the role of TDR mechanisms which by and large operate in many parts of Ethiopia despite non-recognition by the state law will be examined. This discussion will show that the concern on access to justice cannot be attained by addressing the problems of the formal courts alone as the majority of the Ethiopian population get their justice administered by their customary institutions also.

In spite of the introduction of the regular courts into Ethiopia, studies indicate that people use the TDR arrangements more often than the ordinary courts. In spite of attempts to integrate the legal system by doing away with the traditional substantive and procedural rules, pluralism is the hallmark of the Ethiopian legal system today. On the one hand, there is an imported adversarial western style formal procedure whose operation is limited to the formal courts. On the other hand, the local justice administered by traditional procedural rules is not legally recognized but is more vibrant and has greater legitimacy than the formal procedures. As has been observed in other African countries, there is a sharp contrast between the features of these two constituent elements of the pluralist system (Bush, 1974-1975:1135) in Ethiopia.

In the Somali State, only a small percentage of cases is handled by the ordinary courts. A majority of the cases are submitted to the TDR mechanisms and resolved by them. The majority of the Somali people use the TDR more than the regular courts because of speed, cost and the nature of the remedies they get from the system. (Mohammed and Zewdie, 2008) In Korahai Zone, which has a population of 242,276 only 6 criminal cases and 57 civil cases were opened in one year in the ordinary courts. All other disputes were submitted to the TDR mechanisms that are

available in the community. Not only do the TDR handle civil cases, but they also handle criminal matters. The Ethiopian law does not envisage the involvement of TDR in the resolution of criminal cases in any one of the States. It is reported that in the Somali State they handle criminal cases and solve them. Out of a total of 215 criminal cases that have been reported to and investigated by the police in one year, criminal proceedings were initiated in the High Court only in six of them. The other 209 cases, which were within the jurisdiction of the High Court, were resolved through the traditional arrangements TDR. (Mohammed and Zewdie, 2008)

In the High Court of Warder, a Zonal administration with a population of 324,308 people, less than 20 cases were handled in 2002 in the High Court. In Gijiga Zone, which is believed to use the regular courts more than the other Zones, the High Court handled only 72 civil cases and 42 criminal cases in one year. Given the population of the Zone to be around 813,200, it is explained that the majority of cases are handled through the traditional arrangements although it is the urban center of the Somali State. At times judges in the courts send criminal cases, of which they are seized, to the traditional arrangements. (Mohammed and Zewdie, 2008)

Dispute resolution is handled in the Somali State through two different institutions, the *sharia* and the *xeer*. The sharia is based on the Islamic sharia law and uses sharia scholars as judges. The *xeer*, on the other hand is a traditional clan institution that handles all other cases that do not fall under the jurisdiction of the sharia courts. Although not written, the *xeer* system has well developed substantive and procedural rules which are enforced by the *xeergeegti*, which act both as a law making and a judicial institution. The Somalis also have another system which is called *odayaal*, a

system which operates by inviting elders for a particular dispute between individuals in a clan or members of different clans. Interestingly enough once convened the *odayaal* decides on the basis of an already existing *xeer.* If no rule exists in the *xeer* to cover the issue in the dispute, a decision is rendered through compromise and negotiation. The decision that has been so given however becomes part of the *xeer* for future cases of a similar nature. (Mohammed and Zewdie, 2008)

In the Afar State more than 95% of the disputes in the State are handled through the TDR systems. The regular courts handle disputes that arise between non-Afar residents in the State. The customary law of the Afar people, called the *mada*, is an unwritten law that is orally transmitted from one generation to the next. The mada is applied to a specific dispute through the *makaban*, a clan chief who sits to resolve disputes arising within the members of his clan. If the dispute involves different clans there are procedures through which a *makaban* is selected from a neutral clan and handle the dispute. The only limit to the *makaban's* jurisdiction is the Sharia law which reserves some disputes to be handled by Islamic law. Anything that is not within the jurisdiction of the Sharia Courts is handled by the *Makaban*. The *makaban* thus entertains matters both of civil and criminal nature. (Getachew and Shimelis, 2008)

The Afar people have an elaborate procedural customary law on dispute resolution. Dispute resolution is handled through the *maro* which is conducted under the shade of a tree. This system has pleading, hearing, judgment, appeal procedures and enforcement mechanisms. It also has procedures on the organization of dispute

resolution and appointment of the elders who serve in the systems. (Getachew and Shimelis, 2008)

In the Afar state there have been incidents where the prosecution offices terminated criminal proceeding on first degree murder charges on the grounds that the case has been settled by TDR means. The prosecution office cites Article 42(1)) of the CrPC to terminate the prosecution, but this provision gives the prosecution a discretion not to institute criminal proceedings "where the prosecution is barred by limitation or the offence is made the subject of pardon or amnesty". This provision does not justify the action taken by the prosecution. The reason for not instituting the charges is in actual fact their belief that the conflict between the clans will not come to an end unless it is solved through the customary means. (Getachew and Shimelis, 2008)

Likewise the Nuer people in Gambella State have a TDR through which they handle disputes that arise in their localities. Settling disputes among the Nuer involves a process of negotiation which includes uncovering all the facts and reaching at a decision on how to meet the obligations that may arise. Settlement of disputes takes the form of discussion between different groups where each side has its full say rather than an authoritative pronouncement of a single authority. (Dereje, 2008) "It is the rule of such gatherings that everything a man has in his heart against others must be revealed and no bitterness kept secret." (Pritchard, 1956:109) An opinion is given by an influential person using not a form of an authoritative judgment but that of persuasion after a case is fully talked out by the parties and a consensus is reached. (Dereje, 2008:137)

The degree of participation is higher in TDR as many of them allow the members of the public to air their views on how a specific dispute should be disposed of. They are in many ways cheaper than the regular courts and a lot faster. It is interesting to note, however, that in the Gambella State going to the Neur customary institutions costs slightly higher than going to the ordinary courts. In spite of that people still prefer customary arrangements to the formal court structure because of the holistic approach to dispute resolution, in the sense that it addresses the root causes of conflict in addition to giving the people an authentic forum for participation. (Dereje , 2008) The main concern of such institutions is more on restoring the social relationships that are damaged by disputes more than rendering judgment in a particular case.

These studies confirm that the attempts to ensure procedural integration through a single formal system of imported procedure have failed. The Ethiopian experience indicates the existence of some of the potential dangers of the model of integration which have been predicted earlier by some scholars. Robert Bush observed that "instead of bringing the bulk of the population into a regular and unified national court system, the program of integration might succeed in driving them to extralegal sources of authority".(Bush, 1974-1975:1146)

It should be mentioned here that there are some aspects of the TDR which give rise to legitimate concerns. Some of them prohibit women from participating in the customary institutions. In some others, the amount of compensation that is awarded depends on whether the victim is a man or a woman. A woman is entitled only to 50% of what a man gets in some TDR. Women are allowed to give testimony only when a man is not available to do so. These and some other similar problems raise

concerns about the satisfaction of minimum human rights standards for civil as well as criminal proceedings in the TDR. (Alula and Getachew, 2008:70-1)

Some aspects of the customary laws may not be compatible with the minimum standards set in the Constitution. But they are not incompatible in all respects either. Regardless of the issue of their compatibility with the state laws people still go to their customary arrangements and are happy with the type of justice they get. These customary institutions play a significant role in ensuring harmony and peace in their respective communities. In many cases the justice they render is accepted better by the community than the justice provided by the state courts. On the other hand the state law does not give recognition to their activities in some areas formally. In the criminal justice system for example the only institution that is legally empowered to handle intentional homicide cases are the formal courts at the Federal or State level. Customary institutions are not allowed to involve themselves in such matters. In actual fact however, police officers, prosecutors and courts do refer such cases to customary institutions and accept the outcomes when one has been reached by them.

Under such circumstances there are two main issues which access to justice must address in Ethiopia. On the one hand concerns over the constitutionality of some aspects of TDR are legitimate and must be addressed. On the other hand a total abrogation of customary arrangements does not necessarily ensure the prevalence of the state law over the customary law. The Fetha Neguest which was introduced in the 16th Century did not abrogate the customary laws which it tried to replace. The repeal provisions of the Civil Code did not make people shift to the new rules in the Civil Code. In spite of changes in the laws, people's lives do not seem to be affected in any

significant way. Any reform initiative that tries to make justice accessible to the majority of the Ethiopian people must address these issues. Given the resource constraints in the country, it may take many more years to extend the formal justice system to the village level. Even if the constraints are surmounted, the formal justice system will remain to be inappropriate to solve many of the disputes that arise at the village level. The TDR will, therefore, remain to be the main avenues for access to justice for the majority of the population.

3.5. Concluding Remarks

The initiatives to enhance access to justice in Ethiopia are bound to face serious challenges. On the positive side there is a new constitution which sets new perspectives to access to justice. Paramount in this respect is the constitutional recognition of customary and religious dispute resolution systems which used to operate on the ground without any legal basis. Equally important is the recognition of the right of access to justice as one fundamental right in the Constitution. The improvement in the waiting time in many of the courts is also an important development in terms of ensuring better access to justice. So are the initiatives to use ICT in the Ethiopian courts which will have tangible result in terms of reducing the hardships and expenses which people face if when they travel to the court sites.

But there are equally important challenges which will have to be reckoned by the reform program. First comes the dilemma which the legal system faces in having imported complex rules of procedure from the west which seem to face difficulties in

penetrating the bigger part of the country. For historical reasons legally trained people are not available in sufficient numbers. In spite of recent efforts to raise the number, the proportion of judges to the population is still very low. More worrisome is the number of lawyers which is even less than the number of judges. This situation puts a limit to the service which the formal courts can provide to have rights enforced. This is compensated by dispute resolution systems which provide speedy and cheaper justice but face some problems. On the one hand the power given to these tribunals by law is still limited. On the other hand the substantive and the procedurals aspects of these systems may, in some cases, not be consistent with the minimum standards provided in the Constitution and some International Conventions of which Ethiopia is a party. The access to justice initiatives must give wider recognition to the customary institutions but at the same time ensure that they do not discriminate against women and do not display some other features that are incompatible with acceptable standards.

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4. EFFICIENCY OF THE COURTS IN ETHIOPIA

4.1. Efficiency in the Judiciary

4.1.1. Introduction

The problem of efficiency in litigation is partly related to procedural rules that are in place in the system. As a result discussion on judicial efficiency should begin with a proper understanding of the basic procedural design that is in place. In light of this, the salient features of the Civil and Criminal Procedure Codes will be discussed in the first part of this chapter. This overview of the rules will be followed by a discussion of some aspects of litigation in the courts. This research will attempt to examine the efficiency of the courts in Ethiopia based on the data that has been collected from the courts and other relevant institutions. The Federal Courts in Ethiopia have a database system that keeps a proper record which will be used by this research to see the pattern of efficiency in the courts. For the other courts, this research will depend on data provided in their annual reports. Analysis of the rules and the practice in the courts and the difference between the two will show the areas that demand intervention to improve the efficiency in the administration of justice. It is believed that this approach will give a proper understanding of the process and will help in developing viable solutions to the problems faced by the courts. Description of the legal process is deemed important to show the gap between the law and the practice. This paper argues that the rules in the Codes are based on principles which try to strike a balance between the desire to ensure rectitude of decision, on the one, hand and the minimization of cost and delay on the other. If the Codes were properly applied, they could have helped to mitigate the problems which have characterized the litigation process in Ethiopia. This, however, leads to another question. Why have the courts not applied the rules in the Codes for close to half a century after their

enactment? Were the rules meant to be applied when the Codes were adopted given the human resource capabilities and the institutional setup, the cultural background at that time? Is Ethiopia ready for the rules as they appear in the Codes? This chapter will address some of these issues based on empirical data collected over a number of years. The discussion in this chapter will, however, be limited to the regular courts although, as noted earlier, the customary courts also play an important role in the administration of justice.

Discussion of efficiency problems and solutions in Ethiopia will, however, be preceded by presentation of general issues regarding efficiency and the experiences of other legal systems. The process of adjudication in the formal courts in Ethiopia is governed by rules that were borrowed from western countries. The experiences of these countries is therefore relevant for Ethiopia although there are wide social, economic and historical differences between Ethiopia and these countries. That their experiences are relevant does not mean, however, the problems the systems face and the solutions that should be sought are the same in all respects.

4.1.2. Nature of Judicial Efficiency

This part of the thesis will primarily focus on efficiency as one important component of judicial reform. Ensuring efficiency through reform programs requires a compromise between equally important values that may sometimes be conflicting. Different aspects of procedural justice must be balanced to attain an efficiency level that meets the demands of citizens. These competing elements are accuracy, timeliness and cost for the process incurred both by the government and the parties to

litigation. Attaining an optimum level of efficiency requires a trade off between these elements. (Miller, 1997:906)

Rectitude of decisions is one of the most important objectives that should be attained by any legal system. Bentham explained that the purpose of procedure is rectitude of decision signifying the correct application of the law to facts that are established as true. He further added that the rectitude of decision so understood should be obtained without unnecessary delay, vexation or expense. (Bowring, 1843) That rectitude of decision is one objective which any legal system must strive to achieve has been stressed by many other authors since.(Jolowicz, 2003) As a result, efforts have been made to design procedures which would attain the achievement of this ideal. The ability of procedures to arrive at the truth has even been considered as one factor to assess whether or not procedures are just. Procedures which do not attempt to give citizens what is due to them cannot be considered just. (Zuckerman, 1994:355)

Although the principle that rectitude of decisions is important in legal systems is accepted, whether or not any particular decision is correct cannot easily be determined. The general criterion for just outcomes can be formulated but this does not ease the problem of knowing whether or not any specific judgment conforms to the objective truth. Adrian Zuckerman gives the criterion for a just outcome by saying that it is "one which gives the parties what is theirs. An unjust or incorrect result is one which does not achieve this end, which does not correctly apply the law or does not accurately determine the facts. An unjust judgment is one where the plaintiff's rightful claim is denied or the defendant's rightful defence is rejected". (Zuckerman, 1994:355)

There is no other mechanism for testing whether or not a judgment in any particular case conforms to the objective truth other than the procedure that is put in place. This procedure cannot, however, guarantee that errors will not occur. (Zuckerman, 1994:355) As has been observed by Rawls, even if the criterion of justice in any legal procedure is external to the procedure, the procedure itself cannot always guarantee that there will be a perfect correspondence between the individual decisions and the criterion. (Rawls, 1972:85-86)

Legal systems aspire to attain accuracy in judicial proceedings because it adds value to the system. "First greater accuracy is a means of achieving deterrence, in addition to raising sanctions or enforcement efforts. Second, when deterrence is achieved through enhanced accuracy rather than by using alternatives, sanctions are imposed less often, which is a benefit to the extent that sanctions are socially costly. Third, increasing accuracy may increase the precision with which behaviour is controlled". (Kaplow, 1994:348)

Any system of procedure which aspires to achieve justice should, however, take other elements in to account, namely the temporal aspect of the process and the resources which it requires to attain accuracy. Rectitude of decisions cannot be an exclusive yardstick against which efficiency should be measured. The desire to achieve accurate results must balance with the need to give judgments within a reasonable time at a reasonable cost. (Zuckerman, 1994:360) The temporal aspect of litigation is important because of its impact on the accuracy of results. Delay can undermine accuracy by increasing the risk of error or by reducing the utility of the judgment

rendered at the end of the process. Delay increases the risk of error by allowing the deterioration or disappearance of evidence. In addition if the process is delayed for too long a point can be reached beyond which the practical utility of a remedy for a plaintiff will be undermined at an accelerating rate. There could even be situations where the judgment becomes of no value to the plaintiff after a certain point. Delay adversely affects the defendant in a number of ways. It can weaken opportunities for proving his defence. Besides, a pending suit that lasts too long affects the emotional, economic and social interests of a defendant. Under such circumstances even if the result is accurate one can hardly say that justice was rendered. (Zuckerman, 1994:360) "Accordingly a decision may be unjust not because it is incorrect in law or in fact but because it comes too late to put things right. It is this idea that is conveyed by the aphorism 'justice delayed is justice denied" (Zuckerman, 1994:361)

Apart from its effect on litigants, delay can also have far reaching negative implications on a country's economy. As delay increases costs of litigation, it can lead to inefficient private behaviour intended to minimize costs. In some systems it has resulted in distrust of the system by the public and the private sector. Inefficiency leads to reliance on individual reputation and family instead of impersonal relationships that are socially and economically beneficial. (Buscaglia and Ulen, 1997) This implies that although efficiency imperatives demand that an accurate result should be attained, achieving the most accurate results cannot be a realistic goal of procedure because that demands investment of resources, including time, which may rob the process of its utility. On the other hand, although procedure must aspire to secure timely judgments so as to make the process of value to the litigants, there is

no absolute standard to measure what is reasonable level of expediency that could be applied to all disputes. (Zuckerman, 1994)

Greater accuracy comes at a cost. (Kaplow, 1994:307) The law and economics literature considers litigation as a trade-off between different types of costs. The first cost is a cost of procedure and the second one is cost of error. The cost of procedure consists of the investment to arrive at accurate results. The error cost, on the other hand, emanates from an erroneous decision. A system becomes efficient when it minimizes the sum of these two costs. (Miller, 1994:905) A system of litigation that renders decisions too fast has a smaller cost of procedure but is very unlikely to achieve accurate results. If the fact finder makes an error, this constitutes an error in the substance of the dispute, therefore fails in its primary obligation of finding the truth. On the other hand, a system that invests too much on procedure will have a higher probability of arriving at the truth. Thus an elaborate procedure that allows admission of all evidence, where all witnesses are examined, evidence is not excluded on grounds of relevance etc, will probably render correct decisions. But, this comes at an additional cost. Besides, additional cost on procedure avoids error cost only up to a certain point. After a certain stage of investment, the marginal return to procedural expenditure starts to decline. Additional spending after this point will not make the system efficient as the reduction in error cost will not be proportional to the additional investment on procedure. (Miller, 1994:908)

There are important lessons from this theory for improving efficiency. First, some degree of delay is necessary in the process of litigation lest the cost of error becomes too high. Time induces error not only when the process is delayed but also when it is

hurried. A judgment runs a high risk of error if it does not give enough time for the collection of evidence or the preparation of arguments. (Miller, 1994:908) Procedural reform that reduces duration may reduce the cost for the parties and for the system, but one must also consider how much this reform compromises the other obligation of the courts to discover the truth. Second, efforts to raise the quality of justice by increasing investment in litigation either by the parties or by the government raise the quality of justice by reducing the probability of error, but every additional investment will not be matched by an equal amount in reduction of error cost after a certain point. Third, efficiency can be attained by possibly reducing the procedural cost without any trade-off in the accuracy of the results in some cases. This happens in situations where the cost of error is higher than the optimum cost. Systems that have high procedural costs and high error costs fall under this category. (Miller, 1997:909) Many rules of Civil and Criminal procedure as well as rules on evidence try to strike a balance between efficiency and accuracy. (Kaplow, 1994:308)

4.1.3. Factors Affecting Efficiency

A. Legal Tradition and Procedural Design

Considerable literature on procedural reform ascribes the failures in judicial efficiency to the legal tradition and to the procedural design which results from it. Although much of the reform that is under way in this century by and large focuses on procedural issues, that procedural design is an important factor for delay and an area for concern was witnessed earlier. Earlier in history, civil proceedings took a long time to dispose in Europe where "civil proceedings lasting for several decades were not unusual". (Cappelletti, 1970-1971:847) This state of affairs in civil litigation was attributed to the basic features of the *jus commune*, the then prevailing civil procedure

that was common in Europe. In spite of some variations, the *jus commune* had some distinct features which caused unbearable delay in civil proceedings in those days. Under the *jus commune*, procedural acts had to be reduced to writing. This procedure discouraged any direct contact between the parties and the fact finder. Testimony had to be taken by someone other than the judge. The judge had to base his decision on the written record and not on his personal observation. The evaluation of evidence and the system of proof in the *jus commune* was a mathematical one established by law. In the evaluation of evidence counting and not weighing was the rule. Finally the *jus commune* was characterized by a segmented unfolding of the proceedings. (Cappelletti, 1970-1971:850) "Since the judge did not intervene and direct the proceedings, the parties, or rather, their attorneys, were the uncontrolled masters of the conduct of the case. Hence abuses, dilatory tactics, and the postponements were the usual plague". (Cappelletti, 1970-1971:850)

Beginning from the French Revolution in 1789, this system was gradually dismantled and replaced by a new system with different sets of rules. The 'orality' movement brought a breakthrough in procedural theories and practices. This reform revaluated the *jus commune* and replaced its features with the new ideals. First, Immediacy, which allows direct, personal and open relationship between the adjudicating organ and the parties, the witnesses, and the other sources of proof, became the rule. Second, free and critical evaluation of evidence on the basis of direct observation of the adjudicator in open court was introduced. Third, hearing was concentrated in a single or in a few closely spaced oral sessions before the court preceded by a careful preparation in a preliminary stage. (Cappelletti, 1971:851)

Procedural Codes with these basic ideals were adopted in different countries in Europe. , Germany and Austria adopted the codes in 1877 and 1895 respectively. The Austrian Code of Civil Procedure was more innovative because it gave greater emphasis to a more active role of the judge in speeding up the process and in furthering the effective equality of the parties. The impact of these procedural changes on the speed of litigation in those countries that implemented these new ideals and other countries that followed their model was powerful. Germany registered an impressive improvement in the disposition of civil cases after the adoption the Code. Austria likewise declared that the proceedings became simpler, less expensive, quicker and more accessible to the poor after the adoption of the new procedure code (Cappelletti, 1970-1971:856).

The prevailing mode of litigation in the United States was attacked as far back as 1906. In an often quoted address to the American Bar Association entitled *the causes of popular dissatisfaction with the Administration of Justice*, Roscoe Pound challenged the Anglo-American adversarial litigation which he called the "sporting theory of justice". Pound raised serious concerns about the process of adversarial litigation, the role of the judge, the degree of autonomy accorded to litigants and the continuity of proceedings, among many other things. (Pound, 1956:14-15) Procedural design is once again under attack in many countries in this century. The complexity, high cost of litigation and delay in civil proceedings in the UK has been attributed by and large to the procedural design which allows excessive adversarial combat and denies judges the power to control the process (Woolf, 1997:710). Germany, which some praise as having a better design of procedural rules (Langbein, 1985:823) has revisited some aspects of its procedure to enhance the efficiency of the judicial

process. The reform of 2001 in Germany is aimed at streaming procedure at the first instance and lowering the workload of the appellate courts with the end result of making the process more efficient. (Gottwald, 1997)

B. Managerial style

The contribution of managerial style of judges in the process of litigation can better be understood if one examines the nature of the role of the courts on the one hand and the parties and their lawyers on the other. Based on this, systems are divided between adversarial and inquisitorial legal traditions. Both systems accept the adversarial and contradictory nature of the claim they deal with, but they follow a different process in resolving them. (Jacob, 1986:155) Both systems assume that "the opposing parties are in controversy, in conflict, in combat about the disputes between them, but they employ essentially different ways for the adjudication, resolution, or other disposal of disputes. These ways derive, from fundamentally different conceptual criteria and perhaps also different political and social tenets of what civil procedure is about and how it should operate". (Jacob, 1986:156) In the adversarial system, the decision on how to pursue the litigation is basically left to the parties as disputes are considered the private concern of the parties. As a result, the adversary system assumes that the parties are in the best position on how to control and conduct their own cases and discourages any intervention or direction of the courts. The adversarial system is anchored on the belief that truth will come out when the opposing parties come forward with their own versions and when they challenge the accuracy of the other side. (Weigend, 2003:158) The inquisitorial system on the other hand begins from the assumption that, once a dispute is brought to court, there is a public interest, which the court must discharge, in directing and bringing it to a conclusion (Jacob, 1986:156)

The impact of this difference on the managerial role of the judges in ensuring the efficient unfolding of proceedings is immense. The typical adversarial system gives the court only a passive role in managing the process. The court is expected to act like an 'umpire' where it ensures the observance of the rules when the gladiators fight, and to declare which one has won the contest. As a result the court does not have any power to frame the issues in the dispute. It does not have investigative powers of its own, cannot examine or cross-examine witnesses or the parties, and does not have the power to call witnesses not named by the parties. (Jacob, 1985:156) In the inquisitorial system, on the other hand, the court has extensive powers in shaping the process right from the beginning. The responsibility to gather and sift evidence is given to the court, rather than to the party's lawyers. (Langbein, 1985)

Many countries in the common law world that share the adversarial legal tradition have been afflicted by a common problem which resulted not so much from the content of court decisions but from the process leading to court decisions. The common law system which is characterized by an unfettered adversarial system, whereby parties retain the power to control the progress and cost of litigation has resulted in "cost, delay and complexity". (Woolf, 1997:709)

The development of case management in adversarial systems has given the judges the power to control fact gathering. This has however, only brought about a change from adversary control to judicial control of fact gathering, which is different from the judicial conduct of fact gathering observed in some continental systems. (Langbein, 1985) The recent developments in the UK show similar directions. Greater

managerial involvement of judges in the process is necessary for an efficient process of justice. Managerial judging must be balanced with party autonomy to curb the excesses which are seen in purely adversarial systems.

C. Resources

As seen earlier, the optimum level of efficiency assumes that there will be some level of investment below which the cost of error would keep on rising. The quality of procedures is positively correlated with rectitude of decisions. This happens because the degree of accuracy in decisions is dependent on the quality of the procedures which are available to process the facts and the law. As a result, putting in place procedural designs which aspire to achieve the correct decisions increases the likelihood of attaining rectitude of decisions (Zuckerman, 1999)

As the quality of the procedure is some extent dependent on the resources which a system is prepared to invest on it, one can likely expect low procedural quality and lower level of rectitude if a system suffers from inadequate resources. (Zuckerman, 1994:360)

The availability of resources to the courts is an important factor that affects their efficiency. Reform proposals recommend that more resources be allocated to the courts to avoid backlog and reduce delay. Adding the resources to the courts reduces delay in the short run. The long run effect of such additional resources may not, however, necessarily be reduction in delay, because cheaper adjudication will invite more people to the litigation arena. If a system becomes very cheap for the plaintiffs, it is very likely that more of them will bring new cases, which will raise the workload

of the court and eventually bring the performance of the court to its previous position. (Miller, 1997:911-912)

Even if the positive relationship between efficiency and resources is accepted any system does not have a boundless obligation to provide the most accurate procedure regardless of its cost. In so far as a system cannot afford a limitless investment in the administration of justice it must achieve a compromise whereby the resources are affordable but the procedure at the same time is good enough to achieve a reasonable level of accuracy. (Zuckerman, 1994:355)

4.1.4. Measuring Judicial Efficiency

To make judicial efficiency one important component of reform initiatives, it is imperative to develop some mechanisms for measuring it. Many a time judicial efficiency is measured by taking some variables in to account, the commonest of which is measuring the average time it takes to dispose of cases. Although measuring average duration time is necessary, it does not show the whole picture unless it is supported by additional measurements that give information about the level of backlog of the court, the workload per head, and the resources that are at the disposal of the court.

Quantitative measurement of judicial efficiency is made difficult by the unavailability of data in court systems. In situations where direct data is not available, Clark and Merryman have developed a model that can give an estimate of the average duration time in a court system. (Clark and Merryman, 1976-1977:75) This model, which is called the duration of litigation index, has been used to measure the efficiency of

some legal systems. (Chase, 1988:41-87) The index is based on the following formula:

Pt = number of cases pending in the relevant court or court system at the beginning of the year t;

F = number of new cases filed during the year;

J = number of cases decided with a final judgment

W = number of cases withdrawn or dismissed during year t

D = the "duration of litigation index," an estimate of the number of years likely to be required to dispose of a newly filed case in the year t +1.

$$\mathbf{D} = \frac{\mathbf{Pt + F}}{\mathbf{J + W}} - 1$$

In systems where direct data is not available to measure the mean or median duration of cases directly, this formula has great utility. It is basically a ratio between the total number of cases that have been pending in any given period of time, which is composed of the ending inventory of the previous year (Pt) and cases initiated within the given period (F) to cases disposed off within that period of time either through a final judgment (J) or terminated by any other means (W). As far as this model is considered, the manner through which the case has been disposed off does not really make a difference. Therefore, if segregated data is not available for judgments and for other dispositions, the formula can still be of help to obtain the average duration. (Doane, 1976-1977:100) The figure obtained through this formula gives the average time that one should expect to wait before a new case in the subsequent period of time

is disposed of. This formula assumes that cases will be considered in order of the time of their filing. (Clark and d Merryman, 1976-1977:75)

The average duration time is affected by the variables in the formula. Thus, the volume of cases carried over from the previous period affects the average duration of cases, as does the number of cases that are filed within a given period of time. Increment in either of these two variables can possibly give rise to the average duration, if it is not matched by a proportional increment in the disposition within the same period of time. The demand for judicial services is manifested through the cases that are carried over from the previous period and the number of cases that are newly filed during the year (Pt+F). Performance within the same period, (J+W) indicates the supply side in the judicial process. A backlog which may in turn increase the duration time is unavoidable if the supply is lower than the demand. This proportion between the cases opened in a year and the number of cases decided within the same year indicates the clearance rate. The proportion between the number of cases disposed (J+W) and the number of cases filed within a given period of time (F) is particularly important as the beginning inventory of the next period (Pt) is determined by this proportion. If the number of cases disposed in a given period is less than the number of cases filed within the same period the Pt of the next period (say next year) will be higher than the Pt of the previous period. If this trend continues, this will affect the overall workload of the courts by increasing the backlog of the courts and eventually increases the waiting time. (Buscaglia and Ulen, 1997) Reform efforts to enhance efficiency should try to understand the reasons for an increase in the demand for judicial services as

much as trying to understand the reasons for decrease in the performance which reduces the supply of judicial services.

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4.2. Salient Features of Civil Proceedings in Ethiopia

Civil proceedings in Ethiopia are governed by the CPC which was enacted in 1965. The CPC is the only Code that was drafted by an Ethiopian during the codification process in the 1960s but it is heavily influenced by the Civil Procedure Act of India. (Vanderlinden 1967-1968:257). In spite of some major changes in the administration of justice since its enactment, the CPC remains the most important piece of legislation governing civil litigation. Although Federal and State courts are established following the new constitution in 1994, the same CPC is still by and large the governing law for civil litigation. Some States have enacted new legislation as regards the administration of civil justice as it is within their powers to do so under the new constitutional set up. The amendments, however, mainly relate to the structure of the courts and their jurisdiction and not to the rules that govern the process. As a result, there are similarities in the process of civil litigation in all the courts. The problems they face are also similar in many respects and so should, more or less, be the solutions.

In the Ethiopian context civil litigation includes disputes in commercial matters, labour relationships and administrative matters. Unlike many other civil law systems, (Gimenez 2001) Ethiopia does not have a separate court structure that exclusively deals with administrative matters. The procedural rules allow the institution of civil action against the state or a government department (Art. 21, CPC). Therefore, unless

there is another administrative act that excludes jurisdiction of the ordinary courts, disputes that involve the administration or its agencies are adjudicated by the ordinary courts. Regardless of the subject matter in dispute, or the nature of the parties in dispute, the rules of CPC apply in so far as the dispute is submitted to the ordinary courts. Thus, the rules in the Code apply to labour disputes, commercial disputes, marriage disputes, contractual disputes etc. They are equally applicable whether the dispute is between government agencies, companies or individuals. Civil litigation can thus be defined as any litigation in the ordinary courts other than criminal proceedings.

4.2.1. Commencement

Civil litigation in Ethiopia begins when a court is seized of a matter through a statement of claim submitted by a claimant to a court of law. (Art. 213, CPC) The first stage in civil proceedings consists of the exchange of pleadings between the parties and submission of the same together with the list of witnesses and the written document to the court. The early stage of proceedings is characterized by the concept of fact pleading. (Art. 80, CPC) In fact pleading, the plaintiff states only the material facts on which his claim is based and the defendant answers by stating the allegations which he denies or other facts on which he relies for his defences. Fact pleading enhances the possibility for speedy disposition of cases by allowing an early identification of facts on which there is a difference between the parties, helps in limiting the permissible range of evidence that can be brought to trial, and gives the other party time to prepare in advance as he knows the facts which he is expected to answer. (Jolowicz, 2000:35)Fact pleading is limited to the statement of the facts only and forbids the inclusion of the evidence or the conclusions which legally follow from

the pleaded facts. Based on this principle, the CPC requires the plaintiff to state in his claim, in a concise form, only the material facts on which he relies for his claim and the remedy or relief sought from the defendant. The plaintiff is allowed neither to elaborate the evidence nor to build his legal arguments in pleadings. (Art. 92, CPC) The plaintiff is duty bound to attach to his pleading the full name and address of witnesses to be called at the hearing and the purpose for which they are to be called, the list of documents on which he relies specifying in whose possession they are to be found, and the original and a copy of any document upon which he sues, that is in his possession. (Art. 223, CPC) The statement of defence follows a similar pattern to that of the statement of claim. (Art. 234 (2), CPC) Thus the statement of defence "shall contain and contain only a statement in a concise form of the material facts" (Art. 80 (2), CPC) on which the defendant relies for his defence. The list of witnesses or documents that will be relied upon as evidence must be attached to the statement of defence. General denial of the facts alleged by the plaintiff in his statement of claim is not sufficient; denials must therefore always be specific to the grounds in the statement of claim. (Art. 83, CPC) If any allegation of fact is not specifically denied by the defendant in his statement of defence, it is deemed to have been admitted. (Art. 235 (2), CPC)

While these rules impose an obligation on the parties to disclose evidence at the earliest possible stage, the degree of disclosure is limited in two respects. The parties disclose only the evidence which they will use during the trial, and this minimizes the cost which results from unlimited disclosure in some other systems (Davis, 2006). Second, the parties disclose evidence only if it is in their possession. If it is not in

their possession, mention of the person who possesses those documents satisfies the requirement in the rules.

The obligation of the parties to follow the rules on pleadings is sanctioned by the rules of procedure. The primary sanction is rejection of the pleadings at an early stage during the process. While the rejection of the pleadings at an early stage may have the effect of ensuring that only cases that deserve the courts' time and resources proceed to trial, thorough examination of the grounds for rejection and their effects shows its limitations. While the statement of claim and the statement of defence can be rejected if they fail to disclose the evidence upon which they are based, only the statement of claim can be rejected for failing to disclose a cause of action. The statement of defence cannot be rejected on the grounds that it does not show sufficient grounds of defence. In addition, rejection of the pleading does not have the same effect on the plaintiff and the defendant. While the rejection of the statement of claim by the registrar or the court brings the process to a halt then and there (Art. 232 CPC), rejection of the statement of defence does not have this effect. When the statement of defence is rejected, the case proceeds to trial in spite of such rejection. (Art. 238(2), CPC) Besides the court retains the discretion to proceed to trial even when the defendant admits all the facts alleged in the statement of claim.(Art. 235, CPC) These rules on pleadings are relaxed further by another rule which allows the plaintiff to request the amendment of pleadings anytime before judgment.(Art. 91, CPC) These rules on the one hand indicate that rejection of claims on procedural grounds is accepted in the system. This indicates the desire to balance the rights of claimants with the resources that are available, as advocated in other legal systems that have seen some changes in the justice on the merits philosophy. (Zuckerman, 1999:17). It

also indicates that although the procedural design is primarily adversarial and the system leaves the gathering of evidence to the parties, the court is not limited by the pleadings of the parties. This is particularly clear from the discretion given to the court to proceed to trial even when the defendant admits the claim. One can argue that the Code gives this power to the judges to enhance the possibilities of discovering the truth. On the other hand limitations on the powers of the judges to strike out defences that do not disclose reasonable grounds of success will affect the workload and thereby the efficiency of courts by allowing groundless cases to proceed to trial.

Once the exchange of the pleadings is concluded, the court declares the pleading stage closed and adjourns the case for trial. (Art. 240, CPC) As intimated earlier, the case will be adjourned for trial even if the statement of defence which was submitted by the defendant or his counsel is rejected or even when the defence does not have reasonable chance of success. The first stage in civil proceedings, therefore, mainly consists of the exchange of written pleadings between the parties and discovery of evidence. A party that fails to disclose evidence at this stage is not allowed to do so at any other subsequent stage (Art. 137, CPC). This preparatory stage gives the judge an adequate chance to have a good knowledge of the facts well before the case comes for trial.

4.2.2. The Trial

The trial of suit in civil litigation is divided into two main parts. The first part of the trial is called the first hearing. The second and the main part of the trial relates to the hearing of suit and examination of witnesses.

After conclusion of the pleading stage, the case is adjourned for the first hearing, which is the first part of the trial. The judge to whom the case is sent will have had the occasion to see the pleadings, the list of witnesses and the points on which they will testify as well as the annexed documentary evidence of both sides when he sits for the first hearing. At the first hearing the judge gets involved extensively in shaping the process by examining the parties or their pleaders and can give judgment on any point that is admitted by either party. (Art. 242, CPC) During this stage, the court will also rule on preliminary objections that may have been raised in the pleadings or during the first hearing. (Art. 245, CPC) Once decision is given on the preliminary objections, the court will ascertain on what material propositions of fact or law the parties are at variance and will frame the issues on which the appropriate decision of the case depends. (Art. 247, CPC) If the court thinks that some issues cannot properly be framed without the examination of persons that are not before it, or without the examination of documents that are in the possession of anyone else, it has the power to summon the person and examine him or her or to order the production of the document by the person in whose possession the document is to be found. (Art. 249, CPC) The court can, on its own initiative, order the production of a written evidence or the summoning of any person to appear before it at this stage even if the name of the person or the document is mentioned neither in the statement of claim nor in the statement of defence. After framing the issues, the judge can pronounce judgment without going to trial if the finding on the issues is sufficient, and he is convinced that no further argument or evidence than the parties can adduce at once is required, and that no injustice will result from so proceeding. (Art. 255, CPC)

The power to frame the issues for decision, therefore, primarily rests on the courts and not on the parties in the Ethiopian civil justice system. This scheme reduces cost for the state and the parties by limiting the evidence that goes to trial. It also puts the judge in a better position to properly manage the case, including encouraging the parties to settle, as he has a good knowledge of the case and the issues on which the parties are at variance. As the rules give the judge powers to rely on additional information the search for truth is also not limited by the evidence brought by the parties. Much as the law gives the judges wide powers to control the process, there are some limitations which need to be examined concerning the first stage. Once the judge is convinced that there are issues between the parties, the trial continues regardless of the prospect of winning of either the plaintiff or the defendant. The judges cannot give a summary judgment on the merits when they believe that one of the parties does not have a prospect of winning. Summary judgment can be given only when the plaintiff starts a claim under a different track which will be discussed in the following section. This arrangement may give non meritorious cases the chance to proceed to trial which may affect the workload of the court and the cost for litigants.

The second stage of the trial, the hearing of suit and the examination of witnesses, (Arts. 257-273, CPC) is the most important stage where the parties present their evidence and arguments in open court in a continuous and concentrated fashion. The presentation and examination of the evidence primarily rests on the parties. (Art. 259, CPC) The parties are the ones who conduct the examination of their witnesses and the cross examination of the other's witnesses. (Art. 256, CPC)

As in the first hearing, the court retains an important role in shaping the process during the trial. First, the judge can put to a witness called by either side any question at any time which in his opinion appears necessary to determine the suit properly. (Art. 262, CPC) Unlike the parties whose examination of witnesses is limited in time, the court can even recall a witness who has already been examined and ask such questions as 'it thinks fit' (Art. 266, CPC) Second, if the court finds calling a person not called by either party to the dispute as a witness necessary, it can at any time call such person to give evidence or to produce documents in his possession. Any person who is in the court room during the hearing can also be asked to give testimony or to produce documents under his possession then and there. (Art. 264 (1& 2), CPC)

The judge in civil litigation, envisaged by the rules, therefore plays an active role in civil litigation both in terms of discovering the truth and ensuring the efficient unfolding of the process.

4.2.3. Special Proceedings

The rules in the CPC do not mainly make any differentiation between cases as regards the rules that should be followed. There is mainly one track through which all cases are processed regardless of the value, nature or complexity of the case that is before the judges. The preparatory and the trial stages mentioned in the preceding section will therefore apply to all cases, except when they fall under the following two categories.

I. Summary Procedure

Summary procedure allows judges to give judgment on the merits without necessarily going through a full blown trial as mentioned in the preceding section. This procedure is available only to a plaintiff who seeks to recover a debt or a liquidated claim in

money payable by the defendant. Summary procedure is particularly available when the claim arises from

> "a) a contract, expressed or implied, such as on a bill of exchange, promissory note, or cheque, or other simple contract debt; or
>
> b) A bond or contract written for payment of a liquidated amount of money; or
>
> c) A guaranty where the claim against the principal is in respect of a debt or liquidated amount only". (Art. 284, CPC)

This procedure can be initiated by endorsing the statement of claim as "Summary Procedure" to be accompanied by an affidavit where the plaintiff, or his pleader, will swear that the facts in the pleading are verified and state that in his belief the defendant does not have any defence to the suit. The decision whether to follow the ordinary procedure or the summary procedure, is however, left at the discretion of the plaintiff and the court cannot put a case into a summary track if the plaintiff takes the other option.

Summary procedure entitles the plaintiff to a decree to an amount specified in the statement of claim without going through the normal process of exchange of pleadings, first hearing, examination of witnesses and presentation of arguments unless the court grants the defendant leave to defend. In summary proceedings, although the court has to serve a summons on the defendant upon the filing of a statement of claim and an affidavit.(Art. 285, CPC) defence can be filed only if the court grants leave to do so. Leave to defend can be granted if the defendant shows cause to that effect. Should the defendant fail to apply for leave within the time fixed in the summons, the plaintiff will be entitled to a decree 'for an amount not exceeding

the sum claimed in the statement of claim together with interest, if any, and costs against the defendant'. (Art. 285 (2), CPC) The plaintiff will equally be entitled to a judgment if the application for leave to defendant is rejected. The application of the defendant for leave is scrutinized very strictly and the court may go to the extent of demanding the defendant to appear in court and be examined on oath. (Art. 286, CPC) The court may also request the defendant to produce documents or books or deeds to see to it that there is indeed a defence to the claim. The court therefore engages in an examination of the contents of the defence before granting leave to the defendant. .

Summary proceedings are important devices to ensure proportionality of procedure. In Ethiopia, the scope of summary procedure is limited. First, summary procedure can be requested by the plaintiff against the defendant and not by a defendant against a plaintiff. Second, even for plaintiffs summary procedure can be requested only for those grounds that are enumerated under the rules. Cases that fall outside these rules follow the normal procedure even when the case is simple. Third, summary procedure can be used only when the plaintiff applies to that effect. The court cannot use this procedure on its own motion. These factors limit the advantages which this procedure could have provided in ensuring greater procedural economy.

II. Accelerated Procedure

Accelerated procedure is intended to provide remedies in a much shorter span of time than the ordinary or the summary procedure. The basic feature of this procedure is that the court gives its decisions in principle based on the application provided by the applicant. (Art. 303, CPC) Unless specifically provided by law, the obligation to notify and serve summons to appear is dispensed with in this procedure. Unless the

court on its own motion requires production of additional evidence it gives its decision solely based on the application of the plaintiff. This track is available for a number of actions which, by their very nature require a speedy response from the judicial organs. It is specifically available for commercial matters such as calling of meetings, (Art. 307, CPC) appointment of directors, trustees or liquidators (Art. 308, CPC), application to set aside resolutions (Art. 309, CPC), application for the expulsion of a partner or dismissal of a manager (Art. 310, CPC), dissolution of partnership or body corporate (Art. 311, CPC), and amalgamation of endowments (Art. 312, CPC). Such a process can only be initiated within 15 days after the fact on which the application is based unless there is another time limit for specific types of actions (Art. 301 (1), CPC). If the action is not brought to court within the specified period of time these cases also follow the normal procedure.

4.2.4. Judgments

Trials are conducted by judges at all levels and every judgment in civil litigation must be given in writing by a judge. The judgment must disclose the findings of fact and findings of law of the court. It must contain the points for determination, the decision given on every point and the reasons for such decision. (Art. 182 (1), CPC) If a judgment is given at first instance it should also include a concise statement of the case in addition to these elements. Much as the court may have called witnesses on its own and examined witnesses called by the parties, it cannot give judgment on any matter that is not raised by the parties. (Art. 182 (2), CPC)

4.2.5. Alternative Dispute Resolution

The advantage of ADR in the process of litigation has been mentioned in the preceding chapter. The legal system in Ethiopia encourages the use of alternative dispute resolution mechanisms before or during litigation. Both the CC of 1960 and the CPC of 1965 have rules on compromise, conciliation (mediation) and arbitration. Out of the 22 titles of the CC of 1960 one is devoted to ADR. The use of alternative methods of dispute resolution is however optional. Neither the defendant nor the plaintiff will therefore be obliged to try any of the alternative means of dispute resolution that are outlined by the law. There are a few exceptions to this general rule, one of which is submission to arbitration of disputes arising out of marriage relationships. (Art. 725, CC) The CPC particularly mentions that during the process the judge can attempt to reconcile the parties as a result of which the parties may reach 'a compromise agreement' on all or some of the issues and bring the suit to an end. If a compromise agreement is reached in court the court will record the agreement and give a judgment accordingly. Such compromise agreement can also be reached out of court by parties in which case the plaintiff will have to withdraw his case from the court. (Art. 264 & 269, CPC)

4.2.6. Review of judgments and decrees

There are a number of interests which a system of appeal tries to balance in all systems. On the one hand it is a system that tries to reduce the risk of error by allowing revision of the matter by another court. On the other hand it also tries to ensure uniform application of the law. These aims fulfil the personal interest of the litigants on the one hand and public interests on the other. While appeal may reduce

the risk of error it also raises the cost and delay which may undermine the utility of the whole process. This conflict between these interests is particularly pronounced in civil law systems that allow broader right of appeal to litigants in the form of a rehearing. (Zuckerman)

Judicial reform in Ethiopia should address the issue of whether or not the appellate process in place strikes the right balance between these interests. To facilitate the evaluation of this issue the main features of the system need to be seen first.

Under the Ethiopian law there are a number of possibilities of having proceedings reviewed. First, proceedings can be reviewed by the court which rendered the decision. Second, there is an avenue of appeal. And third, review by cassation is available for cases that have exhausted all other remedies.

The CPC empowers the court of rendition to correct procedural irregularities that arise from non-compliance with the rules provided for in the Code. The rule provides that,

> unless otherwise expressly provided by law or directed by the court where irregularities arise from non-compliance with any provision of this Code or regulations made there under, the court may of its own motion or on the application of either party, set aside such proceedings either wholly or in part as irregular, or amend them or make, on such terms as it thinks fit, such other order as may be appropriate. (Art. 207, CPC)

This rule does not allow courts to review their own judgments or decisions in so far as those decisions and judgments relate to final disposition of facts or law. It, however,

gives the courts a power to rectify procedural errors that are made in the process. Based on this rule any irregularity which results from non-observance of the rules of procedure should be corrected by the court which made the irregularity and not by the appellate courts. The procedural law actually denies the right of appeal on such grounds unless an application was made to the court which committed the irregularities. (Art. 211, CPC) The rule on appeals emphatically denies a right to appeal if remedies that are available in the lower courts have not been exhausted by providing that "where an appeal lies from a judgment or order, but remedy under this Code is available in the court which gave such judgment or made such order, no appeal may be lodged unless such remedy has been exhausted". (Art. 320 (2), CPC) This is designed to reduce the risk of error without the cost and delay which appellate processes require. Nevertheless many judges in Ethiopia do not allow correction of any irregularity because they believe that any error can only be corrected by an appellate court. Therefore in spite of this rule litigants take their cases to the appellate courts to have irregularities rectified.[6]

The second avenue that is available for correction of error is the appellate process. The appeal system in Ethiopia gives heed to the interests of error correction and cost minimization. On the one hand it encourages the correction of error by the court of rendition thereby economizing on procedural costs. This can be discerned from the rules which require the parties to exhaust local remedies before they use the right of appeal. As mentioned earlier, appellate review is not available to litigants in a civil dispute if a remedy is available in the lower courts. The party to a dispute is expected to exhaust the avenues that are at his disposal in the court that gave the original

[6] Interview with judges in the Federal and First Instance Courts

decision. It is also not available if it relates to an interlocutory matter which has to wait for the final judgment. (Art. 220, CPC) Second, even when parties go on appeal, they are not entitled to get a full rehearing by the court of appeal as the system allows the court to dismiss cases, if there is not sufficient reason for intervention in the decisions of the lower court. A court of appeal can dismiss an appeal without necessarily hearing the respondent if it agrees with the judgment of the lower court. (Art. 337, CPC) Appellate courts in Ethiopia therefore make some screening of cases that should go for the full hearing on appeal. This system gives the parties the right to have their cases considered without necessarily incurring the costs of the full retrial of the case. The system also ensures economy of procedure by limiting introduction of evidence at the appellate process. Parties are not allowed to introduce new evidence at the appellate level. The appellant can ask for production of additional evidence on appeal only if he can prove to the satisfaction of the appellate court that the lower court has refused to take evidence which should have been admitted. (Art. 345, CPC) Besides, the process tries to reduce delay which may result from the appellate process by recognizing the finality of the judgment given by the lower courts. The fact that appellate process has been started does not therefore stop the process of execution of the first judgment. (Art. 332, CPC)

On the other hand one observes a number of features in the system of appeal which may add to the delay and cost without necessarily having a proportional return in the reduction of risk of error. First the right of appeal is available to all cases regardless of the amount involved in the dispute. Either of the litigants who is dissatisfied with the decision of a court has the right to lodge an appeal to a higher court. (Art. 320, CPC) Apart from the factors mentioned above the system does not compare the value

of any individual case to the resources that may be deployed in the process of appeal. The process of appeal will proceed even if the monetary value of the case is small relative to the cost and the delay. A case can reach the highest court of the land even if the amount in litigation is not considerable in comparison with the resources that will be spent both by the parties and the judicial system to process it. In short, the system does not incorporate the principle of proportionality, a principle which ensures that the "procedure adopted for resolving a given dispute should be proportionate to the value, importance, and complexity of the dispute". (Zuckerman, 1999: 48)) Second, the court fee that is paid to the appellate courts is less by 50% from the courts of first instance, and if there is a second appeal it is still 50% less than the first appeal. Third, although the appellate courts have the power to dismiss cases that do not have a prospect of success, this can be done only after having heard the appellant. The judges cannot dismiss the appeal by just examining the documents. A date of first hearing must be fixed to hear the appellant in all situations. (Art. 338, CPC) These elements of the appellate process can create an incentive for parties to go on appeal just to prolong the process.

The third avenue for revision of judgments is cassation. The cassation division is a mechanism for correcting fundamental errors of law. (Art. 79, Const.) Cases that get a full hearing of the cassation division are screened by a bench of three who may or may not get involved in the final hearing of the cases. This helps the court from getting inundated by cases that come from the lower courts. On the other hand however, the process of cassation follows the same procedure as the appellate process. Like in the appellate division, there are no limits on the type of cases that can come to the cassation division. Anyone can come to the cassation division in the FSC from a

final decision of some other court. Thus cases which started in some small claims tribunals can come to the cassation division claiming that there is a fundamental error of law in the decision of those tribunals. In the cassation divisions of some of the state courts, petitions from the small claims tribunals constitute up to 30% of the workload.[7] Of the civil cases that were filed to the cassation division of the FSC in 2006, 22.4% of them were initiated in small claims tribunals in the Oromiya State. People who petition to the cassation division do not pay court fees, which may encourage litigants to lodge complaints and increase the workload which will in the long run affect its performance.

4.2.7. Costs

As discussed in the previous chapter the cost structure in a legal system affects the pace of litigation through its impact on the incentive of the parties, as well as their lawyers in the process of litigation. Consideration of the legal framework that affects the cost of civil litigation is, therefore, important. Interests to use the cost structure in Ethiopia will, however, be limited because of two basic factors. Firstly the fees which plaintiffs have to pay when they submit their statements of claim are so small that it is very unlikely that they will deter frivolous litigation which court fees are intended to prevent. Secondly the impact of lawyer's fees minimized as many litigants appear without any representation. Studies have indicated that the overall cost of litigation in Ethiopia constitutes only 15% of the total cost. Compared with many other systems this is relatively low. (World Bank, 2009)

[7] Oromiya SC has this problem, but this problem is also faced in other States. In the FSC a big number of cases that were initiated in the small tribunal courts come to the cassation division. In the year 2006-2007, 775 cases which started in the small claims tribunals in Oromiya were opened in to the Cassation division of the FSC. That constitutes 22.36% of the civil cases that were initiated in that year in the same division.

A. Court Fees

Civil litigation can be initiated by a plaintiff only after paying the appropriate court fees. The statement of claim of the plaintiff will not be processed unless the court fees are paid beforehand. (Art. 215(1), CPC) Court fees must likewise be paid by the defendant if the defence contains a counter claim. (Art. 215(2), CPC) The fees for civil cases were fixed in 1952 by a Legal Notice issued by the President of the then High Court (Legal Notice 177, 1943). These rules have not been revised since. The Legal Notice puts the principle and has an annex that shows the amount that should be paid by showing the ranges between 1 and 100, 000 Ethiopian Birr. The fees that are paid are not that high and form only a small percentage of the amount in litigation particularly when the amount in litigation increases. Although this encourages access to justice, it may also encourage litigation in the courts.

Table 8 : Court fee structure

Category	1	2	3	4	5	6	7
Amount in dispute	1-100	101-1000	1001-10000	10001-50000	50001-100000	100001-200000	>200,000
Unit for calculation	10	50	100	250	500	100	100
Fee per unit	0.50	2.50	4.00	9.00	15	1.5	1

Although the amount that is paid to court increases with the amount in dispute, the percentage of the amount paid decreases as the amount in dispute increases. As the law charges a flat rate for disputes falling within the same category the percentage will not be the same for every dispute within that category. The pattern can however be seen by taking some figures in any of the categories.

Table 9 : Rate of court fees

Amount in dispute	100	1000	2000	5000	10000	50000	100,000	200,000	1,000,000
Court fee	5	50	90	210	410	1850	3350	4850	12,850
Percent	5%	5%	4.5%	4.2%	4.1%	3.7%	3.35%	2.42%	1.128%

The court fee becomes a very small percentage as the amount in controversy increases. People having a small amount in dispute pay a bigger percentage compared to those with a bigger amount. Although court fees are just one type of cost in the process of litigation, they can also be used as an instrument to discipline the litigation process. Appellants pay only 50% of the amount that is paid in the first court. The cost structure indicated above applies only for cases that can be assessed in monetary terms. For all the other cases the plaintiff pays a fixed sum of 25 Birr, which is in many cases too insignificant to deter people with frivolous litigation.

Although payment of the required court fee by the plaintiff is a basic prerequisite for the initiation of civil litigation. The CPC has a scheme for people who cannot afford to pay the required amount at the beginning of the process. For purposes of civil litigation, anyone who does not have sufficient means to cover the whole or part of the prescribed court fees is deemed to be a pauper (Art. 467 (2), CPC). The court issues a certificate of a pauper (Art. 143, CPC), after hearing the evidence of both parties in this regard (Art. 472, CPC). After the issuance of such a certificate the plaintiff is "not liable to pay the whole or part of the court fee or other fees or charges in proceedings connected with the suit, as the court may direct" (Art. 473, CPC).

B. Attorney Fees

Attorney fees which in many cases constitute a bigger part of the cost in civil litigation when the parties are represented are not fixed by law. The Licensing and Registration Proclamation leaves the cost for attorney services to the agreement of both parties. (Pro. 166, 2000) The legislation that fixed a minimum and a maximum amount for attorney fees in 1942 was repealed by this proclamation leavening the scheme completely at the discretion of the parties. On the other hand both the CPC and the CC have legal provisions which empower the courts to check that the attorney fees are within reasonable limits. The CPC allows the court to reduce any item in the bill of costs which it thinks is excessive. (Art. 464 (2(a)), CPC) The court is also empowered to reduce the remuneration in contracts relating to the hiring of intellectual work, when the amount agreed between the parties "is excessive as to be contrary to the etiquette of the profession of the person hiring out his work". (Art. 2635, CC)

During the process of civil litigation there are some other costs which either the plaintiff or the defendant must cover to proceed in the process. The plaintiff may be asked to post a bond as a security for the damages the other party may sustain as a result of the litigation. This is a discretionary power which, if exercised, can bar the party from proceeding with his claims any further. (Cappelletti, 1972-1973)

C. Allocation of Cost.

The allocation of the costs incurred during litigation is at the discretion of the courts. The relevant rule in the procedure provides that

> unless otherwise expressly provided, the costs of and incident to all suits shall be in the discretion of the court and the court shall have full power to decide by whom or

out of what property and to what extent such costs are to be paid and to give all necessary directions to this effect.

From the reading of this rule it is clear that the court has full discretion as to who should bear the cost of litigation. The fact that a party loses in litigation does not necessarily imply that he will cover the costs of the other party. On the other hand, a winning party may, by a court order, be required to pay the expenses of the losing party. As usually happens in the courts, both parties may also cover their own expenses. The bearer of costs therefore is not known until the court gives its final order as to costs. This affects the incentive structure for litigation.

4.3. Salient Features of Criminal Proceedings in Ethiopia

The process in the criminal justice system in Ethiopia is primarily governed by the CrPC that was adopted in 1961. This is the first comprehensive legislation that was enacted to regulate criminal proceedings in Ethiopia. This law was enacted as part of the efforts undertaken to modernize the country in the 1960s. Unlike the substantive Codes enacted during this period, which were drafted by experts from continental Europe, the CrPC was finally drafted by Sir Charles Mathew, the then advisor to the Minister of Justice. Because of this background in the drafting process the Code is influenced more by the common law tradition than by the continental one. (Vanderlinden,1966-1967:257). Initially the responsibility of drafting the Code was given to an eminent scholar of comparative law and procedure Jean Graven. Jean Graven submitted the first draft containing 1014 Articles in 1955. Graven's *Avant-Projet* was given to the then legal advisor of the Ministry of Justice Sir Charles Mathew for examination and preparation of a CrPC. (Jembere, 2000) the final draft adopted by the parliament eventually turned out to be completely different from the

initial draft that was submitted by Jean Graven. Stanley Fisher describes the process in the following words.

> The history of criminal Procedure is, in a way, the history of a gradual discarding of Prof. Graven's initial drafting works….The major alteration of the draft occurred when…it was decided that provisions dealing with judicial organization, jurisdiction evidence etc., shall be continued in a separate Code. The second factor which led to the partial abandonment of Prof. Graven's draft was the decision, reached apparently in late 1958, to abandon the initial project of an evenly "mixed" continental-common law procedure for an overall design more substantially adversary and thus less continental…In October 1958, the Commission agreed to give Prof. Graven's *avant-porjet* to Sir Charles Mathew for examination and proposed amendment. (Fisher, 1969:xii)

The CrPC, which is now in force, was finally enacted on November 25, 1961 having 224 Articles with an overall flavor of the common law system and some concepts from the inquisitorial system.

The CrPC regulates police investigation, prosecution, trial and the appellate processes of criminal proceedings at all levels of the judicial arena. Proceedings involving young offenders and petty offences are also regulated by this Code.

In the following few pages the basic features of the CrPC will be highlighted to facilitate the proper understanding of the efficiency problems in the process. Reform of CrPC s is one of the avenues which has been taken to address the problems of undue delay, backlog and other problems in other legal systems. Changes in criminal

procedure have been implemented in Chile and Italy to address the problems which these countries had in the administration of the criminal justice system (Marafioti,).

4.3.1. Police Investigation

The CrPC places the power to investigate crimes in the police institutions, which in practical terms conduct investigation without much supervision by the public prosecution. Its implementation notwithstanding, the Code gives the public prosecutor the power to give "the necessary orders and instructions to the police and ensure that the police carry out their duties in accordance with law" (Art. 8, CrPC). Although this provision does not go as far as placing criminal investigation completely under the control of the public prosecution, it provides for sufficient functional relationship between the police institutions and the prosecution department.

In the process of investigation the police have the power of arrest, search and seizure, which in principle requires court warrant to perform. (Art. 59, CrPC) Thus judges play an important pre-trial role by examining the legality of arrest, search and seizure. With the exception of evidence obtained under coercion, which the Constitution says, is not admissible as evidence, (Art 19, Const) however, there is no exclusionary rule in place in the CrPC.

Unlike in ordinary criminal cases where police has the duty to investigate when it receives complaints (Art. 22, CrPC), cases that involve young persons should be immediately taken before the nearest court. (Art. 172 CrPC) In such cases the complaint is made to and recorded by the court and not by the police. Ordinary police investigation is dispensed with at the beginning of the process and can only be conducted when the court gives instructions as to when and how it should be done.

(Art. 172, CrPC) Likewise, the public or private prosecutor is entitled to directly apply to court to summon the accused to appear in cases of petty offences (Art. 167, CrPC). This provision incorporates the concept of summary process in matters dealing with petty offences. Thus anyone who believes himself to have been a victim of a petty offence has a direct access to a criminal division of the courts to have the case heard. This is a simplified process, which does not need the rigorous process of police investigation and the full-fledged prosecutorial involvement.

4.3.2. Prosecution

Once the police report is sent to it, the prosecution authority has an obligation to institute charges against the suspect. (Art. 40(1), CrPC) The CrPC does not give the prosecution the discretion to prosecute as is the case in some systems. Non-prosecution in provable offences is, therefore, not allowed. Some studies about countries have indicated that the absence of this discretion to prosecute has contributed to the increment of cases in the judicial process and the resulting delays. (Pizzi and Marafioti, 1992) Because the prosecutor has the obligation to prosecute cases, cases have to come to court even in situations where the public prosecutor thinks that there are good reasons for not proceeding with the case. In such cases the only possibility is to bring the case to court and then ask the court to drop it. (Art. 122, CrPC) The Ethiopian prosecutor therefore has neither the discretion to decline to file charges nor the power to drop charges that are already pending in court. On the other hand the prosecutor has the obligation not to institute proceedings against the accused where

A. he is of the opinion that there is not sufficient evidence to justify a conviction,

B. where the case cannot be tried in the absence of the accused, and there is no possibility of finding the accused

C. the prosecution is barred by limitation or has been a subject of amnesty or pardon

D. The public prosecutor is so instructed by the Minister of Justice on grounds of public interest. (Art. 42CrPC)

Refusal to institute proceedings on the grounds mentioned above, however, must be made in writing and shall clearly record the reasons for the refusal. (Art. 43 CrPC) Many a time prosecutors press charges even where the likelihood of getting conviction is low because they find it easier so to do than to write the explanation for dropping the charges. (MoJ , 2005). Besides, the decision of the prosecutor to drop charges is subject to judicial scrutiny through the application of the victim of the crime or his representative (Art. 44(2), CrPC).. This situation affects the scenario in criminal justice by raising the incoming cases to the courts as the prosecutors feel that they have to frame charges on any case that is reported to them by the police

There is no preliminary hearing for charges that are brought by the prosecutor, which means that the court has to set a date for trial for every case regardless of its strength on the merits. There is a process for compulsory preliminary hearing in homicide and aggravated robbery cases, but even in these cases the court's responsibility is limited to taking the testimony of the witnesses before the date of the trial. (Art. 80, CrPC) In all other cases this pre-trial procedure is optional. The purpose of this pre-trial procedure is to have the deposition of the witnesses of the prosecutor recorded in the court of preliminary inquiry in the presence of the accused. During this preliminary hearing the court writes down the statement of the accused if he wishes to make a statement. The accused is also allowed to cross-examine the witnesses of the

prosecution at this stage. The judge is allowed to call additional witnesses at this stage if he thinks that their "testimony is in the interest of justice" (Art. 87, CrPC) The deposition of the witnesses taken during this pre-trial stage can be read during trial and put in evidence if "the witness is dead or insane, cannot be found, is so ill as not to be able to attend the trail or is absent from the" Ethiopian territory. (Art. 144 (1), CrPC) If the deposition relates to a testimony of an expert, however, it can be read and put in evidence even if the expert is not called as a witness by the prosecutor. Art. 144(2) CrPC) At any rate no such pre-trial proceedings are conducted in Ethiopia even in those cases where it is compulsory to conduct them.

4.3.3. The Trial

The CrPC envisages a continuous and concentrated trial where both the public prosecutor and the accused produce their witnesses on the same day and conduct the examination and cross-examination in an adversarial fashion. (Art. 94(1), 123 & 124, CrPC) As has been mentioned and will be confirmed by the data collected from the courts, the main reason for the delay, congestion, ineffectiveness of the criminal justice system in Ethiopia relates to this fact: the fact that the evidence that is gathered by the prosecutor and the accused is not produced, and trial not conducted, following the procedures provided by law. The trial which can only be adjourned to the following day if it cannot be completed in one day, (Art. 94 (1), CrPC) is mainly a forum where both parties examine their witnesses, cross-examine the other's and make oral presentation of their cases by way of opening statements and closing arguments. (Art. 136, 142, 148, CrPC)

The primary responsibility of presenting the facts and legal arguments to the court as they see them rests on the parties to the litigation. However, during the trial the judge may ask a witness any question at any time if it "appears necessary for the just decision of the case". (Art 136(4), CrPC) The court cannot examine the accused as such, but can put to him questions that will help clarify the statements if the accused decides to make a statement. Furthermore, the court in criminal proceedings can, "at any time before giving judgment call any witness whose testimony it thinks is necessary in the interest of justice". (Art. 143 (1), CrPC) The Code thus envisages not a passive judge that only rules on motions and gives a final verdict at the end of the process, but an active judge that plays an important role in discovering the truth.

The criminal justice system has no plea-bargaining procedure. The only exception to this scheme of arrangement is the Anti-Corruption legislation, which allows dropping of charges against a person in return for the testimony which the person gives in court against others. (EACC proc. 90/97) If the accused pleads guilty at the beginning of the trial, the court is not bound by it and may require production of evidence by the prosecutor. The defendant cannot, therefore, bring the judicial process to an end by pleading guilty. Whether or not a judgment of conviction should be given based on the guilty plea of the accused is at the discretion of the court. Even if the accused pleads guilty and the court's decision is based on that plea, it does not necessarily result in mitigation of sentence against the accused. Partly because of this, not so many people plead guilty in the courts.

Judges handle all criminal cases in Ethiopia and the system does not give any place for the participation of a jury or lay judges. An important feature for the system is

the permission of the victims of crime to join their claims for civil compensation with the criminal action by the prosecutor against the defendant. (Art. 154, CrPC) Under the CC of 1960, which was highly influenced by the French jurisprudence, a criminal act is a source of tort liability at the same time (Art. 2030, CC) and as a result conviction for crimes can automatically result in the award of compensation to the victim of the crime without the need to open a file for civil proceedings. In spite of this rule, civil claims are not usually joined in criminal proceedings.

4.3.4. Appeal

Both sides to the criminal process can appeal to the higher courts against a judgment of the lower courts. For the accused the right of appeal is constitutionally recognized. Under the Constitution accused persons convicted of an offence have the right of appeal to a higher tribunal established by law. (Art. 20, Const). The accused or the public prosecutor can go on appeal almost on every ground except on interlocutory matters. (Art. 184, CrPC) Appeal is possible on conviction or acquittal as well as on the sentences passed by the court. (Art. 185, CrPC) The courts of appeal have wide powers to review the facts and the application of the law. Except in the Federal Courts, there is no limit to the number of appeals in criminal proceedings. In the federal courts, second appeal is not allowed unless the first decision has been reversed or varied. (Art. 9(2), Proc. 25, 1996) Although the option to go on appeal in criminal cases is broad, as will be seen in the subsequent sections, the number of cases that are submitted to the appellate courts in criminal cases every year are very few in number and constitute a very insignificant part of the overall workload of the appellate courts.

4.4. Pace of Litigation in Ethiopia

The following sections will focus on the pace of litigation in Ethiopia. The data is collected from the FSC, the FHC and the FFIC in Addis Ababa. The pattern, is however, believed to give a general picture of the courts in the other parts of the country as well. The FFIC has many branches within Addis Ababa. Among these branches the Lideta branch is picked for purposes of this work. Not only is the Lideta Branch the biggest of all the branches, the data is also more organized and was readily accessible than in the others.

The FFIC handles both civil and criminal matters in a bench having only one judge. The number of benches in this court is therefore the same as the number of judges. The court does not have an appellate jurisdiction. All cases for this court are therefore initiated in its first instance jurisdiction.

Judges in the FFIC are appointed usually after a few years of experience as assistant judges within the court system. The number of judges in the court has not been uniform throughout the years. The number of civil benches is usually higher than the benches which handle criminal cases.

Table 10 : Number of judges in FFICL

	2001-2	2002-3	2003-4	2004-5	2005-6	2006-7	2007-8
Civil	14	11	12	11	10	10	11
Criminal	9	9	8	7	6	7	8

The judges in the FHC are usually appointed after having served in the FFIC or in other State Courts. They are more experienced than the judges in the FFIC. The benches are composed of three judges in criminal cases where the defendant is

charged with a crime that carries an imprisonment of 15 years or more. All other cases are handled by benches with one judge. The FHC has two benches that are composed of three judges.

The FSC has two appellate benches, one civil and one criminal. Both benches are composed of three judges. The cassation division in the FSC, on the other hand, hears cases in a bench of five. Cases in the cassation division are screened by a bench of three judges before they are heard by the full bench. (Proc. 25/94)

Table 11: *Number of judges in the Federal Courts*

Court	Year						
	2001-2	2002-3	2003-4	2004-5	2005-6	2006-7	2007-8
FSC	13	13	15	15	15	18	25
FHC	35	38	39	39	39	42	53
FFIC	70	70	52	46	52	56	53
Total	**118**	**121**	**106**	**100**	**106**	**117**	**131**

Source. FJAC

4.4.1. Pace of Litigation in Civil Cases

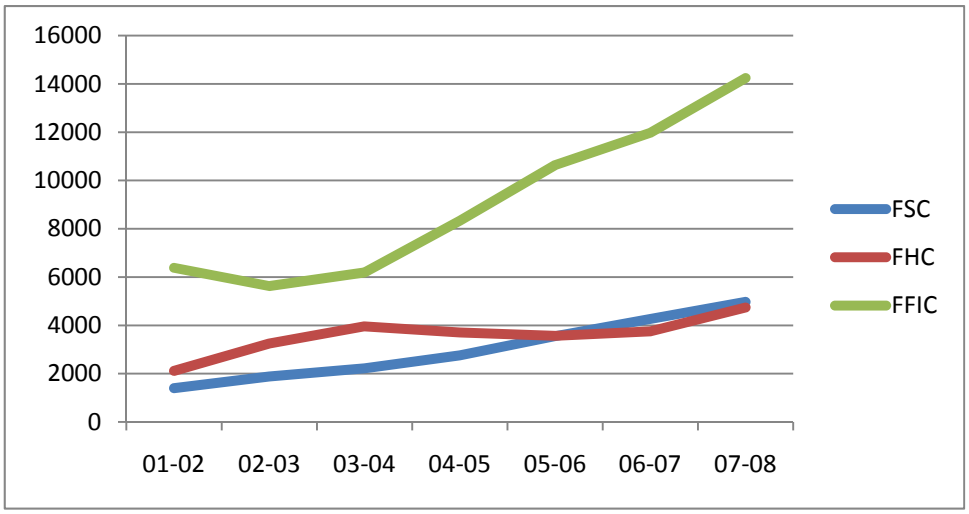
In this section a brief consideration of statistical figures for civil litigation is in order. Empirical data will be the basis for our discussion of the pattern of litigation in general, the problem areas in the process and the possible ways out. Some statistical facts will be discussed in this part to show the general situation of civil litigation in the Federal Courts.

Table 12. Number of civil cases opened (F) in the Federal Courts

Court	Jurisdiction	01-02	02-03	03-04	04-05	05-06	06-07	07-08
FSC	First I	0	4	0	0	0	0	0
	Appeal	309	422	469	460	469	829	786
	Cassation	1091	1454	1749	2297	2887	3436	4185
	Total	**1400**	**1880**	**2218**	**2757**	**3556**	**4265**	**4971**
FHC	First I	261	388	455	414	428	584	621
	Appeal	1854	2859	3502	3294	3139	3169	4118
	Total	**2115**	**3247**	**3957**	**3708**	**3567**	**3753**	**4739**
FFICL		6384	5630	6188	8333	10640	11979	14246
	Total	**9899**	**10757**	**12363**	**14798**	**17761**	**19997**	**23956**

Source. FSC

Figure 5: Number of Civil Cases Opened in the Federal Courts



The number of civil cases submitted to the Federal Courts has increased in all the courts over the period for which data is given. The highest increment is observed in the FSC, particularly in the Cassation division. This is a result of the nature of its jurisdiction. While the appellate cases come mainly from federal matters, the cassation division is open to all final decisions. Besides, petitioners to the cassation division do not pay court fees while people who come to the appellate division pay 50% of the court fee paid in the lower courts. The trend for greater demand of judicial services is likely to increase in the future, as the population grows and the economic interaction increases. As the model adopted by Clark and Merryman indicates, increase in the number of newly opened files is one of the factors which increase the duration time, if it is not accompanied by an equal amount of disposition within that year.

Not only has the demand for judicial services increased over the years but so also has the productivity of the courts. There is a variation between the productivity of the courts (J+W) relative to the number of newly opened files which indicates the clearance rate (CR) of each court. The beginning inventory in the FSC has increased from 929 in 2001-2002 to 1672 in 2007-2008 signalling a relative increment in the beginning inventory (Pt) for each year. With some exceptions the clearance rate for the FSC was less than 100% indicating that it had problems to meet the rising demands for its services. If the clearance rate is not improved, there is a higher risk for backlog in the FSC.

The clearance rate in the FHC and FFICL has been more than 100% for many years indicating that they had a better capacity to reduce their backlog. As a result their

beginning inventory was reduced from 2826 to 2125 and from 9833 to 3978 in the FHC and FFICL respectively between 2001 and 2008 (Table 6).

Average duration time of cases which, for purposes of this research, indicates the time span between initiation of a case and its disposition in a court is an important indicator of judicial efficiency.

Table 13: Performance of the Federal courts in Civil Cases

Year	FSC				FHC				FFICL			
	Pt	F	J+W	CR%	Pt	F	J+W	CR%	Pt	F	J+W	CR%
01-2	929	1400	1748	124.8%	2826	2115	524	24.8%	9833	6381	7584	118.80%
02-3	584	1880	1852	98.5%	4417	3247	3368	103.7%	8633	5620	8905	158.17%
03-4	609	2218	2182	98.4%	4296	3957	3522	89%	5358	6115	8042	131%
04-5	642	2757	2365	85.8%	4731	3708	3417	95.1%	3564	8334	9496	114%
05-6	1024	3556	3036	85.4%	5022	3567	5082	142.5%	3847	10640	12963	122%
06-7	1534	4265	4125	96.7%	3507	3753	5735	152.8%	4150	11979	15760	133.%
07-8	1672	4971	5173	104%	2125	4739	5459	115.1%	3978	14247	18241	128%

Figure 6: Total Filed Vs Total Disposed in FSC, FHC and FFICL

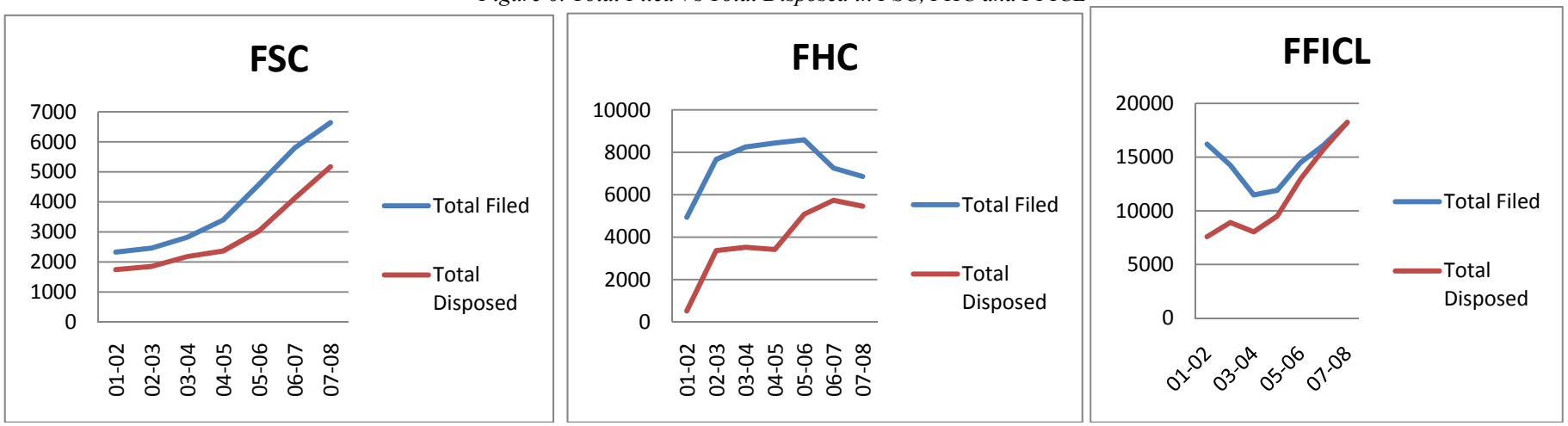


Figure 7: Clearance Rates for Federal Courts

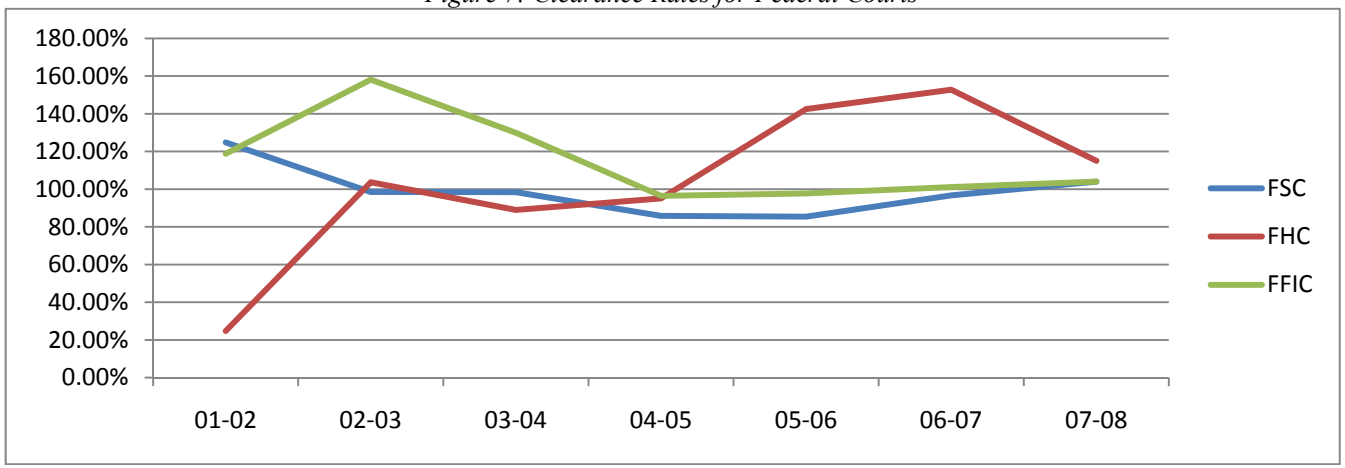
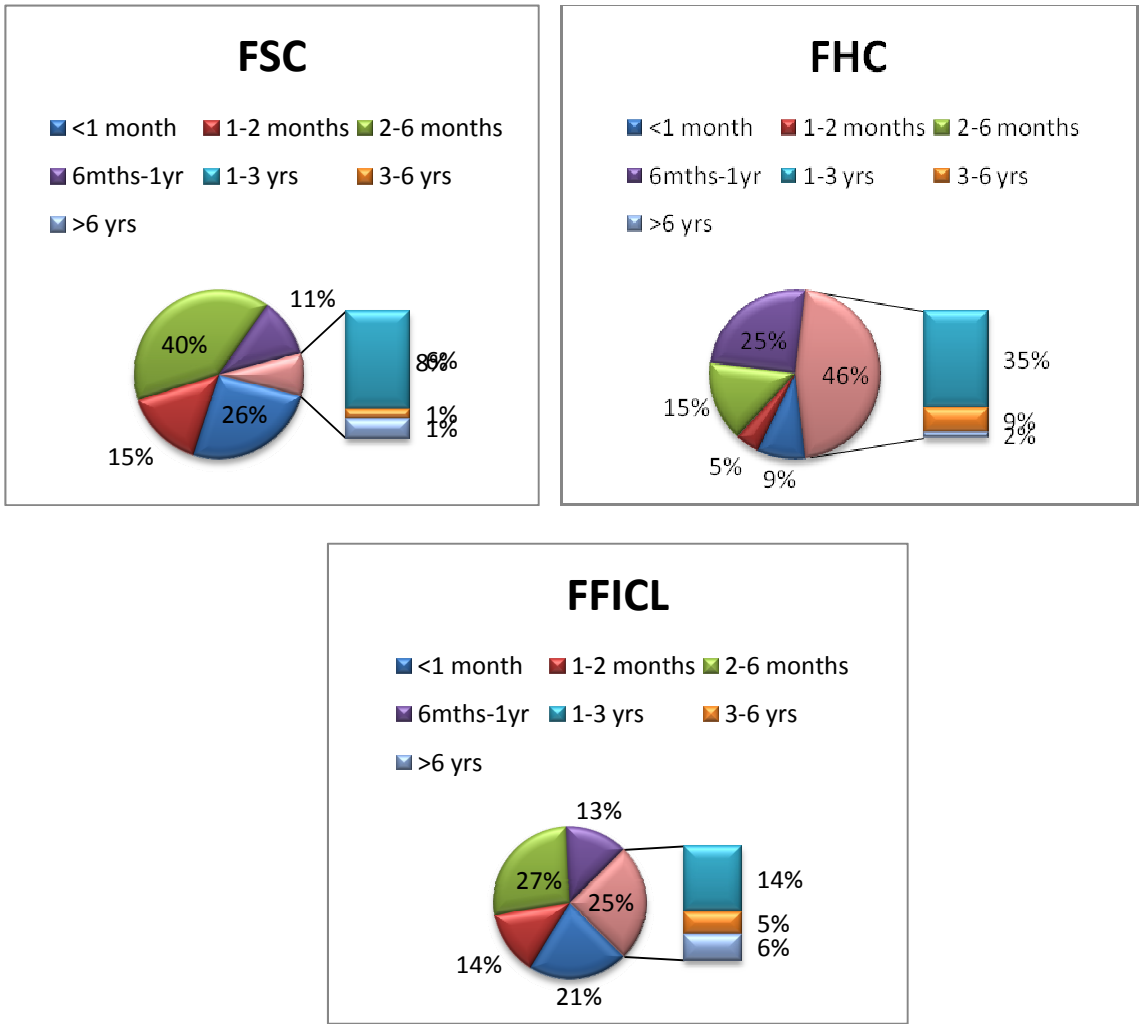


Table 14 : Average waiting time for disposed civil cases, July 2001-June 2006

Court	Level	<1 mth	1-2 mths	2-6 mths	6mths-1yr	1-3 yrs	3-6 yrs	>6 yrs	Total	Average duration (months)
FSC	First instance	3	1	0	0	0	0	0	4	**1**
	Appeal	526	427	779	356	169	45	144	2446	**9.9**
	Cassation	2352	1267	3667	885	537	22	3	8733	**3.2**
	Total	**2881 25.8%**	**1695 15.2%**	**4446 39.8%**	**1241 11.1%**	**706 6.3%**	**67 0.6%**	**147 1.3%**	**11183**	**4.8**
FHC	First instance	149	101	365	269	537	263	95	1719	**20.7**
	Appeal	1311	619	2049	3696	5085	1174	200	14134	**15.3**
	Total	**1460 9.2%**	**720 4.5%**	**2414 15.2%**	**3965 24.9%**	**5622 35.3%**	**1437 9%**	**295 1.8%**	**15913**	**16**
FFICL		8328 21.3%	5352 13.7%	10524 26.9%	5168 13.2%	5567 14.2%	1939 4.9%	2263 5.8%	39141	**9.8**
Grand Total		**12669**	**7740**	**17384**	**10374**	**11895**	**3443**	**2705**	**66237**	

Sourse FSC

Figure 8 *Average waiting time for disposed civil cases, July 2001-June 2006*



The figure in this table gives a general pattern of the duration within which civil cases were disposed in the Federal Courts. The FSC, the FHC and FFICL have disposed a total of 66,237 civil cases in five years.[8] Out of the total of 11, 183 cases that were decided by the FSC, 91.9% of them were decided within one year after the date of opening. The average duration in months for the FSC for this period was 4.8. The average duration within the FSC differs according to the type of jurisdiction of the court. Cases that were submitted on appeal took longer than those submitted to the cassation division. In absolute terms, the appellate division decided more cases after

[8] These files are not necessarily opened during this period.

they have been in the queue for more than three years, 189 cases. The number of cases on the first instance jurisdiction (four in number) was too small to have any impact on the performance of the court.

The FHC on the other hand had a less impressive pace during the same period. Only 53.8% of the cases were decided within one year of their opening. It is therefore not surprising to see that the average duration for civil cases in the FHC was longer than that of the FSC. The performance of the FHC is relatively lower for cases under its first instance jurisdiction. Civil cases that involve more than half a million Ethiopian Birr fall within the first instance jurisdiction of this court. On the average, these cases take longer than any other class of civil cases considered in this sample. One should note that these cases constitute relatively a smaller percentage of the workload in the court. The 1719 cases that were decided in its first instance jurisdiction by the FHC constituted only 10.8 % of the total number of cases decided by the same court. As was indicated on the previous table the number of files submitted to the court on its first instance jurisdiction are also very few in number. The percentage of cases decided in less than 6 months (28%) is lower for the High Court compared with the FSC (70%) and FFICL (61.9%).

Not only does the FFICL decide more cases in absolute terms, but it also decides them in a shorter average period of time than the FHC. As could be observed from the table above, 75.1% of the cases decided in five years were decided within one year of opening. As the FFIC does not handle cases on appeal, the average duration of 9.8 months can therefore easily be compared with the average duration for first instance cases in the FHC (20.7 months). Given the fact that both courts follow the same

procedure, one may ask why there is such a wide difference in duration time between these two courts. One may also ask why the average duration of the appellate division of the FHC (which is 15.3 months) is longer than the average duration for the appellate division of the FSC (which is 9.9 months), although they follow the same procedure and the workload is not significantly different. Some of the tables below will show us why, but more substantive reasons will be proposed when we discuss the reasons for delay in general.

Table 15 Yearly Average Duration time (in months) of civil cases disposed in the Federal Courts

Court	Level	Year					
		02-03	03-04	04-05	05-06	06-07	07-08
FSC	Appeal	7.9	3.06	4	3	5.45	6.97
	Cassation	2.9	3.5	3	3.1	4.07	3.61
	First instance	1	-	-	-	-	-
FHC	First instance	14.2	21.5	17.9	23.9	27	20
	Appeal	22.8	14.2	13.3	16.5	14	6
FFICL		**12.3**	**17**	**7**	**na**	**na**	3

Source FSC

The average duration time for civil cases shows a great variation between the courts. Duration time is generally higher for civil cases in the FHC. Given that the cases in the FHC have higher stake and complexity, longer duration time may be expected. It is not surprising that the waiting time for first instance cases in the FSC is longer than any group of cases in the federal courts. In 2005-2006 the average duration time for first instance cases in the FHC was almost two years. Though slightly lower, the average duration time for the appeal cases in the FHC is also high. For the data included in this study the lowest average was 13 months while the longest was 22.3 months. The average for the FSC appellate and cassation divisions is lower than that

of the FHC. The averages for the appellate and the cassation divisions, however, conceal the real average duration of cases, as this statistics includes that of cases which have been dismissed by the appellate court before the full hearing. Those cases that have gone through the full appellate and cassation hearing are therefore very likely to take longer than the average mentioned here. In the FSC for example, while the average duration time for all cases disposed of by the cassation division for 2005-2006 is 3 months, the average for cases that have gone through the full hearing is 8 months. Likewise for the same year cases that have been disposed in the FHC had an average time of 16.5 months. Cases that disposed after a hearing on the merits had a longer average duration, which is 24 months.

Table 16 Pattern of disposition of civil cases in the Federal Courts

	Year Opened	Number Opened	Decided in							Average Duration (months)
			01-02	02-03	03-04	04-05	05-06	06-07	07-08	
FSC	01-02	1400	**934 (66.7%)**	386	76	1	0	2	1	**4.72**
	02-03	1880		**1386 (73.7%)**	471	16	5	0	2	**2.61**
	03-04	2218			**1610 (72.6%)**	481	60	41	24	**4.25**
	04-05	2757				**1855 (67.23%**	729	96	68	**4.5**
	05-06	3554					**2241 (63.1%)**	**967**	**298**	**1..2**
	06-07	4265						**3014 (70.67%)**	**1107**	**3.97**
	07-08	4971							**3673 (73.89%)**	**1.97**
FHC	01-02	2115	**144 (6.8%)**	1078	415	216	193	64	16	**18.8**
	02-03	3247		**1034 (31.8%)**	1235	433	395	138	29	**12.5**
	03-04	3957			**1345 (34%)**	1328	942	329	59	**10.6**
	04-05	3708				**1177 (31.7%)**	1731	654	104	**7.9**
	05-06						1431 **(41%)**	1717	326	
	06-07	3753						2089 **(55.66%)**	1260	**6**
	07-08	4739							2701 **(56.99%)**	**2**

FFICL	01-02	6381	**3437 (54.1%)**	1890	592	202	121	74	41	**8.4**
	02-03	5620		**3171 (56.9%)**	1693	324	223	115	67	**7.4**
	03-04	6115			**3711 (61.7%)**	1518	485	221	124	**5**
	04-05	8333				**5097 (62.5%)**	2160	731	262	**4**
	05-06	10640					**6867 (69.8%)**	**2877**	**682**	**1.5**
	06-07	11989						**8450 (70.48%)**	**3093**	**3**
	07-08	15765							11120 (70.53%)	1

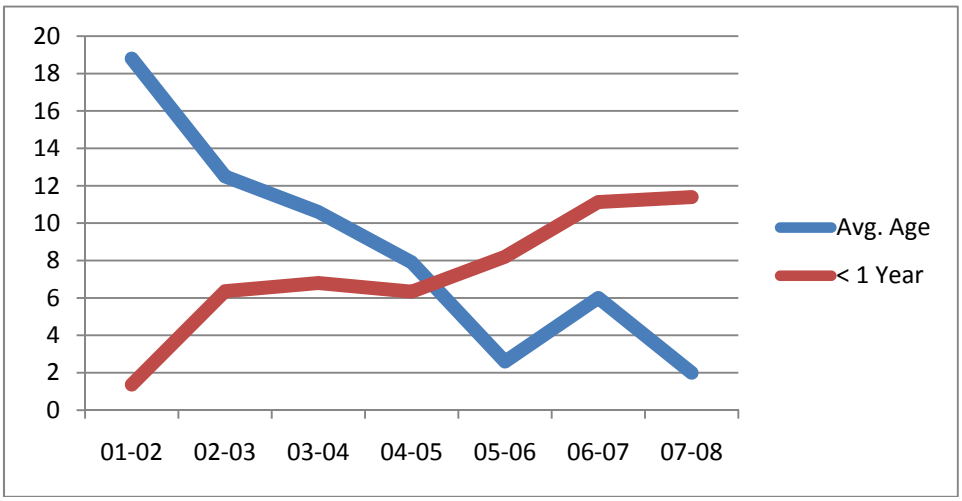
Sourse FSC

This table explains, in part, why the performance of some courts in civil litigation is better or worse, in terms of speed, than the others. All other conditions remaining the same, a court that decides more cases within the calendar year of opening will be in a much better position to reduce duration time. The percentage of cases decided within a year after filing is, on the whole, inversely related to the duration time for all the files opened in that year.

Table 17 : Pattern of disposition and duration time

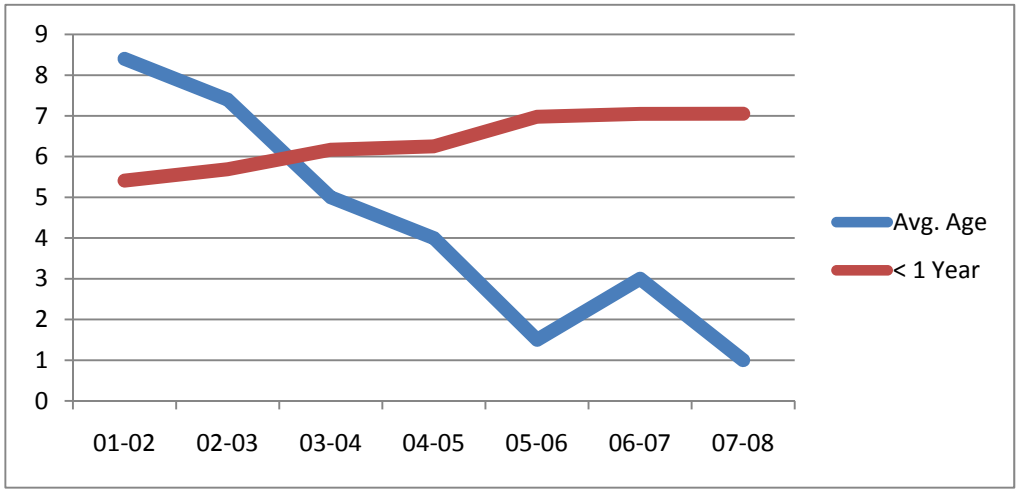
Year	FSC		FHC		First Instance	
01-02	66.7%	4.2	6.8%	18.8	54.1%	8.4
02-03	73.7%	2.7	31.8%	12.5	56.9%	7.4
03-04	72.6%	2.9	34%	10.6	61.7%	5
04-05	67.2%	2.6	31.7%	7.9	62.5%	4
05-06	63.1%	1.2	41%	2.6	69.8%	1.5
06-07	70.7	3.97	55.66%	6	70.48	3
07-08	73.9	1.97	56.99%	2	70.53	1

Figure 9: Pattern of Disposition in FHC



Key: Data for less than one year is scaled 1 to 5

Figure 10: Pattern of Disposition in FFICL



Key: Data for less than one year is scaled 1 to 10

With some exceptions the higher the number of cases decided within the first calendar year, the lower the duration time gets for all the cases that have been filed in the same year although some of them may be decided in subsequent years, and vice versa. Be that as it may, although one sees some improvements in all the courts, the statistics for the FHC obviously shows a lower performance, explaining in part the reasons for the longer time to disposition shown earlier.

Table 18 : A*ge distribution of disposed civil cases in the Federal Courts*

Year	Court	<1 mth	1-2 mths	3-6 mths	6mth-1 yr	1-3 yrs	3-6 yrs	>6yrs	Total	Ave time (months)
01-02	FSC	234 13.4%	76 4.3%	735 42%	321 18.4%	221 12.7%	44 2.5%	117 7%	1748	**12.5**
	FHC	13 2.5%	21 4%	46 8.8%	97 18.5%	299 57.1%	38 7.3%	10 1.9%	524	**18**
	FFICL	446 7.3%	705 11.6%	2409 39.7%	941 15.5%	665 11%	337 5.6%	547 9%	6060	**16.5**
02-03	FSC	619 33.4%	346 18.7%	583 31.4%	180 9.7%	96 9.7%	7 0.4%	21 1.1%	1852	**4.2**
	FHC	330 9.8%	143 4.2%	421 12.5%	737 21.9%	1429 42.4%	259 7.6%	49 1.4%	3368	**15.6**
	FFICL	782 10.9%	826 11.5%	1932 26.9%	965 13.4%	1271 17.72%	501 7%	894 12.5%	7171	**21.8**
03-04	FSC	579 26.5%	254 11.6%	1014 46.5%	145 6.6%	180 8.2%	7 .3%	3 .1%	2182	**3.7**
	FHC	390 11.1%	188 5.3%	538 15.3%	1087 30.9%	949 26.9%	279 7.9%	91 2.6%	3522	**14.9**
	FFICL	1009 13.8%	1064 14.5%	1855 25.3%	1079 14.7%	1285 17.5%	454 6.2%	582 7.9%	7328	**17.5**
04-05	FSC	538 22.7%	324 13.7%	1199 50.7%	206 8.7%	86 3.6%	7 0.3%	5 0.2%	2365	**3.1**
	FHC	332 9.7%	190 5.6%	659 19.3%	943 27.6%	943 27.6%	313 9.2%	190.6	3417	**13.6**
	FFICL	2690 34.9%	1103 14.3%	1754 22.7%	896 11.6%	82 10.7%	296 3.8%	147 1.9%	7709	**8.1**
05-06	FSC	911 30%	695 22.9%	915 30.1%	389 12.8%	123 4%	2 0.1%	1 0.03%	3036	**3.1**
	FHC	395 7.8%	176 3.5%	750 14.7%	1101 21.7%	2002 39.3%	548 10.8%	108 2.1%	5082	**17.5**
	FFICL	3441 31.5%	1654 15.1%	2574 23.6%	1287 11.8%	1523 13.9%	351 3.2%	93 0.8%	10923	**4.6**
06-07	FSC	1031 25.04%	482 11.71%	1396 33.91%	948 23.03%	240 5.83%	20 0.49	0 0%	4117	**4.44**
	FHC	547 10.78%	374 7.37%	1203 23.71%	1082 21.32%	1438 28.34%	347 6.84%	83 1.64%	5074	**13.46**
	FFICL	4049 32.68%	2074 16.74%	3051 24.63%	1386 11.19%	1472 11.88%	289 2.33%	67 0.54%	12388	**NA**
07-08	Supreme	1691 32.78%	896 17.37%	1420 27.52%	511 9.91%	599 11.61%	41 0.76%	1 0.02%	5159	**4.21**
	High	745 16.54%	594 13.19%	1470 32.64%	871 19.34%	661 14.68%	132 2.93%	31 0.69%	4504	**7.59**
	FFICL	4972 33.26%%	3030 20.27%	3713 24.84%	1462 9.78%	1383 9.25%	307 2.05%	83 0.56%	14950	**NA**

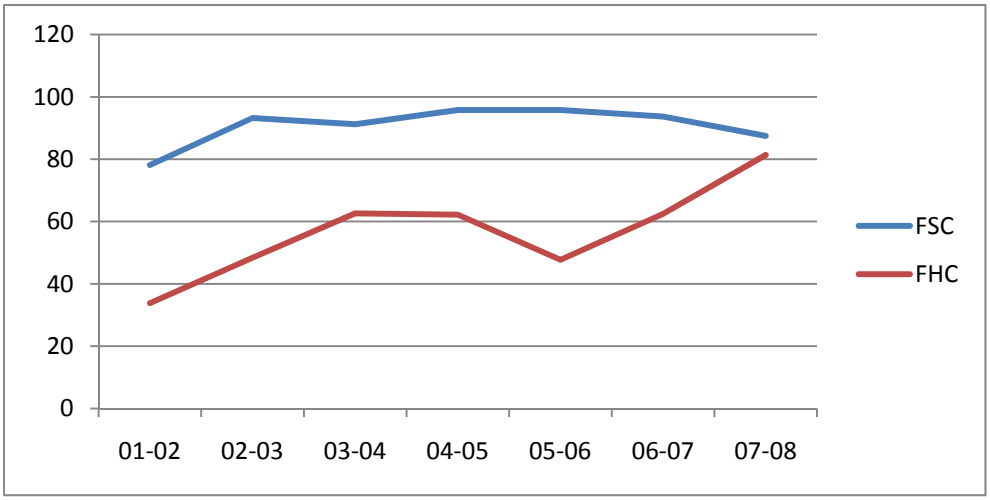
As shown earlier the number of cases flowing to the courts has increased over the years. This, however, does not seem to have adversely affected the performance of the courts in civil litigation. In fact when the overall workload increased, the annual performance of the courts also increased, although the number of judges decreased. Although there are some variations, not only did the number of annual dispositions in every court increase over the years, but the time it took to dispose of cases was also shortened. This is seen from the increasing number of cases that were being decided within a few months of their opening.

Table 19: Percentage of civil cases disposed in less than a year

Court	Year						
	01-02	02-03	03-04	04-05	05-06	06-07	**07-08**
FSC	78.1	93.2	91.2	95.8	95.8	93.66	**87.47**
FHC	33.8	48.4	62.6	62.2	47.7	62.45	**81.38**
FFICL	**74.1**	**62.7**	**68.3**	**83.5**	**82**	**na**	**na**

Source FSC

Figure 11: Percentage of Civil Cases disposed in less than a year



As indicated in the table above the percentage of cases that were decided in less than a year from the date of their opening has been increasing. Also here, whereas the FSC and the FFIL branch have shown an improvement from 78.1% to 95.8% and from

74.1% to 82% respectively, the change in the FHC was not as high. The clearance rate for the FHC reached the highest point of all the years, but still the court cleared only 47.7% of the new cases filed in 2006. This shows that a higher clearance rate in a court is not necessarily an indication of a shorter duration time for cases. To begin with, the fact that a court's clearance rate is well over 100% is by itself an indication that the court is doing well in reducing backlog. And depending on how far back the backlog reduction goes, the duration time of the court will be affected, at least for the time being. Although the FHC decided more cases than were opened in 2005-6, as a consequence of which it has a high clearance rate, many of those which it decided were more than a year old and were already in the backlog.

Table 20 : *Pending civil cases based on the year of opening (On September 2006)*

Court	Year Cases were opened															
	91-2	92-3	93-4	94-5	95-6	96-7	97-8	98-9	99-0	00-1	01-2	02-3	03-4	04-5	05-6	06-7
FSC	0	0	0	0	0	0	0	0	0	0	3	2	65	166	1156	700
FHC	1	1	3	1	6	6	4	10	12	37	52	123	275	570	1826	602
FFICL	1	0	7	2	10	6	2	6	11	17	46	75	156	648	1987	

This table reveals some facts which may not be obtained from the tables based on averages. In September 2006, more than 140 files have been pending for more than 5 years, some of them opened as far back as 1991, which is almost 16 years. As will be shown later some of the cases that have been on line for so many years were not too complex to decide. In fact some of them were simple debt recovery, or rent collection cases, for which the law prescribes a faster track for enforcement.

Table 21 : Disposed civil cases in the FHC

Year case decided	Year cases opened									
	05-06	04-05	03-04	02-03	01-02	00-01	99-00	98-99	Up to 98	**Total**
07-08	320	95	58	28	16	10	4	3	8	542
06-07	1707	648	325	136	62	44	28	10	25	2985
05-06	1464	1810	942	395	193	140	65	23	50	5082
04-05	-	1177	1328	433	216	168	47	21	27	3417
03-04	-		1345	1235	415	251	117	48	111	3522

The figures on this table reinforce the previous findings. Although the clearance rate of the FHC for 2005-6 is very high, one can see that a sizable number of cases were decided after they had been adjourned for more than five years.

The figures shown above indicate that there are some improvements in the civil justice system when it comes to the speed of disposition of cases. Compared with the statistics for the process of criminal justice the pace of litigation for civil cases is a lot better. The question whether or not civil litigation is efficient enough, however, needs to be examined.

4.4.2. Pace of Litigation in Criminal Cases

In spite of the constitutional requirement to handle criminal cases within a reasonable period of time after the charge (Art. 20(1), Const.), the court process in the Ethiopian judicial system leaves much to be desired. Although the standard of reasonable time may vary depending on the nature of the crime a defendant is charged of, the time to disposition in criminal cases was very long in many of the years for which data is provided. The time to disposition has shown some improvement over the years in all the courts.

The data in the following table reveals that criminal cases in the first instance jurisdiction of the FHC constitute the biggest part of the workload in criminal cases and any meaningful improvement in the overall performance of the court requires a thorough examination of the reasons for the delay and congestion of the same. Of the criminal cases that were pending on the 13th of January 2006, 96.38% of them were filed in the FHC on its First Instance jurisdiction whereas the remaining 3.62% of them were submitted on appeal. Of the first instance criminal cases pending only 25% of them are less than one year. The remaining

Table 22 : *Age of criminal cases in the FHC pending on January 13, 2006*

Level		<1 mth	1-2 mths	2-6 mths	6mths -1 yr	1-3 yrs	3-6 yrs	>6 yrs	Total	%
First instance	**No.**	195	231	647	1222	4105	1590	919	8909	**96.38**
	%	2.19	2.59	7.26	13.72	46.08	17.85	10.31	100	
Appeal	**No.**	48	28	87	64	99	8	1	335	**3.62**
	%	14.33	8.35	25.98	19.1	29.55	2.39	0.3	100	
Total	**No.**	**243**	**259**	**734**	**1286**	**4204**	**1598**	**920**	**9244**	**100**
	%	**2.63**	**2.8**	**7.94**	**13.91**	**45.48**	**17.29**	**9.95**	**100**	

74.87% cases have been pending in the court for more than one year. More than 10% of such cases have been there for more than six years and 17.85% three to six years. A detailed examination of the cases based on the year of filing indicates that as many as 146 files have been opened in or before the year 1996, thereby making them well over ten years old. Some 398 cases are between 7 to 9 years old. The age distribution of cases on appeal is different. In the appellate cases, 67.76%of the cases are less than one year old and only 2.69% are more than 3 years old. This does not however change the overall image of the court, as the cases on appeal constitute only 3.62% of the total workload.

As can be confirmed from the table below the FHC decides only a very small number of cases within the year of their opening. In 2002-2003 and 2003-2004, only 6.6% and 5.4% of the cases were decided within the year of their filing respectively. Although the performance has improved a little in 2004-2005 and increased to 14%, it is not high enough to ensure speedy disposition of criminal cases. There is a difference in the time scale between the cases on the first instance jurisdiction and those on appeal. The percentage of cases in first instance jurisdiction decided within the year of their filing is smaller than the percentage for the cases on appeal. With the exception of the year 2004-2005, the percentage for criminal cases of first instance jurisdiction decided within the year of filing remained less than 6%. A big percentage of the cases was transferred to the following year. The percentage for criminal appellate cases decided within the same year on the other hand rose from 20.55% in 2002-2003 to 30.99% in the first half of 2005-2006. Due to the smaller number of cases decided in the first and the second year after the year of filing in criminal cases, the probability that a case would still be pending a number of years after its opening is higher for first instance criminal cases in the high court than it is for the cases on appeal.

The statistical data for criminal proceedings in the FFICL gives a different picture. While the percentage of cases decided within the year of filing was 22.2% for the year 2002-2003, the figure reached as high as 64.7% in 2003-2004 and 60.21% in 2004-2005. This means that the number of files carried over from the year of filing to the next is less than in the FHC. The FHC disposes the smallest percentage of cases in the first year after filing of cases.

Table 23 : Pattern of disposition of criminal cases

Court	Opened in	Number	Decided in					
			02-03	03-04	04-5	05-06	06-07	07-08
FHC	02-03	4105	271 **(6.61%)**	704 (17.5%)	1041 (25.3%	469 (11.4%)	555	296
	03-04	5018		277 **(5.52%)**	1590 (31.73%	1890 (37.6%)	757	460
	04-05	2964			424 **(14.3%)**	1258 (42.4%)	763	448
	05-06	2962				723 **(24.4%)**	1335	676
	06-07	4220					1191 **(28.22%)**	2110
	07-08	4700						2483 **(52.8%)**
FFICL	02-03	2905	645] **(22.2%)**	1835 (63.16%)	373 (12.83%)	43 (1.4%)	10	8
	03-04	5725		3706 **(64.73%)**	1872 (32.69%)	127 (2.2%)	17	8
	04-05	5022			3085 **(61.42%)**	1813 (36.1%)	127	20
	05-06	6757				3461 **(51.22%)**	3072	180
	06-07	7039					3539 **(50.27%)**	2926
	07-08	15091						6828 **(45.24%)**

Figure 12: Percentage of Criminal Cases disposed in less than a year

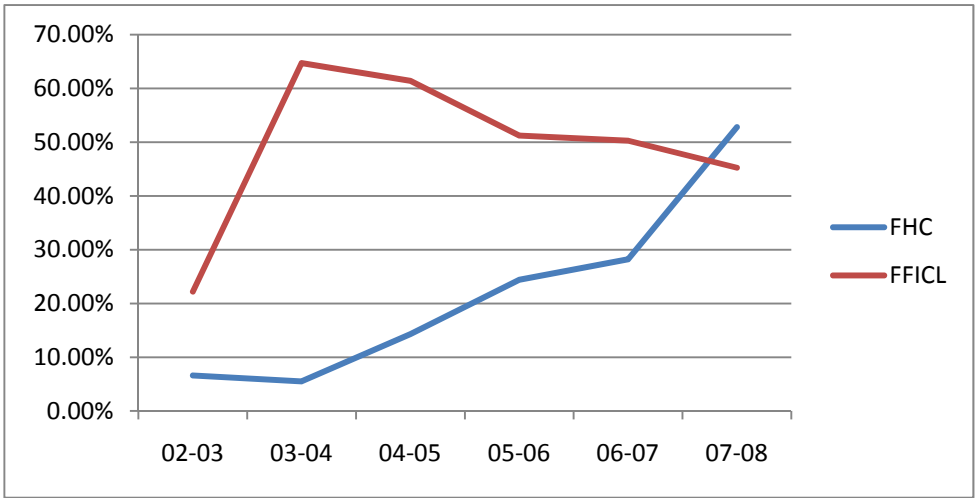
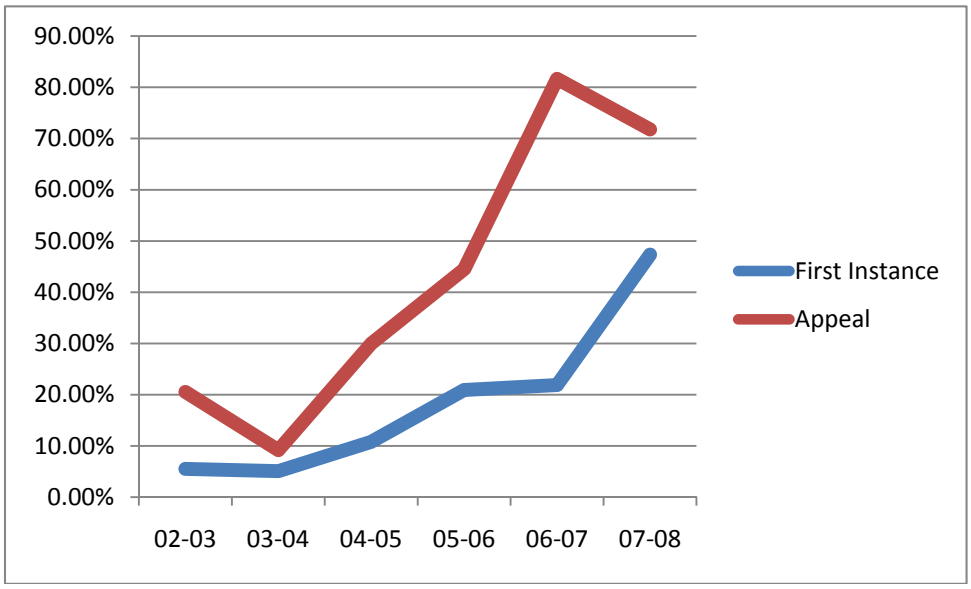


Table 24 : Pattern of Disposition of Criminal cases in the FHC

Level	Opened in	Number	Decided in (year)					
			02-03	03-04	04-05	05-06	06-07	07-08
First Instance	02-03	3813	211 **(5.53%)**	631 (16.54%)	932 (24.44%)	1163 (30.5%)	551	293
	03-04	4485		228 **(5.08%)**	1333 (29.72%)	1677 (29.72%)	744	460
	04-05	2424			262 **(10.8%)**	927 (38.24%)	715	444
	05-06	2434				488 **(20.94%)**	1051	669
	06-07	3773					826 **(21.89%)**	2029
	07-08	3647						1727 **(47.35%)**
Appeal	02-03	292	60 **(20.55%)**	73 (25%)	101 (34.59%)	54 (18.49%)	4	0
	03-04	533		49 **(9.19%)**	257 (48.22%)	213 (39.96%)	13	0
	04-05	540			162 **(30%)**	331 (61.29%)	48	4
	05-06	528				235 **(44.5%)**	284	7
	06-07	447					365 **(81.65%)**	81
	07-08	1053						756 **(71.79%)**

Figure 13: Criminal cases in the FHC disposed in less than a year



Within the FHC, there is a difference between the pattern for first instance and appellate cases. A small percentage of first instance criminal cases in the FHC is disposed of in the year of opening. In 2002-3 the court decided only 5.53% of the first instance criminal cases opened in that year and adjourned the balance of 94.47% to the subsequent years. The situation has shown some improvements but is lower than the cases on appeal. As mentioned earlier in connection with civil cases, this affects and explains why the criminal cases in the High Court display longer average waiting time than the other courts, and why first instance cases take longer than cases on appeal in the same court.

Table 25 : Age of pending criminal cases in the Federal Courts as of January 13, 2006

Court		<1 mth	1-2 mths	2-6 mths	6 mths-1 yr	1-3 yrs	3-6 yrs	>6 yrs	Total
FSC	First instance						3		**3**
	Appeal	32	35	84	98	60	10		**319**
	Cassation	20	18	69	22	6		1	**136**
	Total	52	53	153	120	66	13	1	**458**
FHC	Appeal	48	28	87	64	99	8	1	**335**
	First instance	195	231	647	1222	4105	1590	919	**8909**
	Total	243	259	734	1286	4204	1598	920	**9244**
FFICL		517	674	1193	622	360	41	10	**3417**
Total		**814**	**986**	**2080**	**2028**	**4630**	**1652**	**931**	**13119**

One can see from this table that out of the 931 criminal cases which have been pending in the courts for more than six years, 919 of them are first instance criminal cases in the FHC. Likewise, the proportion of cases that are between 1 to 3 years old as well as between 3-6 years old is higher in the first instance criminal cases in the FHC than any of the two other courts.

The following table reveals that the backlog for the first instance criminal cases in the FHC is higher than the FSC and the FFIC. This reveals that a big proportion of cases pending in the FHC in its first instance criminal jurisdiction are well over the average time for disposition that has been recorded in the court itself.

Table 26 : Age of pending criminal cases based on the year of their opening as of 13 January 2006

Court		Year of filing													Total
		93-4	94-5	95-6	96-7	97-8	98-9	99-0	00-1	01-2	02-3	03-4	04-5	05-6	
FSC	First I.								1	1	1				**3**
	Appeal									1	12	29	109	159	**310**
	Cassation	1									1	2	22	102	**128**
FHC	Appeal							1		5	9	43	112	165	**335**
	First I	18	26	102	164	150	244	419	388	474	1596	2202	1908	1218	**8909**
	Total	19	26	102	164	150	244	420	388	479	1605	2245	2020	1383	**9244**
FFICL				1	2	1	3	8	8	11	43	114	751	2475	**3417**

One notices from this chart that the FHC had a bigger backlog of criminal cases int its first instance jurisdiction.

Table 27: Age range of disposed criminal cases in the FHC

Year	<1 mth	1-2 mths	2-6 mths	6mths-1 year	1-3 years	3-6 years	> 6 years	Total
07-08	593	560	1121	1481	1799	991	325	**6,870**
06-07	137	120	789	840	1748	1237	513	**5,384**
05-06	144	115	418	657	3100	1386	713	**6,,533**
04-05	94	73	192	653	2190	724	418	**4,363**
03-04	85	36	102	347	749	528	209	**2,056**
02-03	55	25	109	227	746	588	220	**1,970**

The Average time for disposition in the FHC is quite high and shows a little improvement over the past few years. It can also be seen from the table below that the average duration time for criminal appeals is relatively shorter than the average time for first instance criminal cases in the same court. The average duration

*Table 28 **:** Average Duration time (in months) of disposed criminal cases in the Federal Courts*

Court	Level	Year					
		2002-03	2003-04	2004-05	2005-06	2006-07	2007-08
FSC	Appeal	7.1	5.2	2.6	4.7	7	2
	Cassation	2.9	3.2	2.51	3.3	5	3
	First instance	23	18	-	-	-	69
FHC	First instance	35.3	32.1	31.4	35.1	28	6
	Appeal	11	12.1	15.9	12.9	8	**2**
FFICL		**23.64**	**14.6**	**8.96**	**6.21**	**na**	**Na**

time for the court has therefore been heavily influenced by criminal cases in its first instance jurisdiction. The average duration time for the criminal cases in the FHC both on appeal and on first instance is higher than the average duration in the FSC and the FFICL.

Table 29 : *Average Duration time of disposed cases in the Federal Courts (in Months)*

Court	Case Type	Year					
		2002-03	2003-04	2004-05	2005-06	2006-07	**2007-08**
FSC	Civil	4.16	3.55	3.09	4.08	5	**4**
	Criminal	5.97	4.2	3.74	3.0	6	**2**
	Labour	3.44	3.89	6.6	4.98	6	**5**
FHC	Civil	16.2	16.8	13.8	17.6	14	**6**
	Criminal	33..4	30.6	29.2	32.1	9	**2**
	Labour	12.03	7.43	15.69	2.9	1	**2**
FFICL	Civil	21.77	17.46	8.06	7.52	na	**na**
	Criminal	23.64	14.6	8.96	6.21	na	na

This chart shows that the average duration time for criminal cases in each court is usually higher than the average duration for other cases in the same court. The difference is particularly marked in the FHC than in the FSC and the FFICL.

The data that has been collected from the federal courts indicates the problem areas that should be addressed to improve the administration of criminal justice in Ethiopia. Although there are some improvements in terms of increasing the number of dispositions given every year in some of the courts, the duration time for disposition of criminal cases is still very high. The average duration time is even longer for some category of cases. The average duration time for the disposition of criminal cases on negligent homicide in the FHC, for example, has been 42, 47, 52 and 53 months for the years was 2002-3, 2003-4, 2004-5 and first half of 2005-6 respectively. An improvement in the administration of criminal justice presupposes that the reasons for these circumstances, which are evidenced by the data in the courts, be identified. This writer has identified some problems, which beset the justice system in Ethiopia and will suggest solutions, which may help in alleviating some, and eliminating many others.

4.5. Reasons for Delay in the Courts in Ethiopia

In this section the main reasons for the problems that are observed in the judicial process in Ethiopia will be examined. Why do the processes of criminal and civil justice in Ethiopia resemble, as was aptly described by Mauro Cappelletti in connection with other legal systems, "the efforts to start the broken mechanism of a clock which must be hit and shaken in order to be put in motion even for a brief moment". (Cappelletti, 1970-1971:857) The unfolding of litigation is influenced by many factors. Some are internal and can be attributed to the court system itself. Others can be attributed to broader causes and need a different solution altogether.

4.5.1. Non Compliance with Procedural Rules

In attempts to modernize its legal system Ethiopia has enacted Procedural Codes which contain many of the principles supposed to ensure procedural as well as substantive justice. These Procedural Codes, like the substantive Codes, were enacted in the 1960s and were as a result enlightened by the debate surrounding the issues of procedural justice. Both procedural Codes contain the basic principles which could ensure fairness, speed and correct outcomes. Although both Codes are basically adversarial, they also contain procedural schemes which arm the judge with enough powers to control the process. They contain procedural rules to avoid segmented unfolding of the process, which is believed to be one of the reasons for delay in other judicial systems. (Cappelletti, 1970-1971:854)

The Procedural Codes have some loopholes which can be used by litigants and their advocates to prolong litigation. This problem can only be rectified by changing the rules. Further amendment of the rules will however be contemplated if the law maker could rest assured that they will be implemented by the institutions once they are enacted. In the Ethiopian context one of the basic problems is that the process is not fully governed by the rules in the Codes. Given this situation one wonders if a reform process that aims at change of the rules will bring the required results. This situation will be discussed in this part as it is believed that it is the major reason for the delay and inefficiency of the courts, both in civil and criminal proceedings.

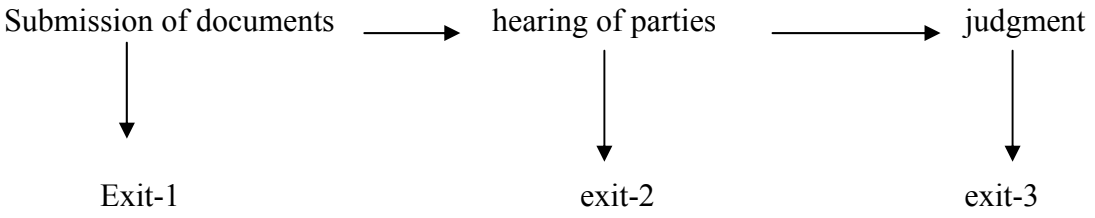
A. Appeals: Law And Practice

The Criminal and Civil Procedure Codes have many differences, but they do have some common features as regards the appellate processes. In both cases the appellant is required to specifically mention the grounds for his objection on the decision of the lower court without arguments. In both cases, the hearing of an appeal is supposed to be conducted through an oral presentation by both sides. In both cases, the court can dismiss the appeal and dispense with the hearing if it is convinced that there is no sufficient ground to intervene into the decision of the lower courts. In both cases lodging of an appeal does not necessarily result in a stay of execution of judgments of the lower courts. The basic principle of both Codes is that the appellate court gets the whole record of the lower courts together with the memorandum of appeal of the appellant, hears the arguments of both parties on the hearing day and gives its decision. The legal setting both in civil and criminal proceedings is discussed in the

previous section. This section will only take the basic framework and compare it with the process on the ground and try to demonstrate how this affects the pace of litigation

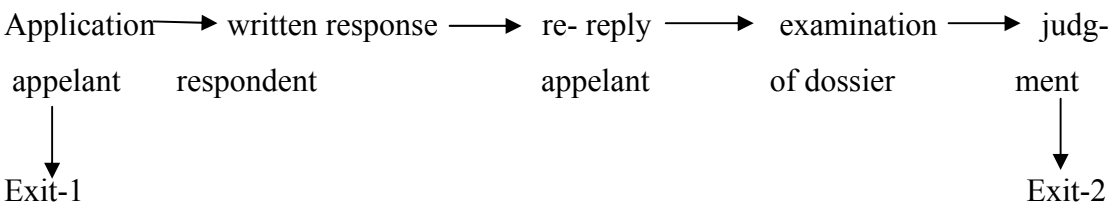
I. Civil Appeals,

The legal frame work



In civil cases exits 1 and 2 represent situations where the court can dismiss the appeal without summoning or hearing, if already summoned, the respondent. Exit 3 represents the final disposition after the hearing of both parties. As can be observed from the sketch the process is primarily oral supported by documents[9] submitted to the court at the beginning of the process.

The process on the ground



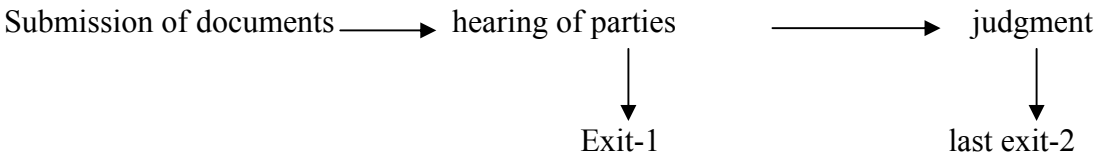
There is a basic difference between the law in the books and the practice, a difference which affects the pace of litigation and some other procedural rights. The concept of hearing in the appellate process is dispensed with and replaced by exchange of written documents. Although the exchange of the documents is usually done by the judge in an open court, it is not in the strictest sense of the word a function which can replace the fundamental judicial responsibility of hearing both sides before the judgment.

[9] This consists of a copy of the dossier of the lower court and the memorandum of appeal of the appellant.

The possibility of an immediate contact between the parties and the appellate judges is minimized which encourages the parties to make their arguments in the documents which are the only options available for doing so.

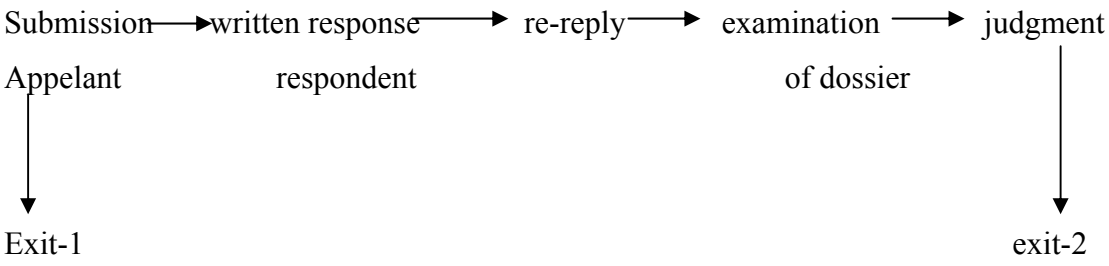
II. Criminal Appeals

The law in the books



In criminal appeals exit-1 represents the power of the court to dismiss the appeal where there is no sufficient ground for interference" (Art. 195 (2), CrPC) and exit-2 represents the final judgment of the court after hearing the parties.

The practice on the ground



A comparison of the sketches shows the following main differences between the rules in the books and the practice in the courts which affect the pace of the process in both civil and criminal appeals. The effect of the discrepancy is not limited to the speed of the litigation process. It also affects the capacity of the judicial process to arrive at the truth. The impact on the cost dimension to the government, the public and the litigants is also huge.

.

1. Oral hearing on appeal, which is the central process in the law, has been replaced by an exchange of written documents on both sides

2. The exchange of written documents requires the court to give additional adjournments which were not foreseen by the law.
3. As parties do not have access to make an oral presentation of their cases, their pleaders include arguments in the documents, which the law specifically prohibits.
4. The courts are forced to give a number of adjournments before they give their judgments.
5. In a country where the illiteracy rate is high, and where there is scarcity of legal professionals, this forces the parties to ask for more time to have their cases put in writing.
6. It deprives the court of an opportunity to understand the case first hand from the parties themselves or their advocates.

The impact of the disparity between the law and the practice on the added time in the litigation process can be verified through figures both in the FSC and the FHC.

Table 30 : *Number of appearances before disposal*

court	Case type			Year					
				02-3	03-4	04-5	05-06	06-07	07-08
FSC	Civil	Cases Decided		504	439	445	456	682	920
		Appearances	Avg.	6	3.51	3.47	3.10	3.06	3.92
			Total	3028	1545	1545	1416	2086.92	3606.4
		Duration in months		7.43	2.8	4.00	3.02	5.42	6.90
	Criminal	Decided		904	529	461	592	738	1037
		Appearances	Avg.	4.93	4.35	3.84	3.75	3.79	1.97
			Total	4459	2306	1771	2223	2797.02	2042.89
		Duration in months		7.1	5.2	3.93	4.7	6.03	1.97
FHC	Civil	Decided			3111	3062	4368	4311	3886
		Appearances	Avg.		7.25	11.32	5.63	4.00	3.03
			Total		22633	34662	24597	17244	11774.58
		Duration in months			14.16	13.32	16.61	11.58	6.89
	Criminal	Decided			159	630	882	716	848
		Appearances	Avg.		29.09	14.19	6.16	4.02	3.00
			Total		4626	8944	5437	2878.32	2544
		Duration in months			14.16	15.89	12.93	7.02	2.15

Decisions in both civil and criminal appeals are given after many adjournments. In the FHC a total of 24597 adjournments were given in 4368 civil appeals before they were disposed of in 2005-2006. The figure is even higher for 2004-2005. During this period the court granted 34662 adjournments before it disposed of 3062 civil appeals. In criminal appeals the average number of appearances for 2003- 2004 in the FHC was 29.09. The average number of appearances for the years 2004-5 and 2005-6 was 14.19 and 6.16 respectively.

The FSC has shown improvements in recent years, but the figures are revealing how the procedure that is now prevailing can prolong civil appeals. In 2000-2001, 1225 civil appeals in the FSC were adjourned a total of 23,246 times before they were finally disposed of. It is not surprising to see that the average duration of civil appeals in this year was 58.21 months. On the average, cases were adjourned 18.9 times. The previous year, 530 civil appeals were decided after a total of 10,029 adjournments, with an average of 18.9 adjournments and an average duration of 57.43 months before

a final decision was rendered. The number of appearances in the FSC has improved over the last few years and has reached as low as 3.1 in 2005-2006. The average number of appearances in criminal appeals in the FSC is however still longer than the maximum (Art. 194, CrPC) the law envisages. The appearances normally envisaged by the law for criminal appeals are one for the hearing of the appeal and another for the judgment, if the judgment cannot be delivered on the same day.

Generally the duration time for appeals is positively related to the number of adjournments granted before disposing of the case. As a result the duration time for criminal and civil cases has improved with the decrease in the number of adjournments. Any reason that increases the number of appearances in courts will eventually prolong the waiting time for the litigants. In some cases repeated adjournments may be given within a short period of time in which case the average number of adjournments may not necessarily imply a longer duration time, as in the case of the FHC for civil appeals in 2005-2006. In some other cases the interval between two appearances may be quite long, in which case the average duration may look too long for the number of appearances, as in civil appeals for the FHC in 03-04.

That the number of adjournments prolongs the duration time in the appellate process can also be seen from the figures for the civil division of the FSC which show the actual number of adjournments that were given before final decisions were rendered (next table). In those years where the duration time is longer a significant number of files were adjourned more than ten times. In 1999-2000 and 2000-2001 where the appellate division had the highest duration time for civil appeals, the percentage of cases on appeal decided after 10 or more adjournments was 81.3 % and 76.3%

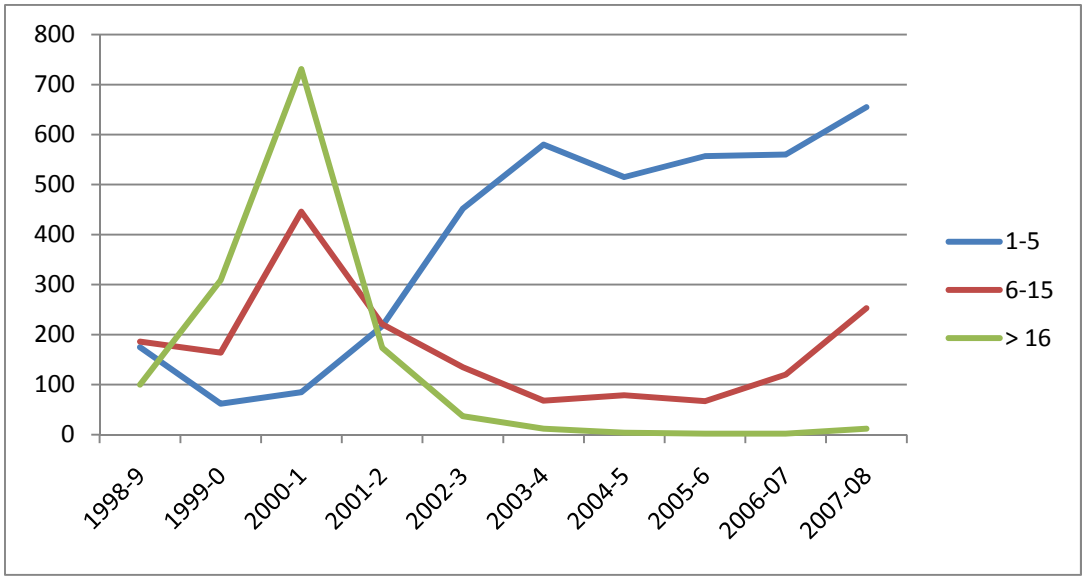
respectively. In both years 22% of the files were decided after more than 26 adjournments were given. The situation has been reversed in 2001-2 since which the number of appearance kept getting lower year after year. The number of judges throughout this period remained the same. The only significant change that has been introduced in the FSC since 2001-2 is the determination of the bench to strictly follow the rules for appellate cases. The appellate benches in the FSC have since this time changed the process from the old practice to the practice envisaged by the rules in the procedure.

Table 31 : *Number of adjournments before disposition in the Appellate Civil Division, FSC*

Year Decision Rendered	Number of Adjournments							Average Duration in Months	Disposed Total
	Only once	2-5	6-10	11-15	16-20	21-25	>26		
1998-9	53	122	107	79	46	22	32	36.2	**408**
1999-0	5	57	42	122	121	68	120	57.43	**530**
2000-1	7	78	220	226	271	182	278	58.21	**1255**
2001-2	10	207	163	58	38	50	86	26.14	**602**
2002-3	120	332	102	33	12	12	13	7.43	**504**
2003-4	221	359	57	11	4	2	6	2.8	**439**
2004-5	153	362	72	7	4	0	0	4.0	**445**
2005-6	170	387	54	13	2	0	0	3.02	**456**
2006-07	**201**	**359**	**106**	**14**	**2**	**0**	**0**	**6**	**682**
2007-08	**236**	**419**	**208**	**45**	**11**	**1**	**0**	**7**	**920**

Source FSC

Figure 14: Number of adjournments before disposition Appellate Civil Division, FSC



Given the nature of the rules for the appellate process in Ethiopia, one would expect that many of the appearances are made either to make an oral presentation by the parties or to deliver the judgment. The figures in the following table however show that majority of the adjournments are given for administrative reasons which could be done better by the administrative arm of the court. In the FHC, 44,996 adjournments were registered for civil appeals decided between July 18, 2002-July 17, 2006. Of these adjournments 21042 were given to 'examine' the files, 15154 to receive a written reply from the respondent, and another 4646 to receive a written re-reply from the appellant. 19800 adjournments, which account to 44% of the total number of adjournments, were granted just to exchange written documents between the parties.[10] The immediate result of the substitution of the oral process by the exchange of documents is increase in the number of adjournments 'to examine' the files. The courts do not give a definite date for delivery of judgment. Instead they tell the parties to comeback on a future date to examine the documents submitted by them. The

[10] This does not include the initial submission of the memorandum of appeal, because it is submitted to the Registrar and not to the judges directly.

bigger the documents get, the more time the judges take to examine the files. A chain effect is created the end result of which is repeated appearances and longer duration time. In civil appeals, 46.76% of the reason for adjournments was examination of the appeal. The court has spent 90.76% of its time to examine the documents, and to receive written pleadings from the parties. This leaves the court with very little time to conduct the hearing of the parties which the law demands from appellate judges.

Table 32 : Reasons for adjournment of disposed Appellate cases in the FHC
July 8, 2002-July 7, 2006

Reason for Adjournment	Civil	Criminal
Examination of the dossier	21042	4321
Reply	15154	1276
Re-reply	4646	117
Decision	1185	822
Hear witnesses	469	92
for additional evidence	541	241
Forced production of the respondent by the police	24	789
Judges not available	144	417
Other reasons	1791	1691
Total number of adjournments	**44,996**	**9766**

B. First Instance Proceedings: Law and Practice

In the Ethiopian context the discrepancy between the rules in the law books and the practice is not limited to appellate processes. First instance proceedings, both civil and criminal, are marred by the existence of a judicial process which, in many of its features, is distinct from the basic procedural devices provided under the Codes. The implications of these discrepancies for judicial efficiency, fairness of the process, rectitude of decision and accessibility of the justice system is immense. Judicial reform in Ethiopia can only succeed if one takes this element into account.

I. Civil Proceedings

The salient features of the first instance civil proceedings in Ethiopia are outlined in the previous sections. A basic sketch will be presented here to help us see the difference between what the law says and how the process unfolds in reality.

Track A- Ordinary Proceedings

Figure 15: Track A- Ordinary Proceedings

<table>
<tr><td>Stage one ⟶</td><td colspan="2">Stage two ⟶</td><td>Stage three</td></tr>
<tr><td>Preparatory stage Written ⟶</td><td colspan="2">Trial (Oral)</td><td rowspan="2">Judgment ⟶</td></tr>
<tr><td></td><td>First hearing ⟶</td><td>Hearing of suit and examination of witnesses</td></tr>
<tr><td>- Exchange of written pleadings including
-statement of claim
-statement of defence (Art. 222, 229 & 238, CPC)
-submission of the list of witnesses and other documents (Art. 137 & 223, CPC)
-collection of documents from other institutions by court order, if that has been asked by the parties</td><td>-examining the parties (Art. 241, CPC)
-Framing of issues (Art. 246, CPC)
-judgment on admissions (Art.242, CPC)
-Ruling of preliminary objections (Art. 245, CPC)</td><td>Opening of hearing (Art. 258, CPC)
Statement and presentation of evidence by both parties. (Art. 259, CPC)
Closing arguments by both parties (Art.259, CPC)</td><td></td></tr>
</table>

In specific cases there may be other additional steps in the process which are not reflected in this scheme. The details are left out on purpose so that the discrepancy will focus on the most important aspects of litigation. As is evident from the table, the unfolding of civil litigation is divided into three main stages. The first part is a

preparatory stage and that is supposed to focus mainly on exchange of written documents. The main written documents are the statement of claim and the statement of defence. Fact pleading is an important principle in the Code and the parties are not allowed to develop their arguments and analyze their evidence on the pleadings.(Art. 80, CPC) Pleadings of both parties have to include the list of witnesses and other evidence which each party intends to present during the trial. (Art. 223, CPC) Unless there are specific matters that demand judicial intervention, the activities at this stage do not necessarily call for the involvement of judges. Being a preparatory stage for the main trial, many of the functions at this stage could be conducted by the administrative staff of the court. Once this stage is concluded the next stage, which is primarily oral, begins. This stage is divided into two. In the first part, which is called the first hearing the judge examines the parties and tries to understand the claims of the parties and the points of fact or law on which they differ. Issues should be framed on points on which there are difference and judgments given on points where there are admissions. Rulings should likewise given on preliminary objections which the defendant might have raised in his statement of defence. When the parties as well as the judge agree on the points that need judicial determination the trial date is fixed for the parties to present their witnesses and their arguments. The CPC demands that "when the hearing of evidence has once begun the hearing of the suit shall, as far as possible, be continued from day to day until all the witnesses in attendance have been examined" (Art. 197 (1), CPC). This process ensures the orality, immediacy and concentration of the proceedings which are believed to be important developments in civil procedure which resulted in improving judicial efficiency in some other countries. (Cappelletti and Garth, 1974:70,) The final stage is for the judges to deliver their judgment. Judgment can be delivered on the date of the hearing but

another appointment can also be given as the judgment is required to be in writing and signed by the judges. (Art. 180, CPC)

The process of civil litigation that was observed does not resemble the procedural scheme in the books. Details aside, the basic pattern of actual civil litigation can be represented by the following diagram. As the distinction between the written and oral stage designed by the law is blurred in actual practice, the unfolding of civil litigation can be outlined better by successive presentation of the main events in the process.

Claim → Defence → Reply for defence → Calling plaintiff's witnesses → Hearing of plaintiff's witness → Summoning defence witnesses → Hearing of defence witness → Examination of the dossier → Judgment

First let us outline the basic points of difference between these two schemes.

1. The law allows the parties to present one document each, the statement of claim for the plaintiff and the statement of defence for the other party. The practice has added a third stage by allowing the plaintiff to submit a written reply to the defence.[11]
2. The exchange of the written documents is something that can be done by the administrative unit of the court. In practice the judges sit in a court room to receive the documents from the parties
3. The law requires that the judge examine the parties on the first hearing before going to trial. In practice there is no such thing as a first hearing. And all the steps which the judge is supposed to do at the first hearing like examining the

[11] The plaintiff is allowed to submit a written reply only when the defendant comes up with a counter claim. In such cases the reply is to the e new claims of the defendant against the plaintiff.

parties so as to understand the nature of the controversy between them, framing of the issues, giving judgment on admissions, ruling on preliminary objections etc is simply not done as required by law, or is postponed to a later stage.

4. As a result when the exchange of the pleadings is finalized, the plaintiff is asked to present witnesses in the next date of adjournment. Because the issues are not framed each party calls all witnesses and the court hears them whether or not their testimony will help to resolve the dispute. Many a time the issue which is framed only when the judge writes the judgment (which the parties are left in the dark as to what point he will deciding on until delivery of judgment) turns out to be an issue of law, and the testimony of the witnesses will not be taken into account although it might have taken repeated adjournments to secure their attendance. As the party is not made to cover the cost of the witnesses as required by law, the party does not have a real incentive to be careful about the number of witnesses.
5. After hearing the testimony of the plaintiff the judge then asks the defendant to bring witnesses. The time between adjournments is not normally short. It therefore takes a long interval between the date of hearing of the witnesses for the plaintiff and the defendant. The time when the defendant takes summonses to his/her witnesses can be many years after the event that gave rise to the dispute. As a result getting the witnesses requires repeated adjournments.
6. If the parties rely on written documents and there are no witnesses for either party, the second and the most important stage, the trial, is skipped altogether, and a date is given for the examination of the documents, which will be followed by another adjournment for delivery of the judgment by the judge

7. Even when there are witnesses for one or both parties no oral argument is conducted in the real sense of the term. The parties or the attorneys examine the witnesses and that is the beginning and the end of the matter. No opening statements or closing arguments are made by either of them. As arguments are not made at this stage the practice tries to fill the gap by allowing the parties to include arguments in their pleadings. As a result not only are pleadings more in number as the plaintiff is allowed to reply to the defence, but they are also not limited to fact pleading. Evidence is analyzed, arguments forwarded in the pleadings as a result of which written pleadings tend to be bigger in size than they would have been if they were limited to the material facts and material facts only. This forces judges to give more adjournments to examine the documents.
8. Finally the court gives its judgment. As mentioned earlier no issues have been framed, rulings on preliminary objections may not have been given and the judgment begins by addressing these things first. Under the law, the issues are the parameters for determination of the relevance of evidence. In practice issues are framed after the evidence of both parties has already been heard. The judge has to go through all the process backwards and try to frame an issue on the basis of which he/she will render a judgment. So the judge tells the parties the issue that has been picked for determination at the time of the delivery of the judgment. But, delivery of judgment may not even be necessary because the ruling on the preliminary objections could have made all the previous exercise worthless. On a date fixed for delivery of judgment a judge could say that the action of the plaintiff was barred by limitation or that the court has no jurisdiction. The issue framed by the judgment at the time of the hearing could

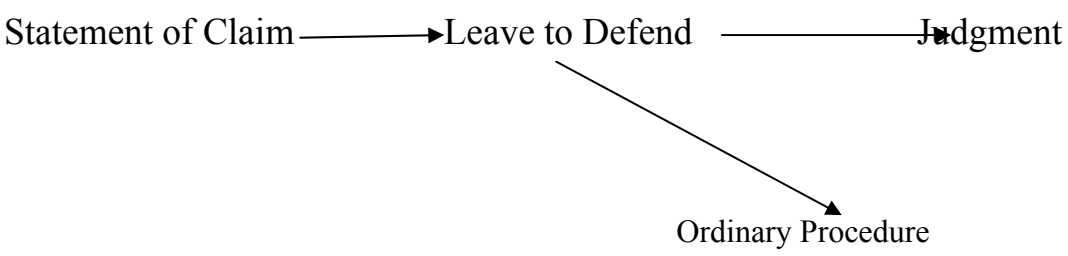
also make the testimony of many of the witnesses irrelevant and the decision may be based on legal issues or on a small part of the testimony of either party or both.

The impact of these differences on the pace of civil litigation is immense. It contributes to the rising cost and delay in the process. As rectitude of decision also depends on procedural design, the objective of arriving at the truth will also be affected if courts do not follow the rules. .

Track B- Summary Proceedings

Summary proceedings are important devices that are used to ensure speedier disposition of some claims which by their very nature require a different arrangement. The Ethiopian Summary proceedings impose limitations on the defendant's right to be heard, and entitle the plaintiff to a judgment unless the court gives the defendant leave to defend. If the defendant's request to defend is accepted then it follows the steps of the ordinary procedure. The summary procedure as envisaged by the law books can be represented by the following sketch.

Figure 16: Track B Summary Proceedings



This procedure is available for liquidated claims but is rarely used in actual process. This track was not available in many courts. Even in cases where attempts were made to make it available, litigants are reluctant to use it because the decision on whether or

not the defendant should obtain leave to defend becomes an additional reason for repeated adjournments.

Track C- Accelerated Procedure

The gap between the legally prescribed procedure and the practice is the widest in relation to accelerated proceedings. As regards some matters specifically provided, the law requires in principle that "the court shall make its decision on the basis of the application" (Art. 303(1), CPC) unless other legal provisions prescribe otherwise. This track is available mainly for declaratory judgments. The main procedural device can be shown by the following diagram

Claim ——————→Order/Judgment

This track has been practically non-existent in many of the Ethiopian courts. Many claims in connection with business organizations which were supposed to be handled by this process are made to run the full course like any other proceeding. As a result matters which are expected by law to be handled within a short period of time stay in the process for a longer period of time. Much as it may be frustrating to the plaintiffs, defendants may not suffer as much damage in the process. The common complaint in Ethiopia, which in Amharic goes like "*kesash kemehon tekesash mehon yishalal*" (one would rather become a defendant than a plaintiff in Ethiopian Courts) is the immediate result of the discrepancy.

II. Criminal Proceedings

The situation in the criminal proceedings in the Ethiopian Courts was not different from the situation in the civil litigation. Like in civil proceedings, there is a wide

discrepancy between the law and the practice in criminal proceedings. To show this, a brief sketch of the law on the one hand and the practice on the other will be presented and the impact of this difference on the efficient administration of criminal justice will be discussed later. The focus here will be the time between the institution of the charge by the prosecution and the delivery of judgment by the court.

A. The law in the books

Stage 1 ⟶	Stage 2 ⟶	Stage 3
Preparatory Stage (written stage) ⟶	The trial (Oral Stage) ⟶	judgment
-filing of the charge (Art. 109, CrPC) -service on the defendant-Submission of list of witnesses to the registrar (Art. 124, CrPC) - serving summonses to the witnesses (Art 124 CrPC	-reading the charge (Art. 129, CrPC) -taking down if there are objections to the charge and responses to them (Art. 30, CrPC) -decide on objections (Art. 131, CrPC) -taking plea of the accused (Art. 132, CrPC) -opening of the case by persecution and presentation of witnesses (Art 136 CrPC) -opening the defence and presentation of witnesses (Art 142 CrPC) -final address on law and fact by both sides (Art. 148 CrPC)	

The procedural law divides the process into three main stages. In the first stage preparations are made for the trial. The charge, together with the list of witnesses and

any other evidence, is served on the defendant. The defendant also submits the list of witnesses and any other evidence at this stage. The trial date is fixed and summonses served on the prosecution, the defence, and the witnesses of both sides to appear on that date. It envisages a continuous trial which is primarily oral where both sides present their evidence and their arguments on facts and law. So trial is in principle supposed to be done in one day and continue to the next if it is not over on that day. (Art. 94(2), CrPC)

B. The process in realty

The process of the criminal justice in many of the Courts in Ethiopia is in many respects different from this framework. It looks more or less like this.

Filing of charge → summoning defendant → serving the charge → reading charge → written submission of objections → written reply to objections → ruling on objections → plea of the accused → summon prosecution witnesses → hear witnesses ruling on whether defence should be entered(in writing) → hear defence witnesses → give judgment

The difference between these two 'systems' is striking. The basic scheme of the Procedure Code which could ensure speedier disposition of criminal cases is frustrated by the elaborate procedure which is put in its place.

1. The law allows the defendant to get the charge and the list of witnesses at the beginning of the process. In practice this comes at a later stage of the process.
2. The law envisages a preliminary stage where the ground for the trial would be put in place. In practice this stage has substituted the main trial.

3. Many of the steps which were supposed to be conducted orally during the trial have been replaced by exchange of written documents.
4. The law expects the defendant to produce the list of witnesses before the trial. In practice the defence produces its witnesses after the witnesses for the prosecution are heard, which may have already taken a long period of time.
5. The law envisages a continuous trial whereby both sides present their evidence and their arguments on questions of fact and on questions of law. In practice the unfolding of criminal proceedings is fragmented with long intervals between the hearing of prosecution and defence witnesses. In fact the witnesses of each side are not necessarily heard at the same time. At times it takes a long time to hear the witnesses of the prosecution or the defence.
6. The law makes a distinction between administrative and judicial functions. In practice everything is handled by the judge. In fact the judges spend too much of their time handling administrative matters, with the result that they have very little time left to do the most important part of their duty.

The impact of this state of affairs on the administration of justice in Ethiopia, both in civil and criminal, is negative. The replacement of the basic rules for first instance proceedings in civil and criminal proceedings by practices that are not in accordance with the law has an adverse effect on the pace of litigation. The 'system' that is in place in the courts makes timely unfolding of processes impossible. It has diverted the focus of the judges, thereby making improper utilization of resources. It has created loopholes for litigants who wish to have the litigation drag on for a long period of time. The empirical findings in the following tables show how the scheme of modernization that tried to speed up the judicial process by adopting new

procedural principles and rules has been subverted by practices that pre-dated the Codes. A few case types were selected in the FHC to see how the discrepancy between the law and the practice affects the speed of the process. These case types were selected based on the frequency they appear in the criminal justice system.

Table 33 : *First Instance Criminal Cases Pending on September 2006 at the* FHC

No	Case type	Article Cited	Number of cases	%	Average duration for cases (in months) decided in	
					2004-5	2005-6
1.	Robbery	636	1059	16.7	30.23	31.98
2.	Negligent homicide	526	1043	16.4	52.66	48.75
3.	Fraudulent misrepresentation	656	853	13.4	27.19	34
4.	Cheque without cover	657	791	12.5	28.3	35.9
5.	Attempted homicide	522/523 cum 27	665	10.4	31.94	34.06
6.	Homicide (first or second)	522/523	504	8	40.38	41.87
7.	Drugs		429	6.7	22.64	24.55
8.	Others		1009	15.9		
	Total		**6353**	**100**	**31.48**	**31.94**

As this table reveals, the work load of criminal cases in the FHC is overwhelmed by a few category of cases; homicide, 34.8% (2, 5 and 6), fraud, 25.9 %(3 and 4) and, robbery 16.7%. These six types of cases constitute 77.4% of the total number of cases pending in the court. Attempts to improve the efficiency of the court should begin by identifying the reasons for delay in these cases. Not only do these cases constitute a big percentage of the workload, but some of them, take a long period to dispose of after the charge.

Table 34 : Reasons for adjournment in the FHC July 7, 2003—July 8, 2006

Reason	Type of Offence Charged			
	522/	Negligent homicide	Fraudulent misrepresentation	Cheque without cover
Examine files	807	1887	2313	1001
Written reply	192	328	445	157
Written reply2	9	8	17	12
Give orders	43	148	120	51
Witnesses	870	2693	2505	740
Evidence	429	1178	1100	436
No judges	194	315	673	185
For the police to produce the defendant or witnesses	1538	2087	6088	1671
Other	280	611	670	229
Total number of adjournments	**4362**	**9255**	**13931**	**4482**

The highest number of adjournments was given in connection with an order for the police to bring the accused or the witnesses. This is partly related to the way the process unfolds. The defence witnesses are summoned after the prosecution witnesses are heard, which takes a long period of time. Finding the witnesses at times becomes difficult as the witnesses could have changed addresses, left the country, died etc. Repeated adjournments are usually given pending the production of such witnesses, adding to an already lengthy duration time. Although the non-appearance of parties cannot be fully avoided, it could be minimized if the list of witnesses for both sides is submitted at the beginning of the trial as the law demands; their presence secured both sides heard continuously. One also notices that many adjournments are given to 'examine the files". This also is a result of the legally unwarranted procedure. Many interlocutory orders which could be disposed after a brief oral hearing of both parties, as the law

requires, are in practice conducted through an exchange of written documents. Not only does the exchange need additional appearance by the parties, but it also demands additional time from the court to go through the documents and give a ruling. As trials take longer, the possibility of judges changing during the course of the trial is also high, compounding the reason for examination of the files. As the witnesses for both sides are heard over a long period of time, the judges who heard the witnesses will have to go through the transcript again to refresh their memories. When one or more judges have been changed and the judgment is given by judges who did not hear some or all the witnesses the need for additional adjournments to examine the files gets higher. Besides, the judges spend much of their time on files that are not yet ready for trial. Submission of written documents or replies thereto, for example, is done in open court, thereby occupying the judiciary with matters that do not call for a judge's time. Moreover every adjournment in a case is from the very beginning of the process up to the end given by the judges regardless of its nature. This takes a lot of judicial time which could have been used to attend matters that are strictly judicial. The practice in the courts has therefore created an inbuilt reason for repeated appearances and delays.

Table 35 : *Cases Pending on August 11 2006 in the FHC as of the year of filing*

Offence Charged	Year of filing of the charge in the FHC												
	93-4	94-5	95-6	96-7	97-8	98-9	99-0	00-1	01-2	02-3	03-4	04-5	05-6
Homicide (first or second)	0	0	0	3	5	3	8	20	28	64	88	144	127
Attempted homicide	3	2	8	21	6	18	23	23	37	109	174	95	131
Negligent homicide	1	0	4	8	10	17	24	28	41	265	188	176	257
Fraudulent misrepresentation	0	3	7	6	16	32	45	34	31	94	174	109	262
Cheque without cover	0	0	0	5	2	6	11	21	18	83	61	218	316

The courts keep on giving additional adjournments take wait for the prosecution or defence witnesses, or to examine the files. Cases like bounced checks which mainly rely on documentary evidence take a number of years but the system gets clogged with unnecessary adjournments which the practice has generated and which the judges are unwilling or unable to stop. In situations where the defendant is denied bail by operation of law, every additional adjournment means prolonged deprivation of liberty pending trial. For defendants who are on bail, it can have two possible effects. It can either create an incentive to seek to prolong the trial, or can subject the defendant to an endless number of appearances failure in any one of which may cause denial of bail.

Table 36 : *Criminal Cases in the FHC Disposed in 2005-6 as of the year of filing*

Offence	Year of filing of the charge in the FHC												
	93-4	94-5	95-6	96-7	97-8	98-9	99-0	00-1	01-2	02-3	03-4	04-5	05-6
Homicide (first or second)	1	0	2	1	2	6	5	12	28	33	34	13	1
Attempted homicide		1	2	1	2	7	13	11	19	61	100	31	8
Negligent homicide	4	4	17	24	25	48	69	60	55	235	122	56	19
Fraudulent misrepresentation			3	9	16	16	18	11	11	2	1		
Cheque without cover	1	2	2	11	9	17	25	26	26	147	122	100	27

Table 37 : *Reasons for Disposition of criminal cases in Kera and Yeka branches of FFIC 2004-2005*

	Limitation	Defendant not found	Defendant dead	Witnesses Not available	Charge withdrawn	Acquittal	Conviction	others	Total
Kera	41	1698	63	488	720	112	368	286	**3776**
Yeka	51	3996	38	678	692	174	425	306	**6360**
total	92	5694	101	1166	1412	286	793	692	**10136**
%	0.9	56.1	0.99	11.5	13.9	2.8	7.8	6.8	

In spite of long adjournments the cases do not to reach even the trial stage in many of the cases. The table shows the high attrition rate in the judicial process. In more than 50% of the criminal cases the proceedings are terminated simply because the defendant cannot be found and brought to court.[12] In the two branches of the Federal FFIC, (table above) the courts gave final decision on the merits only in 9.6 of the cases. In the remaining 91.4% of the cases, the process had to be terminated for some other reasons. This reveals the interrelationship between many of the factors that affect delay. The process is on the one hand delayed because defendants and witnesses cannot be produced to court in time. On the other hand the delay itself reduces the probability of the defendants and witnesses coming to court as they may have died or changed addresses during the process. Many cases are therefore given indefinite adjournments only to be terminated without reaching trial. This creates a disincentive for defendants who are on bail to speed up the process. This also explains why litigants in Ethiopia do not practically plead guilty. The delay in the process makes production of evidence against the defendant so difficult that there is not much a defendant would gain by pleading guilty at the beginning of the process. From the figures, one can see that the probability of conviction is so low, and the probability of any charge against a defendant being dropped so high, that a defendant would be better of if he pleads not guilty. This also creates an incentive for defendants to ask for additional adjournments, as this increases the probability of the charge being terminated short of a judgment. Additional adjournments may mean additional cost to the defendant as he will have to appear in the process, but for a defendant who thinks that he has no sufficient evidence to rebut the case of the prosecution, the dilatory tactic can have a higher return.

[12] The Ethiopian Law an accused cannot be tried in his absence unless the offence is punishable with rigorous imprisonment for not less that 12 years. Article 161(2) CrPC

At this stage one needs to explain why there is so much disparity between the laws and the practice in both civil and criminal proceedings in the courts. Some studies conducted about a decade after the Codes were adopted have shown that there was a similar gap between the substantive provisions of the CC and the ComC and the practice in the community. As these studies focused mainly on business and adoption practices they did not study the gap between the law and the practice within the court system. Some of their conclusions, however, are relevant and can be taken as good reasons for the prevailing situation in Ethiopia.

One of the main reasons for the gap is the process under which the Codes were adopted. Many of the Codes, including the CPC were enacted without a proper assessment of the situation under which they operate. In some cases it was clearly mentioned that some of the Codes were not supposed to be implemented by the majority of the population in Ethiopia. Although the Codes were thought as good tools for transforming the country, that their implementation would be imperfect was anticipated from the beginning. (David, 1963:193-194) Paul Brietzke argues that the "Procedure Codes are based on English models which are no more relevant to Ethiopia than French models, save that traditional litigation tends to be adversarial rather than inquisitorial". (Brietzke, 1974:159) Besides when the Codification process started the intention of the government was to modernize the country without radically altering the institutions. Change of the laws was not accompanied by a radical change of the institutions. (Singer, 1970:97) Another important factor in the effective implementation of rules is the level of communication with those who are expected to apply the rule. During the process of codification no sufficient communication was conducted to show people the changes that have been introduced

and why they have been introduced. (Brietzke, 1974:157) This situation was exacerbated by the absence of other professional publications through which this communication gap could be filled in and by the low level of training of judges who were in the courts until recently.

4.5.2. Absence of Institutional basis for the proper application of the laws

The discrepancy between the law and the practice aside, the pace of litigation in Ethiopian courts both in civil and criminal proceedings is affected by the absence of some basic institutions which are envisioned by the substantive laws. This situation may be seen as another manifestation for a non-application of the law as shown in the previous section. It however deserves to be treated separately as the causes are different, and the courts have no control over such factors even if they are willing to apply the law to the words. Many studies indicate that one way of controlling delay is addressing the supply side of the litigation matrix, to ensure that non-meritorious cases do not clog the process. This approach tries to reduce free access to the courts by building disincentives to frivolous litigation. These measures try to narrow the entry point to litigation by changing the law or by introducing other mechanisms. (Sadek et al, 1996) The Ethiopian experience shows that the low degree enforcement of substantive rules by institutions other than the courts contributes towards increment in the work load of the courts and average duration time for disposition of cases. This requires an intervention other than narrowing the gate.

Some studies conducted a few years after the adoption of the modern Codes in the 60s indicated that it will take years for the new principles in the new laws to be fully

understood and properly implemented by the citizens and other concerned institutions. (Beckstrom, 1973) It is now close to half a century since the Codes were adopted. Their application is however still challenged by the sheer absence of some elements which are in some cases a sine-qua-non for the proper implementation of the substantive rules. Our interest here is to see how this situation affects the pace of civil and criminal litigation in Ethiopia. Examples abound to show the case in point. The following are some examples for the case in point.

A. Absence Of A Registration System

The CC of 1960 contains elaborate procedure for the registration of births (Art. 99-103, CC), deaths (Art. 104-116, CC) and marriages (Art. 117-120, CC) in the law of persons. It also has detailed provisions for the registration of immovable as part of the law of property. (Art. 1553-1646, CC) The enforcement of these provisions has however been suspended pending the issuance of an Order to be published in the Gazette for the Publication of laws in Ethiopia. Article 3361 which suspends the coming into force of the registers of civil status further provides that until the coming into force of such provisions, proof of birth, marriage and death shall be made by producing acts of notoriety drawn up in accordance with the provisions of the Code or by such other persons appointed for this purpose by the Minister of Interior. Neither of these are however available to date. The drawing of an act of notoriety cannot be done as the officer of civil status on whom this responsibility rests in accordance with the CC is not appointed. Neither did the Ministry of the Interior appoint any other person to perform this duty in accordance with the provisions of the CC. In effect no registration system exists in Ethiopia many years after the adoption of the CC.

The effect of the absence of this system on litigation is manifested in a number of ways. First of all as no pre-constituted proof exists as regards such basic things like birth, marriage, divorce and death, their existence or absence has to be established through the judicial process. In marriage disputes anyone who claims that a marriage exists has to produce four witnesses to prove its existence. In inheritance claims, any person claiming to be a legal heir of the deceased has to come up with four witnesses to so prove. Thus disputes which could have been avoided by having some basic things recorded ahead of time are now inundating the Ethiopian courts. This state of affairs is contributing towards judicial inefficiency by increasing the supply side of the litigation scenario and raising the work load of the courts. As indicated earlier, the fact finding process is conducted in a fragmented fashion resulting in a prolonged process for the establishment of the basic facts on which the parties are at issue.

The non-existence of an effective registration system for immovable property has simply become the breeding ground for disputes. As no effective registration system exists as envisaged by the CC, many of the acts relating to immovable property are not necessarily registered. Contracts of sale, mortgages and many other real rights are not registered in any systematic manner. As a result every transaction has to be established by producing evidence to a court of law when a dispute arises between the parties. Under the Ethiopian legal system the only immovable property that can be privately owned is a house. The Ethiopian Constitution allows only the right of use on land, because land is declared to be the property of the public and the state. (Art. 40(3), Const.) Individuals can only have possession and use rights over land. No registration system however exists as to who has use rights over which piece of land. The land use right of every individual is not registered. Partly because of these, some

of the courts have as many as 30% of their work load relating to disputes on who has possession over a piece of land.[13]

The absence of registration affects the pace of litigation in criminal proceedings as much as it does civil litigation, not to mention its impact on the quality of the justice rendered. In criminal matters, where children are involved for example, the court relies on medical evidence to verify the age of the defendant as no record of birth is available to establish the age conclusively. The report from the medicinal institutions not only comes to the courts after a long period of time, but also gives only an estimate of the age of the accused. This situation generates another reason for granting additional adjournments on an already congested court calendar.

B. Non-Authentication of Documents

Non-authentication of documents as required by law is another reason for delay in the judicial process which, if not addressed will continue having an adverse effect on the speed of litigation in Ethiopian courts. These issues are basically issues of the substantive law and their impact on the pace of litigation is usually underestimated. These issues however need to be properly addressed because they have a direct bearing on the supply side of the litigation. Not only do they breed disputes but they also complicate the process of fact finding in the courts with the result of prolonging disputes on such matters.

The law requires authentication of some juridical acts as a pre-requisite for their validity. This is particularly true to contracts relating to immovable property. The

[13] In the Oromomiya Regional Supreme Court, 30% of the work load relates to dispute on who has the right to use a piece of land.

law explicitly requires that "a contract creating or signing rights in ownership or bare ownership on an immovable or an usufruct, servitude or mortgage of an immovable shall be in writing and registered with a court notary". (Art. 1723 CC) Although no valid contract on immovable property can be formed unless this mandatory legal provision is satisfied, no notary services exist in many parts of the country. Neither do the courts register the contracts at the time of their formation as required by law. As a result, many of the contracts relating to immovable property are done by an ordinary contract and the dates for their formation are not authenticated by any government institution. Not only does this create insecurity in legal transactions relating to immovable property, but it has also become one of the reasons for an increase in disputes relating to immovable property and increase in work load in the courts.

C. Shortage Of Institutions Which Provide Expert Evidence

When expert evidence is needed to prove some facts in dispute, it takes a long time to get the expert, if it is feasible at all. When mental health of the defendant becomes an issue in any court in the country, the defendant is sent to the only mental hospital in the country which is located in Addis Ababa. This hospital not only conducts the day to day operation like any other hospital but also has to attend to the request of the courts to give expert evidence that is relevant to the issue of insanity. The demands for the services of the hospital are a lot higher than it can possibly accommodate and it takes many adjournments to get the results. Autopsy reports, audit reports and many other reports that rely on specialized institutions face similar problems and cases are adjourned because the reports do not come to court by the appropriate institutions in time.

4.5.3. Professional Competence

As indicated in chapter one many of the legal institutions in Ethiopia have been introduced into the system only after the second half of the 20th century. This is particularly true of its legal education which has a direct bearing on the human resource component of judicial activities. Studies conducted in 1970 indicated that the average education level of judges in Ethiopia was only grade 5. (Beckstrom, 1973) The first full fledged Law School in Ethiopia was inaugurated only in 1963. There was a diploma program in law that started earlier, but it was very limited in its level of admission and scope of training. When Ethiopia adopted its Codes in the 1960s it did not have a law school that could provide degree program studies yet. The first graduates of the first law school were still doing their studies when the CPC was enacted in 1965. When the CrPC was enacted in 1961, Ethiopia did not even have people who had graduated with law degrees on its own soil. Statistics is not available as regards the number of people who studied law in other countries before the opening of the Law School in Addis Ababa, but it is indicated that the number was negligible. (Vanderlinden, 1966-1967:261)

The qualification of judges in Ethiopia did not improve significantly because the supply of the law school was not as high as the demand of the legal institutions. Until recently, the Law School was producing only 40-50 graduates a year and it was the only the law school for the whole county until 1994.

Table 38 : Level of education of judges in 1989 and in 2006

Level of education	1989	2006 (for Federal Courts only)
PhD	0.1%	0%
LLM	0.4%	6.5%
LLB	7.3%	74.1%
Diploma in law	7.9%	19.4%
Certificate in law	5.7%	0%
7th-12th grade	17.2%	0.9%
1-6th grade	14.4%	0%
No formal education	47%	0%

Insufficient investment in human and institutional resources has many a time been mentioned as one important reason for delay in judicial processes in many countries.(Sadek et al, 1996) The impact of a shortage of sufficiently trained manpower is even more pronounced in Ethiopia. Earlier, substantial percentage of the judges did not have any formal legal education. 78.6% of the judges had no legal training at all, and had to count on their experience to perform their judicial functions. After the introduction of the federal arrangement in Ethiopia, some States use their own local languages in the judicial process which has further complicated the demand for trained man power. The States had to begin from the scratch. All the States had to appoint judges for the first instance Courts by giving a six month training programs. Supreme and FHCs started by appointing new graduates from the Civil Service College or the Law School at Addis Ababa University. Although there are more people with higher professional qualification on the bench some of them lack the experience which the post requires. The number of law schools is rising rapidly,

Ethiopia has a long way to go to fulfil the demand for trained man power in the courts and any reform effort must in the meantime take note of this element.

4.5.4. Absence of Proper Case Management

The importance of managerial judging in reducing delay has been extensively studied and has become a focus of reform to reduce delay in many legal systems. The reform programs introduced in England and Wales take managerial judging as one important direction to reduce delay in the courts. Case flow management was introduced into many courts in the U.S. even earlier.

In Ethiopia the process of litigation both in civil and criminal proceedings is not properly managed, contributing to the delay and creation of backlog in courts. The absence of a proper case management manifests itself in a number of ways. Development of an effective reform strategy requires an appropriate identification of these problems at all stages. In this section some of the most important aspects will be discussed briefly.

The problem starts with the improper organization and management of the registrar's office, an office which, when it exists, is responsible to provide important administrative support to the judges during the process. Verification of pleadings' compliance with procedural rules, keeping records, classification and tracking of cases, keeping of exhibits, service of notices and summonses on parties and witnesses are some of the responsibilities of the registrar's office.

As mentioned earlier many of the administrative responsibilities of the registrar are transferred to the judges thereby sharing a very scarce resource of the judges. The

vetting of the written reply of the defendant in civil proceedings is an administrative matter which should be done in the registrar's office. This is however done by the judges themselves. Not only are litigants made to wait for many hours in the courts just to submit a written response to the judge in an open court or in chambers, but the judge also spends a big part of the daily schedule in handling such administrative matters which were supposed to be conducted by the administrative arm of the court.

The record keeping system in many of the courts leaves much to be desired. Files are easily misplaced and additional adjournments given as a result. Systematic information about the progress of individual cases or the courts in general is not available. Many of the registrars in the courts lack proper training in law or another field. In many of the lower courts, the judge doubles as a registrar denying the judge of whatever services the registrars in other courts provide. When judgments are rendered at long last, the registrars rarely process the services with adequate speed. It takes time to type the hand written record of the dossier and give it to the parties who may wish to go on appeal.

Discussion in previous sections shows that managerial judging though reflected in many rules of the Procedure Codes is not practiced in the courts. The judges do not control the process. Adjournments are granted whenever demanded by the litigants. Many a time the judges play a passive role in the unfolding of the process. They do not use many of their powers to ensure that cases are disposed of in the shortest possible time. And much of the time of the judges is spent on administrative matters. Many of the cases listed in a day relate to exchange of pleadings or to other matters that could have been done by others better and faster.

4.5.5. Insufficient Resources

Many of the Ethiopian courts do not have sufficient resources to cover even the basic facilities. Although the annual budget for the courts has shown significant improvement in absolute terms over the years, it still remains to be a very small percentage of the annual budget for the Federal Government.

Table 39 : *Annual budget of the Federal Courts*

Year	Federal Government	Federal Courts	Percentage
1996-7	4,959,258,800	4,321,800	**0.08**
1997-8	3,752,370,700	11,857,100	**0.315**
1998-9	4,047,647,100	14,429,400	**0.356**
1999-0	8,238,615,900	14,851,300	**0.18**
2000-1	8,583,800,000	13,765,500	**0.16**
2001-2	11,892,422,000	17,891,200	**0.15**
2002-3	13,347,300,000	17,447,200	**0.13**
2003-4	13,855,300,000	15,632,300	**0.112**
2004-5	14,504,200,000	20,265,700	**0.14**

The budgetary constraint is in general a reflection the low level of development in which the country finds itself. Not only did this constraint affect past performance of the courts, but future reform proposals must take this into account.

4.6. Alternative Dispute Resolution

4.6.1. ADR after Initiation of Formal Proceedings

As noted earlier, TDR mechanisms are very common in many parts of Ethiopia. The demand for juridical services from the ordinary courts is low compared with the number of disputes channelled to the TDR.

Much as the traditional arrangements play an important role in dispute resolution before cases come to court, there is little indication that they continue to do so after cases are initiated in the ordinary courts. Once formal proceedings are started the parties to the dispute in civil litigation usually stay on course until a final ruling is given by the judges.

As could be observed from the figures in the previous sections, criminal proceedings in many courts in Ethiopia constitute a bigger part of the workload of the judges. Not only does this workload affect the waiting time for criminal proceedings, but it also adversely affects the situation in civil litigation. Many judges in the lower courts handle civil and criminal cases at the same time. Even in situations where there are distinct benches for civil and criminal cases, improving one would affect the other as it would make more judges available. Therefore solving some of the problems in the criminal justice may have a positive impact on efficiency as it releases some of the judges' time tied up in criminal proceedings. This is particularly important as increasing the number of judges can solve the problems of efficiency only to a limited extent because of budgetary constraints and the limitations on the supply of trained manpower.

Judicial efficiency and access to justice are highly interrelated. A problem that causes delay may also be a barrier to justice. In general, the problems which were raised and discussed in connection with judicial inefficiency need to be solved to make the judiciary more accessible. Some particular points will be highlighted because of their particular impact on access to justice. Two points will be raised in connection with the situations in the criminal justice, the incentive structure and delay. In criminal

proceedings cases are congested because the legal system lacks an incentive for defendants in criminal proceedings. The accused who pleads guilty on the first day of his appearance is not in any meaningful way treated differently from a person who fights tooth and nail and loses at the end of the process. The criminal justice system has aggravating and extenuating circumstances but they are not necessarily related to the guilty plea of the accused. It is possible that given the same criminal charge of a crime committed under similar circumstances, a person who pleads guilty may carry a longer prison term than a person who does not. It all depends on how the judge weighs the aggravating circumstances that may be raised by the prosecution and the extenuating circumstances that may be raised by the accused, whether he pleads guilty or not.

Given the higher probability that a case may be dropped because of some of the reasons mentioned earlier, the accused who does not plead guilty may actually be better of because he has a much higher probability of never reaching the trial stage or not being convicted at all even after the trial. Any accused person who makes rational calculations would, therefore, not plead guilty lest he carries a sentence which he, most likely would have avoided just by not saying anything at all. Therefore, not only does the legal system deny incentives to those who plead guilty, but it gives an incentive to those who do not. Addressing these incentive and disincentive structures would enhance access to justice by reducing the number of criminal cases that congest the process.

One observes similar situations in the civil justice system as well. Many of the reasons mentioned in connection with delay connive to make settlement very difficult

if not completely impossible. Many of the reasons that cause delay also act as barriers to justice, directly or indirectly, but we will pick only two of them to show the interface between these factors, the structure of the proceedings and the cost factor.

The CPC hints that a compromise agreement may be reached because of the initiative of the parties, or because of the court's attempt to reconcile them. (Art. 274 (1), CPC) It is also provided that the "court may on the application of the parties, indicate to the [parties] the lines on which a compromise agreement may be made" (Art. 274 (2), CPC). Obviously the law does not take a judgment as the only way to dispose of a civil case. On the contrary, the law clearly expects the judge to encourage the parties to reach an agreement and terminate the case rather than conduct a full trial. (Art. 275 CPC) This takes place only rarely. Here are some of the reasons.

The mindset of the judges, the parties and the lawyers can be taken as one important explanation in this respect. The prevailing attitude among judges is that they are there to give decisions, to declare one a winner and the other a loser. That is how those who have been to the law schools were trained. Every discussion in the law schools whether in substantive law or procedural issues portrays the judge together with his judgments. Training on ADR is only a recent development in the curriculum of the law schools.[14] The lawyers' mindset is not any different. Many get suspicious when a judge, if ever, asks the parties to reach an agreement.[15]

[14] At Addis Ababa University ADR is given only at a post graduate level. The course on Civil Procedure focuses on the adversarial tradition of decision making and gives little attention to ADR.
[15] Interview with Members of the Bar think that a case comes to court because it could not be solved by agreement saying all they expect from a judge is a judgment.

But there are more important underlying problems which will persist even if this was surmounted. As things stand now, the litigation landscape is not conducive for the judge to persuade the parties to settle. The problem starts from the way the pleadings are written. Although the law requires the plaintiff to state the material facts, and only the material facts concisely, (Art. 80 (2), CPC)and the defendant to make a specific denial of any fact stated in the statement of claim which is not admitted, (Art.234(2), CPC) often times the pleadings are presented as long stories including arguments. Besides, the first hearing in which the judge, amongst other things frames the issues on which both parties are in disagreement is not conducted. Issues are not framed until a later stage in the process. The issues are set, at times when the judge sits to write the judgment. This has deprived the judge of the opportunity to intervene at an earlier stage, on which the law seems to be counting. The judge can hint to the parties of the possibilities of settlement only if he is aware of the issues on which they are at variance. The parties would also be in a better position to compromise if they are assured that the issue upon which the judge will give the judgment is the same as the one upon which they are negotiating. If the first trial is conducted and issues framed with the participation of the parties, this could be achieved. Without it, the probabilities of the parties reaching a compromise agreement would be less.

The fact that issues are not framed partly means that the court will have difficulties controlling the relevance of the evidence which each party proposes to produce. This gives the parties greater latitude to bring more witnesses or other evidence to the court, putting the economically powerful party or the party who benefits from delay, in a better position to dictate terms or to say no to ADR. In Ethiopia, this is exacerbated by the fact that the parties are not made to cover the cost of the witnesses'

expenses they call, as the law demands. (Art. 112(1), CPC) Thus there is no direct and immediate financial implication to the number of witnesses one calls in to the court room. As both parties do not pay for the travelling costs and other expenses of the witnesses, the loser will have less to reimburse to the winner, if the judge decides that the loser should cover all the expenses. This is, however, still complicated by the discretionary nature of the power of the courts in relation to costs and other incidental expenses. As the court has "full power to decide by whom or out of what property and to what extent such costs are to be paid" (Art. 462, CPC), the parties may be made to cover their own costs, or the loser may cover the expenses of the other party only in part. A party who knows that he will eventually lose when the judgment is given may not be willing to settle, as the benefits he gets from delay may outweigh the loss he incurs by early settlement. A litigant or his advocate can use procedural matters to wear the other party out. The plaintiff can request for the amendment of the pleadings, when the trial is about to be completed. Such requests by litigants are usually accepted by the courts on the ground that the rules allow amendment of the same at any time before judgment (Art. 91(1), CPC). Plaintiffs who obtain injunctions from the court usually use this procedure as a dilatory tactic. Obtaining stay of execution in the appellate courts is another commonly used procedure which impedes the effective utilization of ADR. As appellate processes take long to finalize, the party against whom a judgment is rendered asks for a stay of execution which the courts usually grant. In the appellate courts, more than 80% of the judgments of the lower courts are confirmed. (FSC database). A litigant with a frivolous claim can, however, easily cling to this procedure even though he may as well know that he will lose at the end of the process. The court fee for the appellate courts is 50% of the fee for the trial courts. The benefits one draws from the payment of the judgment money

during the period of appeal can easily be higher than the cost which may eventually be awarded, if at all, to the other party at the end of the process.

The party who declines offers for settlement therefore has many strings which he can pull to frustrate the other party who may be willing to terminate the process by compromise.

4.6.2. Small Claims Tribunals

As explained in the previous parts of this thesis, the TDR mechanisms are vibrant in different parts of Ethiopia. It should not, therefore, come as a surprise that in most of the Regional States where the TDR mechanisms are relatively stronger, no separate small claims tribunals exist. Where the TDR system handles disputes including the ones which fall under the jurisdiction of the ordinary courts, there seems to be no strong need for having these tribunals. In these states, as the ordinary courts handle only a small segment of the disputes that arise in the communities, the problems of adjudication which call for a separate small claims tribunal are not that profound.

In the other States[16] small claims tribunals are established and operate at the lowest level of the state structure called the *Kebeles*. In all the states where they are established, these tribunals have jurisdiction to handle civil claims below a certain value. As jurisdiction of the social courts is based on the amount in controversy, the primary determinant for jurisdiction is not so much the nature of the dispute or the type of relationship that gave rise to the dispute but the monetary value of the claim by the plaintiff. Their jurisdiction cannot exceed Birr 5000 in Addis Ababa social

[16] These tribunals are established in the States of Tigrai, Amhara, Oromiya and SNNPR.

courts, (Proc. 31/ 2007 AA) Birr 1000 in Oromiya State, Proc. 66/2003 ORS) Birr 2500 in Tigrai State (Proc. 93/2005) and Birr 1500 in Amhara State.(Proc. 17/2007 ARS) In some States they also have the jurisdiction to handle disputes relating to land use right, marriage disputes and abuse of property regardless of the amount of money in controversy. In Tigrai State the social courts have jurisdiction on matters relating to property in marriage, partition of common property, establishment of paternity and other related issues. In Oromiya, the social courts have the jurisdiction on land use rights regardless of the amount of the claim. Such issues are bound to raise complex legal issues which can be beyond the competence of the judges in the social courts.

The jurisdiction of the social courts in criminal cases includes handling what are categorized as petty offences under the Penal Code. In matters that fall under their jurisdiction, the Social Courts are allowed to impose a maximum arrest of one month if the accused is found guilty.

The objectives of the social courts are not always articulated in the laws that bring them into existence. Some common objectives can, however, be inferred from the details of the establishment proclamations, the most important of which are the following.

1. Making efforts to maintain peace and good neighbourly relations among citizens of the Kebeles[17]
2. Creating a forum for dispute resolution that is not bound by stringent procedural rules (Proc. 31/2007 AA)

[17] This objective is stated in the Proclamations of Oromiya, Amhara and Tigrai Social Courts.

3. reducing the workload of the ordinary courts by diverting small claims to these tribunals (Proc. 31/2007 AA)
4. settling conflicts through mediation or arbitration (Proc. 17/2007 ARS)

These objectives indicate an interest on the part of the policy makers not only to divert cases from the ordinary courts to the social courts but also to organize the latter under a new thinking. Achievement of the first and the fourth objectives clearly demand from the social courts pursuit of a method other than the adjudication model where the process involves binary oppositional presentation of facts in dispute (Menkel-Meadow, 1996:6). Although the degree of simplicity depends on the nature of the rules, the declaration of intent to avoid the rigid rules of procedure in social courts and adopt a more simplified procedure that fits their purpose also reflects recognition that attainment of these objectives demands following a different method.

The imported procedural laws of Ethiopia which are highly technical and formal have nothing in common with the highly informal and democratic traditional dispute settlement practices. In a country where the majority of the population is illiterate, the stringent technical requirements in pleadings, presentation of evidence, the process of trial and the possibility of losing a case for reasons of legal technicality constitute a nightmare for an average citizen. (Girma, 1982) Small claims tribunals have become instrumental in reducing delay and complexity in many other legal systems to the extent of having been praised as the "supermarket justice" because of the quick and inexpensive justice they provided. (William, 1972) Their existence should be encouraged in the Ethiopian context for stronger reasons.

Reports in some States indicate that as many as 85% of the cases in the States are handled by the Social Courts. (Tigrai SC 2005) As these tribunals are established at the lowest level of the state structure, they will create the advantage of proximity to their users. Ethiopia's population has exceeded 73 million and it covers an area of approximately 1,098,000squre kilometres. For such a big population and geographic expanse there are only about 800 court sites in the whole country. This inevitably means that people have to travel a long distance to get the regular first instance courts. Compounded by the low level of economic power of the majority of the population and bad infrastructure this would discourage many citizens from using the ordinary courts to vindicate rights. Under such circumstances the establishment of social courts can help citizens get a better access to justice. The judges are drawn from the same community as a result of which they are very likely to speak the same language and share the same culture with the disputants. The social courts generally render decisions faster than the ordinary courts. All these elements combined together make the social courts less expensive compared to the ordinary courts. As many of the disputes channelled to the social courts are of a small value, parties who would have been discouraged to go to the ordinary courts because of the disproportion of the cost may have more incentives to take their claims to these tribunals.

To make these tribunals a more robust forum for effective use of rights there are a number of points which need thorough consideration under the Ethiopian small claims regime. In the following paragraphs the basic points for concern in the legal regime for small claims tribunals will be considered.

Small claims tribunals are needed because of some of the problems that are inherent in the formal administration of justice, namely the procedural technicality and the disadvantage which people with small claims suffer as a result. The way out of such anomaly is utilization of simplified procedural rules and adoption of methods that fit the nature of the disputes in the tribunals. (Kruse, 2004-2005:394)

In spite of declarations to this effect in the legislations in Ethiopia, one notices that the mode of litigation in the social courts is not significantly different from that of the ordinary courts. The social courts are by law bound to follow the rules provided in the CPC as much as the ordinary courts. A social court is expected to "use the Civil Procedure Code, Criminal Procedure Code and other relevant laws in accomplishing its tasks and executing it decisions." (Art.7 (6), Pro. 31, 2007) The requirement for pleading, the process of appeal, and the fee structure[18] is the same as for the ordinary courts. Representation by attorneys is encouraged by the legislation. Once pleadings are concluded the courts are expected to give a judgment in writing and attach the dissenting opinion if there is one.[19] The jurisdiction of the social courts is limited to small claims, but they are expected to handle the matters brought to them in more or less the same way as the regular courts. It is provided that the judges should be guided by nothing else but the law[20] in the same way as the ordinary courts. This strengthens the combative mentality in the social courts and takes them further away from the possibilities of settlement which is one of the declared objectives. Although some of the proclamations which establish the social courts mention that ensuring

[18] A plaintiff in the social courts pays the same court fee as would have been paid if the case were submitted to the ordinary court. Article 16 of Addis Ababa Social Courts.
[19] In all social courts three judges sit for every case.
[20] Oromiya Social Courts Proclamation 66/2003, Article 7 provides that judges of the social courts 'shall be guided by no other authority than that of the law'. Similar provisions are found in the social courts proclamations of the Southern Nations, Nationalities, and People's Regional State (Proclamation 65/2003 Article 7), Tigrai state (Proclamation 93/2005 Article 5.

peace and stability in their community is one of their purposes, none of the proclamations envisage settlement as a primary way to achieve these ends. Implicit in these proclamations is therefore the understanding that the social courts can ensure harmony in their communities by using the adjudicative process like the ordinary courts. The basic ideas for the organization of the benches, place, time and manner of hearing are similar to that of the ordinary courts. The primary mode for dispute resolution is the binary mode where one would be declared a winner and the other a loser. The combative adversarial mentality is carried over to the working environment of the social courts. This situation defeats the purpose for which the social courts are established.

Furthermore, the principle of judicial independence is spelt out in more or less the same way as it applies to the ordinary courts.[21] The relevant provision of the SNNPRS for example provides that "judges of Social Courts shall exercise their functions in full independence and shall be directed solely by the law; they shall, however, be held legally responsible for deliberately breaching the law with a view to unjustly favour or disfavour a party". (Art.7, Pro.65, 2003) This situation is further compounded by the training programs for the social court judges prepared on the implicit assumption that given the resources and the time, the social courts should be versed with the procedural rules as much as the judges in the ordinary courts.

The social courts are established at the lowest hierarchy called Kebeles. Much of the TDR is still vibrant and working well in many of the Kebeles. Recent studies indicate that the TDR are the primary modes of dispute settlement in many parts of the

[21] Social Courts Proclamations of the Oromiya, Amhara, Tigrai and SNNPRS are essentially the same as regards this point.

country. Many of the people involved in these TDR do not read and write but they do settle disputes that arise in their communities. On the other hand reading and writing is a requirement to become a judge in the social courts. By virtue of this requirement many of the traditional wise men who know the tradition and who are accepted by the community are excluded from such tribunals. The ones who read and write and by virtue of which they become judges in the social courts are usually neither well versed with the TDR systems nor with the rules in the formal state laws. In some traditions the people who are involved in the process of dispute settlement are believed to have the power to foresee events and to identify who did what in public gatherings encouraging the parties as well as the witnesses to tell the truth.(Tesfay, 2005) Taking these people out of the process because of their illiteracy raises the tendency of the parties and the witnesses not to tell the truth affecting the tribunals' capacity to arrive at the truth. As the trend of such tribunals is to render binary decisions, the losing party tends to go to the next echelon on appeal either because he/she does not want to be seen to be losing or because he/she thinks that the outcome was unjust.[22]

It is submitted that mediation rather than adjudication is more appropriate to achieve the goals set for the social courts. In other systems, mediation was introduced in small claims tribunals because of the inadequacy of the trial process and the quality of justice attained through adjudication. Adjudication is not appropriate for small claims because it narrows disputes arising from any incident to legally cognizable issues thereby leaving many underlying causes of the dispute untouched while resolving the legal case. (Wissler, 1995:351) Mediation is also likely to give wider remedies to the

[22] The number of appeals coming to the Oromiya regular Courts from the Social Courts is increasing over the years. The same pattern is observed in the Cassation Division of the FSC. Many litigants that started their litigation in a Kebele in one of States reach up to the FSC alleging that the decision rendered by the lower courts, including the social court contains an error or law.

disputants in the social courts than the binary win/lose outcomes in adjudication (Menkel-Meadow, 1996:6) which are very likely to create the feeling of humiliation and vindication by one of the disputants. (Wissler, 1995:351) The number of appeals that are coming to the regular courts up to the highest court in the land is an indication of this sense of humiliation and vindication created by the binary adjudication in the social courts.[23] This can be greatly reduced by introducing mediation in the social courts. The mediation process allows the disputants to include in the discussion anything which they think is relevant to resolve their differences including broader contextual factors such as past relationships, their existing situations and future consequences that may result from the solutions. (Wissler, 1995:347) Introducing mediation in to the social courts will also have the advantage of enhancing the perception of fairness and satisfaction of the process by the disputants. As mediation is more inclusive and participatory than adjudication, it is more likely to create better results by allowing examination of different perspectives of a problem. Because of its participatory nature outcomes in mediation are also more likely to be perceived as legitimate by the participants in the process. (Kruse, 2004-2005:395)

The stated objective of the social courts, achieving peace and good neighbourly relations, is very unlikely to be achieved through the adjudicative binary model which is unavoidable if the courts follow the rules in the Procedure Codes. Given the level of training of the judges in the social courts, it is unlikely that the social courts will follow the Codes to resolve the disputes in practice. As is observed in practice many of the social courts find adjudicating cases on the basis of the Codes problematic and resort to other methods quite often. Given the fact that many of the regular courts

[23] Data In Oromiya Supreme Court indicates that up to 30% of the cases that are opened to the court every year started in the Social Courts in the Regional State

also deviate from the rules in the Codes to a great extent, one should not expect the social courts to behave in a different way. Thus even if the adjudicative process were considered more superior to achieve the objectives, it cannot be attained in the social courts in Ethiopia because of the overall situation under which they are operating.

The initiative in the Amhara State to reorganize the social courts under new principles should be emulated by all the other States. The new legal regime for social courts which became effective beginning December 31, 2007 has changed the basic premises for the organization of and process in the social courts. Unlike the previous laws, the new law makes mediation the primary mode for resolving disputes that are submitted to the social courts. A clear link is created between the objective of ensuring a peaceful neighbourly relations and the process of mediation by the social courts. A relevant part of the legislation provides that the social courts should "enhance the culture of peaceful neighbourly relations by settling conflicts through arbitration, mediation and negotiation". (Art. 4(1), Pro. 151, 2007ARS) The judges in social courts who are elected by the people serve primarily as mediators and decide cases only when the mediation fails. (Art 9, Pro. 151, 2007ARS) When mediation fails and cases are set for adjudication, the new law gives enough flexibility for the social courts to use their customs and traditions. Unlike the previous laws, the new law does not impose the rules of CPC and CrPC on the courts. (Art. 20 ibid) On the contrary, it explicitly stipulates that the social courts are not bound by the details in these Codes. This arrangement for social courts is, therefore, a new model which aspires to integrate the local justice without necessarily eliminating customary rules of procedure. These tribunals may earn greater legitimacy because of the level of

satisfaction which they are likely to provide as a result of the process they follow and the outcomes they attain.

The grounds for appeal under the new legislation are more restrictive than the previous one. Appeal to the ordinary courts is allowed only if the appellant can show that there were clear indications of partiality during the process, there was bribe or if the decision was rendered after hearing only one of the parties. Now that the courts are focusing on mediation, it is unlikely that there will be as many appeals as in the previous arrangements because the process and the outcome will most likely be accepted by the disputants. The only time when cases that are initiated in the social courts could go to the first instance courts is when the courts have acted beyond their jurisdiction and when the decision violates fundamental rights and freedoms of the disputants. (Art. 22 Proc. 15/2007 ARS)

Neither are the new social courts bound by the previous rules about neutrality which are necessary to the ordinary procedure but may not be as helpful at the village level where closeness of the third party to the disputants may be an important factor in bringing disputes to an end.

4.6.3. Ad-hoc ADR

Formal institutional arrangements to provide forum for ADR are rare in Ethiopia. Currently there are only two institutions, both of which have been established recently, to provide forum for mediation and arbitration. The first one is an arm of the Ethiopian Chamber of commerce and the other one is an NGO established with the aim of encouraging resolution of disputes through mediation and arbitration. Both

institutions are established to facilitate the resolution of disputes, particularly business disputes, without resorting to the formal court system. They have however so far handled a few cases by mediation and arbitration. The Ethiopian Arbitration and Conciliation Center (EACC) has given a number of training programs on mediation to professionals in different fields including lawyers. It is believed that this would eventually change the combative mentality particularly that of the lawyers and may create an interest in mediation and arbitration.

The cost factor may be discouraging disputants from taking their cases to these centres. When parties go to these centres for arbitration the fee they are charged by the arbitrators is exorbitant compared to what they would pay if they go to the courts. Apart from the amount that is paid, the modality for payment may also discourage particularly the defendants from consenting to go to these centres. In the ordinary courts, fee is paid by the plaintiff with a possibility of reimbursement. The defendant does not have to pay upfront and reimbursing is not automatic even when the decree is in favour of the plaintiff. Going to theses centres, on the other hand, entails payment upfront which can discourage many a defendant from accepting ADR through these institutions. The financial interest of lawyers also plays an important role. A speedy disposition of cases in these centres may not be compatible with the financial interest of the lawyers who may earn more as the process drags longer in the courts. Even where there are no lawyers, the widely held perception that court process can be dragged for too long can encourage parties whose prospect of winning is less from using these institutions.

4.7. Concluding Remarks

In this chapter an attempt was made to show the pace of litigation in and the factors that affect the efficiency of the courts in Ethiopia. On the one hand Ethiopia has Procedural Codes that reflect the adversarial tradition. These laws try to strike a good balance between the competing interests in the process of adjudication. The interests of truth finding, cost minimization and speed are given relatively adequate attention in the procedural design of the Codes. The Codes give wide power to judges to control the process and to minimize excesses of adversarial litigation at the trial as well as at the appellate level.

On the other hand there is a practice which does not correspond to these fundamental principles. The rules in the Codes are not effectively implemented in the courts. As a result of the gap between the law and the practice, the basic objectives which the law aspired to achieve are undermined. One of the results is delay in the process and backlog in the courts, although there are encouraging improvements in the recent years. As far as this writer is concerned the main reason for inefficiency in the courts is the failure of the actors to abide by the rules of procedure. This situation is exacerbated by the absence of adequate institutional support in other sectors of the society. This indicates that the gap between the law and the reality is not limited to the court as such but is a phenomenon observed in other institutions as well.

This scenario determines the direction of reform programs to enhance efficiency in Ethiopia. Ensuring efficiency in Ethiopia requires something more than changing the rules in the Codes. Changes in the rules must be preceded by creation of an environment conducive for the proper implementation of those rules. This includes assessment of both the internal and the external environment of the courts. The

problems in the rules could be tested only when they are properly applied. This should not imply that the Codes do not have problems at all. On the contrary, the Codes do have some loopholes which could give people an incentive to prolong litigation. At the end of the day, however, change of these rules could be fruitful if there is an assurance that they will be implemented. The priorities for enhancing efficiency should therefore be changing the institutional framework, having more professional judges, training them on new modes of doing business, making those key institutions envisaged by the Codes (such as registration) work, revitalizing legal education, and increasing the resources for the judiciary.

The legal regime on small claims tribunals moves into two directions. On the one hand there is an apparent interest to have small claims tribunals handle disputes of small value through institutions which are established at the grass roots level. The methods used to achieve these objective however, seem to be in direct conflict with the stated objectives. The complex procedural rules which have proved difficult to properly apply in the ordinary courts are transferred to the small claims. Under the Ethiopian context the combative adversarial spirit is not appropriate method for the small claims tribunals. Ensuring access to justice would therefore require assessment of methods that would be more appropriate for these forums. Recent attempts to make these tribunals focus on mediation and use customary substantive and procedural rules to resolve disputes is a move in the right direction

5. INDEPENDENCE AND ACCOUNTABILITY OF THE JUDICIARY

5.1. Introduction

This chapter will raise some issues which the judicial reform program in Ethiopia should address to ensure independence as well as accountability of the regular courts. In this connection the state of judicial independence and accountability will be examined. The legal framework for judicial independence and accountability will be discussed separately from the actual level of judicial independence and accountability. This will show the achievements and problems in *de jure* independence and accountability separately from the problems in *de facto* independence and accountability which may come up with different indices. In examining the degree of independence and accountability of the judiciary, a distinction will be made between the legal and factual situations that affect the personal or the decisional independence and accountability of the judges and those that affect the institutional independence and accountability of the courts.

As was done in the previous chapters, discussion of issues that are particular to Ethiopia will be preceded by general theoretical discussion of judicial independence and accountability which highlight the basic points which deserve to be incorporated in efforts to ensure the independence as well as the accountability of judiciaries.

5.2. Independence of the Judiciary

5.2.1. Nature of Judicial Independence

Despite a growing consensus on the core values and the importance of judicial independence there is an ongoing debate on its exact meaning (Ferejhon and Kramer, 2002: 965). The meanings attached to the concept are as many as the people who write about it. As such independence of the judiciary is one of the least understood concepts in the field of political science and law. (Larkins, 1996: 607) One can discern this from the myriad of definitions given to the concept by different authors at different times in many legal systems. Even then much of the literature on judicial independence is based on the assumption that there is an agreement on the meaning of the concept. In some cases definitions are offered which are ill-suited for the practical business of government functions and reform. In others the multiplicity of meanings is exploited as a way out. (Burbank, 2003: 323)

It is more or less accepted that the principle of judicial independence is central to the judicial process. The meaning that may be attached to the concept may, however, vary in space and time. Amongst many other things, factors like the form of government that is in place, the specific tradition and the prevailing political situation in any one country affect the understanding of the concept (Shetreet, 1994)

The multiplicity of meanings can partly be attributed to the vantage point from which writers see judicial independence. These differences are related to the concept of power and function of courts in a society. The definition given to the concept by scholars and statesmen who follow the instrumentalist approach is understandably different from the one forwarded by those following the utilitarian approach. The

instrumentalist approach to judicial independence takes the concept not as an end by itself but as a means to an end. The utilitarian definition on the other hand takes judicial independence as a monolith which deserves protection on its own right. (Burbank, 2003:323) The points of departure of these and other theories affect the design for judicial independence, the degree of insulation of the judge and the courts from external influence, the relationship between the different branches of government and the modalities of court administration. The most important thing in this regard is whether judicial independence is considered as a means to an end or an end by itself. The traditional view takes judicial independence as a means to an end and accepts that the power vested in the judiciary is as limited as the powers of the other branches of government. The contemporary view of judicial independence on the other hand attaches a very wide meaning to judicial independence. The first model is commonly called judicial restraint while the second one is labelled as judicial activism. (Jipping, 2001:144) For the judicial restraint model "judicial independence is judicial license or freedom to do as the judge chooses. While the traditional view says judges are free to properly exercise judicial power, the contemporary view says judges are free from any restraint on judicial power." (Jipping, 2001:150)

Many of the traditional definitions which take judicial independence as a means to an end, use as their point of departure, the basic concept of conflict resolution by a "neutral third", which implies settlement of controversies through the consideration of only the facts and the relevant laws. (Shapiro, 1981: 1-18) This is the central theme of the "social logic of courts" which is necessary to avoid dispute resolution under "two against one situation". (Shapiro, 1981:1-18) the understanding of judicial

independence based on this premise conveys the idea that a dispute should be resolved by a judge who has neither a direct interest in the outcome of the dispute nor any relation to the litigants, which Fiss calls "party detachment". (Fiss, 1993,) From this basic premise emanate two interrelated aspects of judicial independence, impartiality and insularity. (Larkins, 1996: 609) Impartiality implies that the decisions of judges will be based solely on the facts and law and not any bias or prejudice in favour of one or the other of the parties. Insularity on the other hand conveys the idea that judges should neither be used as tools to further political aims nor punished for failing to further them, (Larkins, 1996:609) which, Fiss calls 'political insularity.' (Fiss, 1993) Many definitions thus reflect these twin concepts of impartiality and insularity. Rosenn for example defines judicial independence as "the degree to which judges actually decide cases in accordance with their own determination of the evidence, the law and justice, free from the coercion, blandishment, interference, or threats from governmental authorities or private citizens". (Rosenn, 1987) Brinks also uses more or less the same elements as he considers judges independent "when their appointment is not controlled by a party that has an interest in the outcome of a dispute and when they are not subject to unilateral interference in their decision-making process by a party with an interest in the dispute". (Brinks, 2004-2005: 600)

The triad logic of a neutral third as articulated by Martin Shapiro helps one grasp the basic nature of judicial independence. If judges are meant to supply the neutral third in modern politically organized systems two basic requirements must be satisfied. First, the judge should not be "identified with" anyone having an interest in the outcome of the dispute. Second, the neutral third should not be "unilaterally influenced" by anyone having an interest in

the outcome of the dispute. (Brinks, 2004-2005:598) The first requirement demands that the decision maker should have a sufficiently distinct preference from that of the appointing authority. Similarities between the preferences of the decision maker and the appointing authority cannot be avoided. This identity of the preferences should not however be a preordained phenomenon. It basically means that the preferences of the judges should be partly different from the preference of the party that makes the appointment. In an independent judiciary where the decision maker is not identified with one of the parties the outcome of the process will not be predetermined by the preferences of one of the parties, but by the legally relevant features of the dispute. If the outcome of the process is preordained and determined solely by one of the parties, the preference of the judge is not sufficiently independent and therefore there is no independence. Brinks calls this preference independence. (Brinks, 2004-2005: 599)

An equally important element in judicial independence is the non-existence of undue influence by one of the parties in the process of decision making, which is called decisional independence (Brinks, 2004-2005:599) or party detachment. (Fiss, 1993) This element of judicial independence requires that the judge should not be controlled or influenced by the parties in litigation.

The relative nature of judicial independence (Rosenn, 1987:3) brings with it some limitations on the content and scope of judicial independence. While political insularity requires that the judiciary be independent from the political authorities and the public in general, this type of independence cannot be unlimited. (Fiss, 1993:59-60) The need to insulate the judiciary from political control is qualified by other equally important considerations some of which are connected with democratic

commitments to majority rule. Although insularity of the judiciary is needed to ensure justice, complete removal of the judiciary from public control compromises the democratic values of majority rule. (Fiss, 1993:60) The limits on the insularity of the judiciary are reflected in different ways in different legal systems. The involvement of the political organs in the process of appointment, removal, budget allocation, law making powers are some of the processes used in various degrees to attenuate the insularity of the judiciary.

Neither are judges completely insulated from other forms of influence. "Judicial independence does not require that judges remain oblivious to all political considerations when deciding cases". (Rosenn, 1987:3) Decisions of judges are bound to be influenced by a number of factors and the presence of some sort of control or influence does not necessarily make the judiciary less independent. It is rather the presence of unilateral interference by one of the parties that constitutes a treat to this decisional independence. "The touchstone for independence is not the lack of control, but the lack of partisan control: unilateral control by an identifiable faction with an interest in the outcome of the dispute." (Brinks, 2004-2005:600)

Limiting the concept of judicial independence to impartiality and insularity is, however, criticized as being too narrow to convey the core meaning of judicial independence. Larkins argues that apart from impartiality and insularity, the definition of judicial independence must include the scope of authority of the judiciary as an institution which could show the relationship between the other branches of the political system and the courts. He contends that while impartiality and insularity focus on the status of judges, the third element shows the place which

the judiciary should occupy in the political system and its relationship with the other branches of government. He thus defines judicial independence as "the existence of judges who are not manipulated for political gain, who are impartial toward the parties of a dispute, and who form a judicial branch which has the power as an institution to regulate the legality of government behaviour, enact neutral justice and determine significant Constitutional and legal values. (Larkins, 1996:611)

Brinks argues that the scope of authority of the judiciary should not be part of the definition of judicial independence. In his view, taking some issues from the competence of the courts affects their power, but not necessarily their independence. Independence becomes a problem for the whole legal system not because power is withdrawn from the courts, but when it is "assigned to questionable, partisan bodies for decision". (Brinks, 2004-2005:595)

5.2.2. Aspects of Judicial Independence

A. Decisional Independence

One of the fundamental elements of an independent judiciary is the recognition and the actual realization that the individual judge should be free from any undue influence in the process of making decisions. This element is sometimes divided into two sub components, substantive and personal by some authors, but the end result is insulating the judge from external as well as internal influences which can adversely affect her autonomy to arrive at decisions which are based on the evidence and the relevant laws, (Shetreet 1976:77). The main objective of this element is fulfilled in different ways and there is no universally accepted mechanism that can be used across systems. Nevertheless, there are some basic points which all legal systems should fulfil to have an independent judiciary.

I. Selection

The process of appointment of judges is one of the areas that is believed to have a potential effect on the decisional independence of judges and all legal systems have come up with a number of modalities to ensure the independence of their respective judges. (Madhuku, 2002: 234) The most important issues in this regard are the distribution of power on the appointment of judges, the features of the process that is followed, and the requirements that are used to pick individuals for appointment. These elements affect the decisional independence negatively or positively by affecting the qualification of the people that come to the bench, the level of participation of the public and other political institutions as well as the level of control of the political or judicial institutions on decision making. There are three prevalent methods for the selection of judges in different countries, namely; appointment, election and mixed methods. (Shetreet, 1976:259) Each method of selection may take

different forms depending on which organ has the power to appoint judges and to what extent the other branches of government participate in the process. In some legal systems judges are selected by popular election. (Larkin, 2000); in others judges are selected by the executive organ with or without the consultation of either the legislative or the judicial (Madhuku, 2002) branch. In still others the nomination may be done by judicial councils that are established for these purposes and the final appointments may be made either by the executive or the legislative organ of government. The method of appointment also differs depending on the level of the court for which the appointment is made. (Rosenn, 1987:19) Regardless of variations, the head of the executive plays a critical role in the process of appointment of judges in many countries. (Madhuku, 2002:234)

By and large the process of selection prevalent in the common law world gives more space for political consideration than the appointment process in the civil law system, which, because of the career structure of the judiciary, uses exams at the entry point. (Rosenn, 1987) This situation at the entry level which gives the continental politicians less room for manoeuvring, is however, offset by the existence of wider opportunities for manipulation of the career structure through the system of promotion. (Cappelletti, 1983: 21)

Although different systems of selection are followed, some of them are favoured than others as they ensure a higher level of judicial independence and are less manipulated by the government of the day. Among the different methods of selection, the election method which is prevalent in many states of the United States seems to give the judges a lesser degree of protection in their decisional independence. Amongst the

systems of appointment, the ones that give a wider spectrum for participation of the public and the different organs of government are preferred to the ones that exclusively give the power of appointment to one of the branches of government.

II. Tenure

The security of tenure of judges affects the independence of the judges to decide cases based on their own preferences rather than on the preferences of the government. Again there is no uniformity in the modalities for tenure of judges, as it is partly related to the method of selection discussed earlier. Security of tenure of judges is maintained by those systems that give the judges longer terms than the others. Life time appointments or tenure up to a retirement age give fewer opportunities for those in power to remove judges in reaction to their decisions and are therefore considered to be better arrangements for security of tenure. (Larkin, 2000:72) Appointment of judges for a fixed term or contractual arrangements give the appointing authority the opportunity to extend the term of favourable judges and is by virtue of that not consistent with the principle of personal independence of judges. (Rosenn, 1987)

Related to the tenure of judges are the issues of removal and the retirement age of judges. Some systems provide for a mandatory age of retirement which is believed to deny the executive the power to grant favourable judges the opportunity to stay in office. (Madhuku, 2002:243)

III. Immunity

Many systems grant different degrees of immunity as a package to ensure their decisional independence. The type and scope of the immunity is measured in light of other competing interests, mainly the interests of those that may have been victimized by the act of the judge and democratic principle of holding office holders answerable

for their acts. The main rationale for immunity is the desire to insulate the judges from incessant actions that may harass and thus minimize the level of their decisional independence. The degree of insulation accorded to judges is not however, uniform and there are variations across legal traditions. The approach of the common law tradition has been to completely insulate judges from all civil actions (and to some extent also in criminal cases), thereby giving them absolute immunity. This strict application of the principle of immunity in these systems, is however, compensated by the availability of processes of impeachment which can be used by the political organs to remove a judge on grounds of having violated the standard of good behaviour upon which the term of office of a judge is in principle based. (Cappelletti, 1983) The civil law legal tradition has followed a different approach which strikes a good balance between these conflicting interests. In the civil law legal tradition the state is vicariously liable for the acts of the judges. In some cases, the judge is also held responsible for his own acts. As the purpose of the immunity is to minimize harassing actions against the judges, giving civil immunity to judges while at the same time holding the state vicariously liable for the actions of the judicial officers has been praised as compatible with the modern principles of good governance. (Cappelletti, 1983) In some legal systems judges are treated like any other citizen in this regard and subjected to the same rules on criminal and civil liability. (Rosenn, 1987:23)

B. Institutional independence and court administration

Much as insulating judges from undesirable influences from the parties to the litigation and the government is needed to foster judicial independence, its impact on the administration of justice will be limited if it is not accompanied by institutional as well as organizational design that ensures a desirable degree of independence to the

judiciary as an institution. Thus even if one system adopts the best model for decisional independence which fits its objectives and other political, economic situations and legal traditions, it does not necessarily imply the existence of an independent judiciary unless some other mechanisms are put in place to protect the institution from equally undesirable external influences. The institutional independence of judges concerns itself much with the nature of the relationship which the judiciary as an institution has with the other branches of government, particularly on issues that pertain to the overall administration of the judiciary including budgetary, organizational and administrative personnel issues. The institutional independence of the judiciary can be discussed under the following basic headings based on the extent on the powers on administration of the judiciary.

I. Exclusive Judicial Responsibility Model

Under this model the power to administer the judiciary is vested in the judiciary and only in the judiciary. This does not leave any room for the participation of the other branches of government in the administration of the courts. This may involve existence of a separate body which is entrusted with the power to appoint, promote and discipline judges. (Smith, 2008:88)

II. Exclusive Executive Responsibility Model

Under this model the power to administer the courts is vested in the executive, usually through the Ministry of Justice which exercises wide ranging powers. The powers of the Minister may include among other things, the power to decide whether courts are needed, the power to initiative disciplinary proceedings against judges, and the power to issue rules on court administration or court procedure. In some instances this may include monitoring the performance of the judiciary, distribution of case-load, supervision of judge's behaviour and keeping court records. (Smith, 2008)

III. Shared Executive-Judicial Model

This scheme allows participation of the different branches of government in various degrees. The power to administer the courts may be divided vertically whereby some specific matters fall under the responsibility of one branch and others are handled by the judiciary. Or it may be divided horizontally and the power to administer the higher courts is vested in the judiciary and the lower courts fall under the responsibility of the executive. The administration of the judiciary may also be conducted through the establishment of a collegial body which reflects some proportional representation of the judiciary and the other branches of government.

5.3. Legal Framework for Independence of the Judiciary

5.3.1. Personal Independence of Judges

The most important aspect of the independence of judges is that in the discharge of their functions they should not be subject to anything other than the law. This dimension of judicial independence makes sure that the judges remain neutral, impartial and be released from unnecessary influence from any direction. In the Ethiopia, this principle is incorporated in the Constitution. Article 79(3) of the Constitution provides that "judges should exercise their functions in full independence and shall be directed solely by the law". The Constitution also provides that "[c]ourts of any level shall be free from any interference or influence of any governmental body, government official or from any other source" (Art.79 (2), Const.) Although it is true that judicial independence does not depend on constitutional text only, giving judges' independence a constitutional guarantee is one of the first big steps to ensure a real independence of the judiciary. The recognition of personal independence in the Constitution as one of the values which deserve special protection is an important point of departure in the process of reform. Though not a sufficient condition for the full realization of judicial independence, giving the personal independence of judges a constitutional recognition and protection is an important prerequisite. All federal as well as state courts at all levels are staffed by judges in Ethiopia. The declaration on judicial independence in the Constitution, therefore, covers judges who sit at all levels in the judicial hierarchy. These constitutional provisions are designed to ensure the actual as well as the perceived neutrality and impartiality of judges, which is an important aspect of judicial independence.

Neutrality and impartiality of judges, perceived or real, however, need to be reinforced by other rules which insulate judges from unnecessary external influences. In Ethiopia, rules that prohibit judges from simultaneously becoming members of the legislative body, executive organ or a political party (Art.8 (2), Pro. 24, 1996), Codes of conduct that, among other things proscribe behaviour for judges both in their official and non-official activity, procedure for removal of judges from cases where they have an interest (Art.27, Pro. 25, 1996) also exist to reinforce the impartiality and neutrality of judges and thereby strengthen their personal independence.

As an important constitutional principle independence of judges is protected from some other encroachments through a variety of legal mechanisms. The scope of protection accorded to impartiality and neutrality of judges varies from one system to another. The level of protection of judges in Ethiopia can be examined from the point of view of the following points.

A. Immunity

1. Criminal Immunity

Some legal systems give absolute immunity in criminal cases for judges as part of their protection schemes.[24] Judges in Ethiopia do not have such a protection. Judges are thus liable to criminal prosecution under the law like any other citizen without any exception. In Ethiopia, only members of the House of People's Representatives enjoy absolute immunity from criminal prosecution in connection with opinions expressed or votes cast during parliamentary deliberations. (Art. 54 (5), Const.) Likewise the Constitution grants procedural immunity to the members of the House (Art. 54(6), Const.) but not to any other holder of office. Procedural immunity was granted to judges by the transitional government when the proclamation for the independence of judges was issued. (Pro. 28, 1992) This protection was not included in the legislation for the establishment of the Federal Courts which was enacted in 1994. As a result, the benefits of procedural immunity in criminal proceedings which judges enjoyed between 1992 and 1996 do not exist anymore. The only state that grants procedural immunity to its judges in criminal proceedings is the state of Oromiya. (Pro.46, 2001) Except in Oromiya State, where permission is required from the JAC, any criminal investigation can be conducted against a judge by a police officer without any prior permission from the judicial authorities.

2. Civil Immunity

Unlike in criminal cases, the civil liability of judges in tort cases is limited by law if the action which is complained of is connected with their functions. Thus "no action for liability may be brought as the result of an act connected with their functions

[24] Israel gives such protection to its judges under section 23 of its Penal Law. "The immunity Is granted to any "holder of judicial office" acts done in the course of discharging judicial duties. Shetreet p. 201

against a judge of the Ethiopian Courts". Art. 2138 CC). The bar for action against a judge is waived if the judge is sentenced by a criminal court for the acts connected to his office. Judges enjoy immunity against actions from civil liability in tort cases, which cannot be lifted short of a conviction by a criminal court. The ambit of this immunity is quite wide and covers all acts that are connected to the functions of a judge and such things like bad faith, negligence, acting in excess of jurisdiction, etc., are not grounds for removing the immunity. Although the rule is silent as regards the nature of this immunity, one can understand from the wording that it is a procedural immunity. What the law does not allow is an action against a judge in tort, and it does not deprive the victim of his right to be compensated. The desire to protect the judge from tort actions on the one hand and the need to have citizens compensated for faulty acts of judges, on the other, is balanced under the Ethiopian Tort law through the vicarious liability of the state. (Art. 2138, CC) Under the existing rules, any judge is not practically liable for the consequences of a judicial ruling. The general principle which says that "any civil servant or government employee shall make good any damage he cause to another by his fault" (Art. 2126, CC) does not apply to judges' faulty acts "connected with their functions" (Art. 2138, CC).

B. Sub Judice Rule

The *sub judice* rule is a rule that attempts to protect the independence of judges by putting some limits on equally important constitutional rights such as freedom of expression and the right to be informed. The substance of this rule is reflected in a number of laws in Ethiopia. The Constitution recognizes the 'the right of thought, opinion and expression' in Article 29 as one of the democratic rights. This right includes the freedom of expression, which includes "the freedom to seek, receive and

impart information and ideas of all kinds". Freedom of the press which is equally recognized as one fundamental right in the Constitution includes access to information of public interest. (Art. 29 (3), Const.) The Constitution envisages possibilities of putting a limit to the freedom of expression, but it also adds that "these rights can be limited only through laws which are guided by the principle that freedom of expression and information cannot be limited on account of the content or effect of the point of view expressed". (Art. 29(6), Const.)

The Press law of 1992 recognizes the right of the press to seek and obtain information from any source on the one hand and the right to disseminate news and information in its possession on the other. (Art. 8(1 & 2), Pro. 34, 1992) The same legislation, however, puts a limit to these rights by declaring that these rights do not apply as regards information relating to any case heard by any court in camera, unless the court decides otherwise (Art. 8(3(c)), Pro.34, 1992), and information relating to a case pending before any court. (Art. 8(3(d)), Pro.34, 1992). This legislation forbids publication of anything about a case that is pending in court proceeding thereby blocking any flow of information from the courts to the public. As this legislation puts a bar on publication about pending cases it can be said to have protected the judges from unnecessary influence coming from the public though the press. On the other hand, as reporting of accurate facts regarding the judicial process is not allowed by the press legislation, one doubts if this satisfies the conditions for limiting the elements of freedom of expression as enshrined in the Constitution. The *sub judice* rule as reflected in this legislation protects personal independence of judges by putting unjustifiable limit on the freedom of expression.

The CRC on the other hand follows a different path from that of the press law. The CRC punishes breach of secrecy of proceedings only if someone discloses facts which are secret or which are declared secret by the court hearing the case. (Art. 450, PC) Under the PC court reporting is punishable only if it involves inaccurate or distorted information, note, précis or a report about pending cases. (Art. 451, PC) Thus although the Press law forbids publication of any report on pending cases, the PC does not have a criminal sanction against it. On the other hand, in so far as the report about pending cases is accurate, it does not matter, as far as criminal liability is concerned, whether or not it is done with the intention of influencing the outcome of the proceeding.

C. Appointment of Judges

The basic principles for the appointment of judges are spelled out in the Federal as well as State Constitutions. Generally all the judges in Ethiopia are appointed by the legislative organ. No judge at whatever level is directly appointed by the executive organ, and particularly not by the prime minister. The Constitution draws a distinction between the process for the appointment of the Presidents of the Federal and Regional Supreme Courts and for the other judges. The President and the Vice President of the FSC are nominated by the prime Minister and appointed by the Parliament. (Art. 78(1), Const.) Likewise the President and Vice President of the SSCs are nominated by the respective heads of State and appointed by the State Parliament. (Art. 78(3), Const.) Thus, unlike all the Anglophone and Francophone African countries where the presidents of the courts are invariably appointed by the heads of state, (Fombad, 2007) the executive branch in Ethiopia appoints neither the presidents nor the other judges of the ordinary courts. Appointment of judges is a

domain of the parliament and the role of the executive is limited to the submission of candidates to the parliament. On the other hand the JAC, which nominates the other judges for appointment, does not have any say on the nomination and appointment of the President and the Vice President. The Judiciary is not thus involved in the process of having its own leaders appointed as the nomination and appointment of the President and the Vice president of the Supreme Courts is exclusively done by the executive and legislative organs of Government. This scheme obviously gives enough room for political considerations and influence by the government of the day in the process of appointment. It must be noted, however, that the head of the executive does not have a final word on the appointment of the heads of the judiciary. Besides, once the president and the vice-president are appointed, the executive does not have any say on their tenure, discipline or removal, thereby minimizing the effect which of political considerations by the executive at the time of appointment during their term in office.

The nomination and appointment of other judges allows the involvement of the three branches of government in various degrees. The nomination of judges is vested in the JAC whose existence is recognized by Federal and State Constitutions. The power to nominate judges is exclusively vested in these commissions which, in spite of some differences, are primarily composed of judges[25] and presided over by the Presidents of the Supreme Courts. At the federal level the list of names recommended by the FJAC is sent to the Prime Minister through the President of the FSC. The judges are then presented for appointment to the parliament by the Prime Minister. The role of the Prime Minister in the process of appointment is not clear. The main

[25] In Oromiya State that the majority of members of the commission should be judges is determined by the State Constitution. In the Federal and the other States, the majority of the commission members are judges by legislative enactments.

issue is as to how much weight the Prime Minister is bound to attach to the nominations of the JAC. As the parliament is the final authority as regards the appointment of federal judges would the Prime Minster be obliged to pass the list to the Parliament with whatever comments on each, or would it be sufficient if he passes the list to the parliament after having deleted from the list names with which he is not comfortable? As the Prime Minister is the leader of the party which has a majority in parliament, (Art. 73 Const.) one may say that this distinction does not have any practical significance as the judge who does not get the blessing of the Prime Minister may not get appointed by his party at the end of the process. The whole question eventually boils down to whether or not the Prime Minister is required to give reasons if he does not accept the candidacy of some that have been nominated by the FJAC which has the power to nominate judges. Apart from the point as to which branch has what power, it is also a matter of ensuring transparency in the process. The nomination of judges can get the highest level of transparency only if it reaches the parliament. Even if the ruling party would eventually have its way in having the list approved through its majority sitting in parliament, discussion of appointment of judges in parliament would play a vital role in making the process more transparent.

The process for the appointment of judges in the States follows a slightly different procedure in that the executive branch of government is not involved except for the presidents and the vice presidents. In the states, the list of names recommended by the SJAC is directly submitted to the state parliament. The heads of government in the states do not get involved in the appointment of judges. This, however, is in some

states compensated through the power of the president to nominate a majority of the members of the SJAC.[26]

The process for the appointment of judges is the same regardless of the position for which a judge is nominated. Judges in the FFIC are nominated and appointed in the same way as judges in the highest court, except the president and the vice president. Although judges sitting in the lower courts are appointed to the higher courts quite often, Ethiopia does not have the career type of judicial structure. Judges in the lower courts may be appointed for the higher courts but they have to pass through the same process of appointment as would a new judge.

The requirement for the appointment of judges is outlined in the Proclamation for the establishment of the FJAC. Article 8(1) of the proclamation provides that "any Ethiopian who is loyal to the Constitution, has a legal training or acquired adequate legal skill through experience, has a good reputation for his diligence, sense of justice and good conduct, consents to assuming judgeship and is more than 25 years of age may be appointed as a federal judge". One can gather from the reading of the requirements that Ethiopia does not follow the career path, as do many continental legal systems. As the minimum age to be nominated as a judge is only 25, it is also apparent that long years of experience is not a requirement, as it is the case in many common law systems. Neither is legal training a mandatory requirement, as some one who "acquired adequate legal skill through experience" is also equally eligible for nomination. The impact of these requirements on the independence of judges will be discussed later.

[26] In the Amhara State for example, 9 of the 15 members of the SJAC are nominated by the head of government and only 6 are nominated by the President of the Supreme Court.

D. Tenure and removal from office

The security of tenure of judges in Ethiopia is protected by constitutional provisions. The Constitution provides that no judge can be removed without his consent from office before the retirement age which is fixed by law, unless the conditions for removal specified in the Constitution itself are satisfied. The retirement age of judges is fixed by statute at 60 (Art. 9(2), Pro.24, 1996) which cannot be extended because of a constitutional rule. (Art.79 (5), Const.) A judge can be removed before the retirement age against his will from office

a. "when the Judicial Administration Council decides to remove him for violation of disciplinary rules or on grounds of gross incompetence or inefficiency
b. when the Judicial Administration Council decides that a judge can no longer carry out his responsibilities on account of illness; and
c. When the House of People's Representatives or the concerned State Council approves by a majority vote the decisions of the Judicial Administration Council." (Art. 79(4), Const.)

This arrangement gives judges at all levels a secure tenure of office up to the retirement age. The decision to have a judge removed from office must be made by the JAC and must have as its basis violation of disciplinary rules, gross incompetence or illness. Although the decision of the JAC is a necessary condition for removal, it is not sufficient by itself. The removal requires approval by the parliament for its effectiveness. It must be noted that although the appointment of judges involves the three branches of government, the executive is not involved in the process of removal. Not only should the removal be initiated by the JAC, but the decision for removal of a

judge should also be submitted to the parliament by the commission. It is therefore not possible for the parliament to initiate a disciplinary process against a judge as it is done in some systems by way of a direct impeachment. Neither can the executive or any of its organs direct the process, although they have the right to lodge complaints against a judge. Considering that the majority of the members of the FJAC are from the judiciary itself, one can say that the legal scheme gives an ample room for the protection of the tenure of judges. This is particularly an important improvement when one compares it with the legal framework that prevailed under the previous constitutional order. During this time not only was the term of office of judges at all levels limited to the term of office of the parliament that appointed them, which was five years, but the head of state could also remove them and appoint some others pending a decision by parliament which was in session only twice a year. Under this arrangement the term of office of judges was too short and the executive branch of government was also given an unlimited power which could be used at leisure to dismiss judges when it was unhappy with their decisions.

The current arrangement, however, lacks clarity as regards the removal of the Presidents of the Supreme Courts. The Presidents of the supreme courts are the ones that preside over the JACs that consider cases for removal of judges. Practical problems are bound to arise if the presidents are the ones that are subject to the disciplinary process. Not only would potential complainants be deterred from complaining against the presidents, but it would also be practically impossible to have the complaints processed as the complaints are submitted to the office which is headed by the presidents (Art.10, Pro.24, 1996). The legislation (Art.14 (2), Pro.28, 1992) that was enacted during the transitional period had a special procedure for the

removal of the President and the Vice President of the then Central Courts. Under this law the President of the Transitional government had the power to set up a special committee that could investigate alleged disciplinary matters by the President or Vice-President of the Central Supreme Courts. Based on the findings of the committee the President submits proposals or recommendations to the House of Representatives for a final decision. No such procedure or its equivalent exists under the current legal framework in the Federal Courts or the State Courts. There were, however, incidents where Presidents of the SSC were removed by the decision of the head of the government in the States[27] and in some other cases by the decision of the Parliament.[28] Given that no such procedure for removal of presidents is clearly articulated in the laws of the land, these decisions are not consistent with the law and constitute violation of the independence of the judiciary.

5.3.2. Institutional Independence of the Judiciary

The institutional independence of judges in Ethiopia can be examined in terms of the powers of the Presidents of the courts and the Judicial Administration Commissions which are established at the federal and state level and their relationships with the other organs of government. The role which these organs played in the administration of the courts and the relationship they had with the other organs of government has not been the same over the years. The dominant trends in the past, however, have been exclusive administration of the courts by the executive in earlier periods and shared administration by the executive and the judiciary at later stages.

[27] In the Benshangul Gumuz Regional State 3 Presidents of the Supreme Court were removed by the President of the State.
[28] In the Somali and Gambella States a number of Presidents were removed by the Parliament but no reason was given for their removal.

Since 1993 this trend has even moved further and become more or less an exclusive administration of the courts by the judiciary itself.

In 1993, the Central Courts establishment proclamation declared that 'the President of the Central Supreme Court shall be responsible to administer the Supreme Court in accordance with the law" (Proc 40/93 Art. 29(1)). The power of the president included the power to hire necessary staff, prepare the plan for the courts to the parliament and implement them when approved, give assignment to and administer judges of the Supreme Court and cause the preparation of the activity reports of the courts. The presidents of the Central High Court and Central First instance Court were given similar powers to administer their respective courts.(Art. 31) The power to administer courts was thus exclusively given to the presidents of those courts and the executive was not given any power in this regard. Obviously this was a clean departure from the previous experience of court administration in Ethiopia, where the executive had the power to run the business of the courts.

This was further strengthened when the Constitution came up with clear rules that highlighted the institutional independence of the courts in 1996. Not only does the Constitution declare the establishment of an independent judiciary (Art. 78 (1) & 80 (1), Const.), but it also vests the FSC with a supreme federal judicial authority (Art. 78 (2), Const.).

The Constitution also provides that 'the Federal Supreme Court shall draw up and submit to the House of People's Representatives for approval the budget of the Federal Courts, and upon approval administer the budget'. (Art. 79 (6), Const.) In

spite of the various models on court administration implemented in many other countries, the issue has finally been settled in favour of an exclusive administration of the court by the judiciary. Not only does the Constitution empower the FSC to prepare the budget for all the federal courts, it also empowers it to implement the same once it is approved by parliament. The Constitution has thus ruled out any involvement of the executive organ in the day to day administration of the courts. The Ministry of Justice in particularly has no role whatsoever in the routine administration of the courts as is the case in some legal systems and as used to be the case in Ethiopia in earlier periods.

The Federal Courts Establishment Proclamation which was issued after the adoption of the Constitution reinforced the exclusivity of court administration. The president of the FSC has the duty and the responsibility for the administration of all the federal Courts in accordance with the law. (Art. 16 25/96). Under the current legislation all the federal courts fall under the administrative authority of the president of the FSC. This is consistent with the spirit and wording of the Constitution. The administrative power of the president of the Supreme Court includes among other things the power to assign the judges in their respective courts, the power to hire the support staff of the courts, the power to prepare and implement plans and budget for all the federal courts. The administration of the courts is therefore the sole responsibility of the President of the FSC. The legal framework leaves no room for the executive to intervene in the administrative arrangements of the courts and much less in the assignment of cases

and administration of judges. The administrative powers of the Supreme Court presidents in the States are similar to those of the federal courts.[29]

The Federal Constitution is less clear about the financial autonomy of the state courts. The Constitution only states that "budgets of the State Courts shall be determined by the respective State Council". (Art. 79(7). Const.). It does not state whether the SSCs have the power to prepare and implement their budget and plans, like the federal one, and directly submit them to the councils. This gap is, however, filled in by the state Constitutions, as these give the supreme courts the power to submit their own plans to the state parliament and implement them when approved. Article 62(6) of the Constitution of the Amhara State, for example, states that the "supreme court shall submit the budget necessary for the administration of the judiciary and upon approval administer the same".

This arrangement on institutional independence is further strengthened by the composition and power of the JACs. The following structural elements are designed to ensure the intuitional independence of the judiciary. First, the existence, and in some states the composition, (Art. 65 Amhara Const.) of the JACs is determined by the Federal or State Constitutions. Second, the majority of the members of the JAC in the federal courts and many States are drawn from the judiciary itself. Third, in the FJAC and in many of the SJACs the commissions are chaired by the Presidents of the Supreme courts. Fourth, these commissions are given the power to nominate judges, issue codes of conduct, and decide on the transfer, salary, and other benefits as well as on the promotion and placement of judges. These are powers, which, if given to other

[29] The court establishment proclamations of Oromiya, Tigrai and Amhara States enumerate the powers of the President of the Supreme Court in exactly the same wording as the Federal One.

authorities, particularly the executive, can raise concerns that they might be used to stifle the judiciary if need be.

5.4. Accountability of the Judiciary

5.4.1. Nature of Judicial Accountability

Like on judicial independence, there are different points of view on the nature of judicial accountability. (Zemans, 1999:625)As much as there are authors who think that judicial independence and judicial accountability are two conflicting, and as a result, mutually exclusive concepts (Wynn and Mazur, 2004:779), there are many others who strongly argue that judicial independence and judicial accountability are two sides of the same coin. (Handberg, 1994:134) Some argue that the different aspects of accountability are dressed-up attacks on judicial independence, and the very idea of making the judiciary accountable is inimical to the valuable concept of judicial independence. Many others think that in so far as the judiciary exercises power, it should be held accountable. (Fombad, 2007:252) For many, unaccountable judiciary is not only unrealistic, but is also a danger to the public, whom it is established to serve. (Ferejhon and Kramer, 2002:973) For theorists who accept judicial independence as a means to an end rather than an end by itself, judicial accountability is only another side of the same coin. Some even take judicial accountability as an important dimension of judicial independence. "If the public is to continue to grant authority to the courts, it will on the basis of decisional independence accompanied by accountability. First and foremost accountability is to the law. Indeed, it is that accountability that justifies judicial independence". (Jipping, 2001)

This split of opinion can partly be attributed to the absence of clarity on the concepts of judicial independence and accountability. Equally important, however, is the concern of maintaining a good balance between judicial independence and judicial accountability. It is, therefore, inevitable that even where there is an agreement that the judiciary should be accountable, there would be arguments as to what accountability means, and to whom the judiciary would be accountable and how.

The statement by Edmund Burke in 1775 tells much about the rationale for accountability in the judicial system. He said, "Abstract liberty, like other mere abstractions, is not to be famed. Liberty inheres in some sensible object". (Cappelletti, 1983:3) The accountability of the judiciary is connected with the fact that the courts exercise power. "Judges exercise power. With power comes responsibility. In a rationally organized society there will be a proportion between the two. The question of judicial responsibility accordingly becomes more or less significant, depending on the power of the judge in question." (Cappelletti, 1983:4) In democratic systems there should be a sound proportion between power and accountability to ensure corresponding growth in control with increase in power. (Cappelletti, 1983)

In any society based on the principles of democratic governance, every one that holds power is eventually accountable to the public. (Wynn and Mazur, 2004) The legislature is directly accountable to the electorate. The executive organ of government is accountable indirectly to the people through the legislature. And there seems to be no reason why the judiciary should not be individually and collectively accountable for the performance of the responsibilities that are vested in it. Any

power is basically exercised on trust and the judicial power is not an exception. The issue is not therefore whether or not the judiciary should be accountable, but as to how to hold it to account in a manner that is consistent with the principles of impartiality and independence. (Jayawikrama, 2003:167-8)

There are different mechanisms for holding the judiciary accountable. Maria Some outline as many as seven methods to keep the judiciary accountable. These are executive and legislative oversight and intervention, societal oversight, establishment of judicial councils, implementation of evaluation programs, development of internal audit, conducting investigations and putting sanctions against violation in place. (Dakolias and Thachuk, 2000) Shimon Shetreet on the other hand argues that the models for judicial accountability can be classified into three models, namely, legal accountability, public accountability and informal and social controls. According to Shetreet, legal accountability includes 'supervision over judges, appellate review of their decisions and their civil and criminal liability'. (Shetreet, 1994:289) Control over judges that is exercised by the legislative body, the executive, pressure groups and the press fall under the second category of public accountability. The third form of accountability refers to the brand of accountability that is informally made by professionals in private away from the public gaze. (Shetreet, 1994:289)

Professor Mauro Cappelletti (Cappelletti, 1983) on the other hand classifies the models of accountability into repressive (dependency), autonomous corporative and responsive consumer oriented models. According to him the first model vests the power to control the judiciary in the political branches of government and the second model gives an exclusive control over judges to the judiciary. The third one, which

he says, is a mixed model distributes control of the judiciary between the different organs of state power.

The realization that the judiciary works within a democratic framework also gives rise to the need for accountability. A judiciary which is completely insulated from legislative and executive organs which are popularly controlled can frustrate the will of the people by curbing the actions of those institutions. Although an independent judiciary is needed to act as an effective watchdog in the political process, there is no guarantee that the judiciary will use its power not to constrict but to enhance the power of political freedom of the electorate. "Thus, although independence is assumed to be one of the cardinal virtues of the judiciary, it is also true that too much independence may be a bad thing. We want to insulate the judiciary from the more popularly controlled institutions, but at the same time recognize that some elements of political control should remain." (Fiss, 1993:65)

5.4.2. Aspects of Judicial Accountability

A. Political Accountability

In many legal systems judges are held politically accountable in various ways. Accountability of the judges becomes political accountability when one; judges have to account to the executive or legislative branches of government and two, when the judges have to account to these organs not primarily for "legal" violations, but for other behaviour which is measured on the basis of political criteria. (Cappelletti, 1983:18) Political accountability of judges so described is observed in various legal systems. The commonest form of political accountability is found in the common law countries in the form of impeachment. (Cross, 2003) Germany also has a similar system called *Richteranklage*, which allows the *Budestag* to initiate proceedings against a judge who is said to have violated the basic principles of the Constitution in official duties or out of the office. (Cappelletti, 1983) Unlike in this United States where this highly politicized accountability is decided by the Senate and the House, in Germany the power to decide on such matters is given to the Constitutional Court. Although the process of impeachment is rarely used in these counties, it is used to deter judges from involving in any behaviour that can potentially bring the office which they hold into disrepute. It is also believed to have the effect of attenuating the risk of the separateness of the judiciary from the legislative organs, an impression which, one is very likely to get from the concept of judicial independence. (Cappelletti, 1983:25)

B. Legal Accountability

In almost all legal systems there are many devices that ensure what Cappelletti calls the legal accountability of the judiciary. (Cappelletti, 1983) This relates to the criminal civil and disciplinary liability of judges. Legal accountability refers to

accountability of judges based on violation of law rather than violation of politically or socially acceptable behaviour, as determined by juridical rather than by political bodies. (Cappelletti, 1983)

C. Public Accountability

Apart from political and legal accountability, the judiciary has public accountability. This is different from the other two because of its manifestations and also because the judiciary is made to account "to less precisely determined societal bodies or groups, and ultimately, to the general public (Cappelletti, 1983). The commonest form of public accountability manifests itself through public criticism of court decisions through different media outlets or professional means. Public criticism of the judiciary has a great potential of making the judicial branch stay within the bounds of the law and forms an integral part of the freedom of expression in many democracies. This mode of accountability, however, has an obvious danger in the judicial process, in terms of both creating undue influence on the judges, and adversely affecting the rights of the parties in the litigation, particularly the defendants in criminal proceedings. Different balancing methods are thus employed to ensure the proper implementation of both rights. The requirement to conduct trials in public and the procedural rules that allow publicity of dissenting opinions also fall under this category. (Cappelletti, 1983)

> "Those institutions that tend to subject the judiciary to public control and scrutiny have proved themselves effective in this respect. They appear under the threefold aspect of publicity of judicial proceedings, of judicial decisions and of the law itself….
>
> The decision which does not express the people's inarticulate conceptions of right and wrong lacks that public approval without which it cannot be

> effective. … Of all the controls of judicial activity, that by public opinion is among the effective. (Rheinstein, 1947:595)

Not only can the press help in making the judicial conduct known to the public through its publications, but it can also convey to the courts the feelings of the public to the court (Shetreet, 1994)

Peer pressure and professional criticism of judges by other judges and members of the legal profession plays an important role in controlling behaviour of judges on the bench. Bar Associations, individual lawyers and other judges have ample information about the behaviour and the predilections of the judges and are by virtue of those important instrumentalities in controlling judicial behaviour. (Shetreet, 1984)

5.5. Legal Framework for Accountability of the Judiciary

The basic legal framework for judicial accountability in Ethiopia emanates from Article 12(2) of the Constitution which declares that "any public official or an elected representative is accountable for any failure in official duties". Thus, accountability is as important a constitutional principle as independence of the judiciary.

5.5.1. Political Accountability

Like in many other legal systems in the world the judiciary in Ethiopia has political accountability to the political bodies, namely, the parliament and the executive organs of government. The nature of their accountability, however, has its own peculiar features which emanate from the constitutional and legal framework. The political accountability of judges is manifested in a variety of ways.

Although the legislature in Ethiopia does not have the impeachment powers which are exercised in many legal systems, it is the only branch of government that can finally

decide upon the removal of judges from office. As the process of removal of judges has to be initiated by JAC, however, the degree to which this process makes the judiciary subservient to other political organs is very little. Moreover the grounds for removal articulated in the Constitution are related to disciplinary, inefficiency or health issues which are usually considered as legal rather than political grounds for removal. (Cappelletti, 1983)

Besides, although the parliament and the executive can be said to have the standing to initiate a disciplinary procedure against a judge, as any one has the right to lodge the complaint to the JACs, the complaint must be brought to and decided by the commission and not by parliament or its standing committees.

Although Ethiopia is mainly a member of the civil law legal family, it does not follow the career type for judicial staffing as it is the case in many countries following the civil law legal tradition. As a result the process of initial appointment is not completely insulated from political influence. The political influence is, however, attenuated as the initial nomination for appointment for judges at all levels can only start from the JAC, the majority of whose members come from the judiciary itself. Thus although the Parliament appoints judges from a list submitted to it by the Prime Minister, the latter is bound by the list of candidates that are submitted to it by the JAC, at least in the sense that he cannot add a name not recommended by the Commission.

The role of parliament in making the judiciary accountable is more visible in connection with budgetary issues. The budget is allocated to the courts by the

parliament and this has been taken in many systems to have a potentially chilling effect on the independence of the judiciary. The federal Constitution allows the FSC to submit its budget directly to the parliament, unlike other organs of state power which submit their budget to the Ministry of Finance. The power to decide on budgetary matters is that of the parliament which can increase or decrease the budget of the courts as it deems fit.

The power of the parliament to change the jurisdiction of the courts has been treated in many legal systems as a tool to keep the courts politically accountable, which if not used in the right proportion, can easily endanger the independence of the judiciary. It must be noted in this connection that, unlike the state courts which have been established by the Constitution, the FHC and the FFIC are established only by legislation as required by the Constitution. (Nahum, 1997) The parliament can change the structure and jurisdiction of the FHC and the FFIC, if it finds it so fit. Although the Constitution requires a two-thirds majority to establish the Federal High and First Instance Courts (Art 78(2), Const.), it is not clear if this qualified majority is needed to have them changed. Where no federal courts are established by parliament, the Constitution has delegated the federal jurisdiction to the State Courts. (Art. 78 Const.) Based on the constitutional provision the Federal parliament has established FHCs in five states, stripping the state courts of their delegated federal jurisdiction. The parliament retains the same power to abolish these federal courts and give back the delegated jurisdiction to the state courts.

Changing the jurisdiction of the courts can be used as a political tool for keeping the courts accountable. The legislatures have wide powers to change the jurisdiction of

the federal courts as they deem fit. This power has actually been used in a number of occasions. Important matters, which the law maker rightly or wrongly thought were not handled speedily enough by the judiciary, were transferred to some authorities that are within the ambit of the executive organ. The foreclosure legislations (Pro. 97, 98, 1998) have empowered the banks to directly sell mortgaged or pledged property if the debtor defaults, by repealing Article 3060[30] of the CC which demanded judicial oversight. The reason that is provided in the preambles of these laws to strip the courts of their jurisdiction was that there was delay in obtaining a judgement and having them enforced. The proclamation on lease holding likewise transferred the first instance jurisdiction of the courts to a tribunal that entertains complaints relating to such disputes. The courts were given an appellate jurisdiction only as regards the amount of compensation in relation to the measures of expropriation. Another proclamation that was recently issued by the Federal Parliament gave the Governmental Rental Housing Agency the power to evict tenants without any court order. The justification for the issuance of this legislation was again that the court process to recover rent takes too long. These measures indicate that the legislative organ has tools within its power that can be used to make the judiciary accountable.

That all the courts are required by law to report to the parliament about their annual performance can also be taken as a modality for political accountability of the judiciary. Through this process matters relating to the judiciary are discussed except individual cases. The proclamation for the establishment of the state courts in the SNNPRS (Art. 8, Pro. 43, 2002) particularly mentions that the president of the Supreme Court is accountable to the parliament.

[30] The CC prohibited any provision in the contract which entitles the creditor to sell or appropriate the mortgaged property when the debtor defaults.

5.5.2. Public Accountability

In the Ethiopian legal system one finds different legal rules that ensure public accountability of the judiciary. Public trial by impartial courts is a constitutional right of the defendants enshrined in the Constitutions and the international instruments to which Ethiopia is a party with which all courts must comply. This allows the public to follow the trials and criticize the process as it sees fit. Although the Press Law forbids publication of pending cases, the media can also play an important role in ensuring public accountability of the courts.

The requirement for publication of judgements can also be seen as an important aspect of ensuring public accountability. The publication of judgments is considered so important that the court establishment proclamation mentions it as one of the obligations of the President of the FSC. (Art. 16 (2 (i)), Pro. 25, 1996) Although many first instance benches in Ethiopia are composed of one judge, the legal framework which allows dissenting opinions to be included as part of the judgment can also be viewed as an important mechanisms to ensure accountability.

5.5.3. Legal Accountability

In addition to political as well as public accountability, the judiciary and judges should also be legally accountable. Legal accountability refers to accountability of judges based on violation of law rather than violation of politically or socially acceptable behaviour, as determined by juridical rather than by political bodies. (Cappelletti, 1983)

1. Appellate Review

Appellate review is one of the mechanisms that is legally available to make the judges accountable. The court of appeal is "the only institution which officially and openly passes judgment upon judicial misconduct, and when warranted, has the power to take disciplinary action ranging from mere censure or criticism of the judge's misconduct to a reversal of his judgment or setting aside a conviction coupled with severe condemnation". (Shetreet, 1976) As elaborated in the previous chapters, the Supreme and the High Courts at the Federal and State level ensure accountability of the judges through appellate control. In criminal as well as in civil cases any party aggrieved by a judgment can lodge an appeal at least once to the next higher court. In addition to appellate review of lower court judgments, the FSC and SSC do have a power of cassation which allows them to quash any final judgment containing a fundamental error of law. (Art. 78, Const.) Through this power, not only do judges reverse judgments of lower courts, but they also do criticize judges for improper behaviour during the proceedings in the lower courts.

This control of accountability is somehow dependent on the courts' obligation to give reasoned judgment. The Ethiopian law makes an important distinction in this regard. Courts of first instance have the obligation to give a reasoned judgment, together with a summary of the facts, the evidence, and the relevant law on which their judgment is based. (Art. 182, CPC) The appellate court is bound to give reasons in its judgment only when it reverses or varies the judgment. If the appellate court feels that there is no sufficient ground for intervention in the judgment of the lower court, it can dismiss the case, without necessarily giving reasons for its action. (Art. 337, CPC) Based on this procedural rule all appellate courts as well as cassation divisions of the Supreme

Courts have developed a template to dismiss cases which they think do not merit review by the higher court. This may raise some concerns that it undermines the mechanisms for judicial accountability.

2. Penal Liability

As mentioned earlier in connection with judicial independence, judges in Ethiopia, both at federal and state level are held accountable for criminal acts like any other office holder. All the crimes which are proscribed in connection with the exercise of official duties are applicable to judges. The PC does not have specific penal provisions that are applicable to judges. Thus such crimes like abuse of power, extortion, corruption, etc, apply to judges to the same extent as they do to other public servants.

If a criminal case is pressed against judges, the process follows the same procedure as it does in any other criminal case. Except for the judges in Oromiya State, judges do not have procedural immunity as a result of which criminal investigation is conducted by the police officers like other criminal investigations.

3. Civil Liability

In contrast with criminal liability, judges in Ethiopia are exonerated from action for civil liability in torts in connection with their official activities. Judges are, therefore, shielded from civil suits which could otherwise have had a negative influence on their independent performance of judicial functions. This immunity is quite broad and extends to "an act connected with their functions". (Art. 2138, CC) For purposes of

this article it does not matter whether the act is intentional or grossly negligent. In some systems, although the principle of civil immunity is accepted it is readily lifted if one can prove an intentional or negligent act on the part of the defendant. In still other legal systems, although the judges are immune from civil action in connection with their judicial functions, the state remains vicariously liable for their actions and the state pays compensation to the victims. This experience is said to have struck a good balance between the need to insulate judges from civil actions and the desire to compensate citizens for faulty acts of government officials.

The concept of vicarious liability of the state for a professional fault of civil servants and government employees is accepted in the Ethiopian system. One may, therefore, argue that although judges are immune from tort action in connection with their functions, the victim would still get compensated by the state. A closer reading of the text, however, discloses that the state becomes vicariously liable, when the civil servant or the government employee is duty bound to compensate the damage caused by his own fault. In such cases the state pays the compensation to the victim but can 'subsequently claim it from the servant or employee at fault'. (Art. 2126, CC) One may argue that the state's obligation to pay compensation is only concurrent, and therefore, exists if the public servant has the obligation to pay compensation in the first place. As judges are declared immune from any civil action in tort, one may argue that the victim cannot claim compensation from the state on behalf of the judges and neither can the state demand payment from the judges as envisaged by the rules mentioned earlier. To ensure greater accountability this rule needs to be clarified. There is also no proportion between the degree of immunity and the need to shield judges from harassing actions. is Judges are not liable in cases of deceit, extortion,

fraud or other malicious acts which are accepted as legitimate grounds for holding judges civilly accountable in some legal systems. The immunity of judges from tort liability can only be lifted if the judge is convicted by a criminal court. (Art. 2139, CC) Proof of criminal behaviour by the degree of proof requisite for civil litigation is not, therefore, enough to sue a judge in a civil claim for compensation. This should also be reconsidered.

4. Disciplinary Liability

Rendering the judiciary accountable requires putting a well functioning disciplinary system for judges in place. The judiciary cannot deliver high quality services in the absence of a system that evaluates their performance, or where the evaluation system, if there is one, does not function properly. (Dakolias and Ratliff, 1995)

In Ethiopia disciplinary matters of judges are within the jurisdiction of the JAC, which is composed primarily of judges. The power of the executive to discipline judges has thus been transferred to the judicial body. This body which nominates judges is the very organ that issues the codes of conduct and takes disciplinary action other than removal. Complaints against judges are submitted to this organ, are primarily investigated and decided by it. With the exception of the three members selected from the members of the House of People's representatives no other member of the legal profession or the community is involved in the process of disciplining judges at the federal level. Once a complaint is initiated against a judge the process is basically not conducted in public unless the process involves removal of the judge which then becomes public as it is debated in the parliament. This may be a ground for complaints that the body is not representative and the process not transparent enough.

The Commission has formulated standards for acceptable ethical behaviour, but there are no appropriate mechanisms for their enforcement. The Code of Conduct is not well known by the general public, and partly because of this not so many people lodge complaints to the commission for disciplinary measures against judges. It is clearly specified in the legislation for the establishment of the FJAC that undue delay in the disposition of cases by a judge is deemed to be a manifest incompetence and inefficiency. No judge has been held accountable on such grounds. Implementation of this legal standard obviously requires determination of reasonably acceptable time for disposition of cases, and reasonable grounds for extension beyond the standards. Even where there is undue delay in the process, that undue delay must be attributable to the judge as opposed to other external factors. Although the judges have their own contribution to delays, they are not the only reasons. Undue delay in criminal proceedings is bound to adversely affect the public confidence on the courts, but taking disciplinary measures over judges anytime there is undue delay in such proceedings does not necessarily cure this problem as the root causes for the delay may at times be exterior to the court.

Since 1996 many complaints have been submitted to the FJAC. Amongst these only 6 judges have been removed as a result of the disciplinary sanction by the commission and approved by parliament. Many of the complaints have been dismissed by the commission as not having sufficient ground or enough evidence to support the allegations. In very few cases the commission asked the judges to answer against the complaints. Apart from giving the judges the opportunity to submit a written reply to the complaints, the commission also allows judges to orally present their version to

the commission. Once the commission gives a decision, other than removal of judges, the decision is final and not subject to revision by any other authority. There is any appeal mechanism to challenge the decision of the commission.

The current disciplinary system for judges allows almost everything to be conducted within the judiciary. As the process itself is not transparent, and the outcome of the processes is not made available to the public, it can easily give the impression that it is not functioning well in the light of widely held public view that there is a high level of corruption and violation of other disciplinary standards by judges. Changing the composition of the Commission and allowing participation of the government as well members of the legal profession and the general public may be considered as an important measure to enhance accountability and boost the public confidence of the judiciary.

5.6. Judicial Independence and Accountability in Action

Studies conducted in other legal systems show that real independence and accountability of the judiciary is not a result of the legal framework alone. In a recent study, Lars P. Feld and Stefan Voigt have found out that while de facto judicial independence influences economic growth positively, *de jure* judicial independence does not have any impact. Judicial reform programs should give as much attention to the level of independence and accountability as manifests itself in actual operation of the judiciary as it does to the legal framework that exists in the law books. In the following sections this paper will highlight three basic situations which affect the legal scheme discussed earlier.

5.6.1. Non Observance of the Rules

As discussed in the previous chapters, one of the basic problems faced by the justice system in Ethiopia is sheer non-observance of the substantive and procedural rules by members of the legal profession. This shatters the basic premises of both judicial independence and judicial accountably. Both principles are anchored on the fundamental premise that judges would follow the law and only the law. In a system where the basic procedural rules which are designed to ensure the neutrality, impartiality and accountability of the judiciary are neglected, the principles and rules about judicial independence and accountability would remain paper tigers. The basic scenario that shows the departure of the practice from the legal rules is depicted in previous chapters. But a few more deserve to be mentioned here to show how they affect the reform efforts on accountability and independence.

In spite of clear rules outlining the procedures for removal of judges, there have been incidents which show that the rules of the game have not been respected. The incident in the Gambella State is the worst example. Judges of the Supreme Court were arrested immediately after giving a ruling on an application for bail in favour of an applicant. The judges were not charged of any offence, but it took 75 days to have them released from police custody. Judges should remain accountable for their acts and be criminally responsible if they transgress the criminal law of the land. The case in Gambella however, does not show violation of any law of the land. It was taken only to show that the then executive was not happy with the decision of the court.

The constitution empowers both the Federal and the State judiciary to submit their annual plans and budget to the legislative organs. This constitutional rule is not

however respected in the day to day operation. The courts are required to submit their annual budget to the Ministry of Finance which against the words of the constitution. The budget of the courts is submitted to the parliament as an integral part of the overall budget of all the other organs of government. This arrangement has deprived the courts of the opportunity to directly submit, explain and defend their plans and budget before the parliament as envisaged by the constitution.

5.6.2. Contextual Factors

The level of independence and accountability of judges must also be seen within the context under which the legal system operates. A few contextual factors which affect the independence as well as the accountability of the judiciary in Ethiopia will be discussed here.

One of the factors that affect the point under discussion is the professional competence of judges. The professional competence is affected partly by factors that are external to the judicial process. As mentioned earlier, Ethiopia had only one law school for more than 40 years which was producing only less than 50 graduates a year. Under such circumstances all courts cannot have qualified judges, and resorting to people who do not even have the basic legal training to fill some of the vacancies becomes imperative. Many civil law countries give exams to recruit judges for their first instance courts; others pick only the ones with many years of experience. In Ethiopia, neither of these is an option. Exams become irrelevant because the market does not have enough number of professionals. If exams are conducted and many of them do not make it, the courts will not have sitting judges. The choice is, therefore,

not between having the best and the less so judges, but between having a judge and not having one at all.

This affects the rate at which judges leave the bench to join the private bar. Many judges leave the bench after having served a few years as the demand for lawyers in the market is very high and the supply very low. The government cannot pay them as much as the market does, and the judiciary becomes a learning ground for newly recruited judges. This situation affects the accountability aspect of the judiciary. In a court that is staffed by young lawyers with little or no experience and no previously accumulated assets, the temptation for corrupt practice is higher. On the positive side, as the judges have no previous experience as practitioners the possibility for conflict of interest, which troubles many legal systems, becomes less problematic.

Conducting trials in public is undeniably an important safeguard for individual rights and a tool for accountability. Trials are, however, sometimes not conducted in public by some courts. This happens either because the judge does not want to follow the rules, which is a breach of the rules, or the government does not allocate enough funds. In many of the states the courts have been established since 1991. In many cases there was no court worthy the name in the states previously or whatever court existed earlier was replaced by the new ones because of the dictates of the new federal arrangement. This means the basic infrastructure for conducting public trials did not exist in the past. The government has the obligation to allocate sufficient funds for the courts. The level of economic development, however, puts an outer limit to the budgetary allocation scheme within which the government can have discretion.

5.6.3. Defective Legal Regime

Regardless of the level of its implementation appropriate legal framework for judicial independence and accountability must be in place. Thus the legal regime in Ethiopia which adversely affects the independence and accountability of the judiciary must be identified and rectified.

This writer believes that the legal regime in Ethiopia for the independence of the judiciary can be classified as one of the good legal regimes. That said there are some areas which, if examined further, can strengthen judicial independence, and create a good atmosphere for accountability. The main areas are listed below, not necessarily in order of their importance.

1. Some level of procedural immunity in *criminal* proceedings should be introduced to strengthen judicial independence of judges
2. The degree of *civil* immunity should be reduced to make it compatible with basic principles of accountability
3. Participation of lay people should be allowed in criminal proceedings to raise the level of accountability
4. The media should be allowed to report about pending cases, and the bar against reporting should be the exception.
5. Registration of property of judges should be introduced
6. The arrangement for court administration should provide more room for participation of different groups in society, namely, the bar, civil society etc.

6. CONCLUSIONS

In the preceding chapters the thesis has raised basic issues which should be taken in to account by the CJSRP that is under way in Ethiopia. The thesis has put the theoretical framework to identify the main problems in the judicial process and to propose solutions which should be picked up by the reform program.

The decision by the government to reform the judiciary together with other institutions would lay down the basic foundations that are needed for a vibrant market economy and strengthening of rule of law. One of the aspirations stipulated in the Constitution of the FDRE is the desire to ensure lasting peace, economic development which is based on rule of law. These aspirations can be attained if the judiciary in Ethiopia meets the threshold of a strong judiciary.

Identifying the judicial problems and addressing them through reform efforts has a direct impact on Ethiopia's endeavour to achieve economic growth. As propounded by many scholars and proved by the experiences of many countries, the capacity of the judiciary to enforce contracts and to have property rights protected will affect the rate at which Ethiopia will potentially register economic growth. Being a poor country Ethiopia needs to attract private capital to boost its economic growth in addition to making proper use of its ample labour and land resources. Ethiopia needs long term investments to fill in a long felt gap in many of its sectors. Such long term investments, however, require existence of a judiciary that has the capability to have terms of contract enforced properly in case a dispute arises in the process of the execution. The reform programs in Ethiopia should therefore aim at developing the capabilities of the judiciary to reduce contractual hazards which are likely to arise

when parties to a long term contract resort to self help as result of their inability to force all the possible contingencies at the time the contract was formed.

Economic agents in specific investment need to be stimulated to increase their market in number as well as in geographical spread, which in turn will have a market enlargement effect followed by technological spillovers and diffusion of knowledge through the transmission of sound marketing, financing and managing practices. These economic agents which Ethiopia should attract to boost investment operate under situations that are different from traditional contractual arrangements in Ethiopia which are primarily based on personal relationships and repeat dealings. Investment in Ethiopia is bound to be affected by the changed nature of self-seeking economic agents which act based on innumerable complex, impersonal and cooperative interactions based on incomplete information about each other. This further strengthens the need to have the judiciary reformed as these situations force people to rely more on institutional strength and third party enforcement of contracts. Without an effective judicial sector Ethiopia cannot secure a high performance economy that relies heavily on long term contracts. Research findings which indicate that a country without a sound judicial system raises the transaction cost by creating a network of traders who act as go betweens, looses the trust of the economic agents for fear of breach of terms of contract thereby creating insecurity are instructive for the reform initiatives in Ethiopia.

The rationale for having the Ethiopian judiciary reformed is not based on economic explanations alone. The establishment of a governance system that is based on rule of law also requires the existence of an impartial, independent and accountable judiciary which Ethiopia did not have in its recent past. In addition to the timely enforcement of contracts the judiciary plays an irreplaceable role in protecting rights and making the other organs of government operate within a predictable framework of rules. The credibility of the overall business and political environment can be sustained if the judiciary can support sustainable development by holding the other branches of government accountable.

Ethiopia needs an effective judicial organ to ensure economic growth, rule of law and protection of individual and group rights. This thesis has examined three aspects of the judiciary which help Ethiopia achieve this end. Ethiopia's reform program should ensure efficiency, enhance accessibility and maintain a good balance between independence and accountability of its judges and judicial organs. These can be attained only through a thorough examination of the main problems which beset the justice system.

The progress of the reform program in Ethiopia will, however, be affected by the overall historical development of its legal system and institutions. Three aspects of the context within which the reform program operates particularly deserve attention in designing as well as implementing reform programs.

The first feature relates to the pluralist nature of the Ethiopian legal system. Like many African countries the traditional systems in Ethiopia have been competing with

the state law throughout history. Not only were they competing, but they also prevailed over the state law in many cases. It is important to note that this happens in spite of their non-recognition by state law in a number of areas. Customary systems and TDRs operate although there are state enacted rules which abrogate them. This shows that the earlier attempts to do away with legal pluralisms in Ethiopia either by doing away with the customary laws or by incorporating some of them in to the state law have not fully succeeded. Recognition of the pluralist nature of the Ethiopian system is instructive for the current reform efforts because it helps it to look for pluralist solutions to the pluralist societal needs. It also helps it look for home-grown solutions to some of the problems observed in the administration of justice.

Another important feature is the fact that many of its formal institutions are of a recent development. In spite of its long history, the formal legal institutions particularly the courts started to emerge only at the beginning of the 19th century. The formal courts were established in 1942 and the first law school in 1963. The other agencies in the administration of justice likewise came in to the picture only after 1943. The first judicial administration commission was established as recently as 1973. Before the emergence of these institutions, the system heavily depended on traditional arrangements and a few imperial decrees. The attempt to modernize the Ethiopian legal system through essentially imported Codes from the western systems in the 1960s was imposed on this background. This background affects the current efforts of reform as it adversely affected the Emperor's modernization efforts.

Thirdly, the fusion of the judicial organs with the other arms of government in the greater part of Ethiopian history is important to understand the context under which

the judiciary in Ethiopia operates. This historical background affects the prevailing understanding of the concept of judicial independence and people's perception about the judiciary. Current efforts to increase efficiency enhance accessibility and strengthen the independence and accountability of the judiciary must be understood in the light of the overall background of the Ethiopian legal tradition.

The reform component on efficiency of the judiciary is bound to face the difficulty of striking a good balance between rectitude of decisions, timely disposition of cases and the cost of litigation. Rectitude of decisions should be one of the objectives of the reform in Ethiopia as it is one of the hallmarks of a good legal system. Rectitude of decisions signifies the correct application of the law to facts that are established as true. As determining whether any specific decision fulfils this requirement is not easy, the reform should rely on putting a procedural design in place and ensuring its proper implementation to guarantee rectitude of decisions. This thesis has indicated the twin problems that are observed in the process in Ethiopia both in civil litigation and in criminal proceedings in this regard.

On the one hand the procedural rules in Ethiopia have many of the procedural designs which try to strike a good balance between the competing interests mentioned above although the rules may need some updating to reflect current needs and recent developments. On the other hand there is a serious deviation of the actual process from the rules in the law books. As shown in the preceding chapters the procedural rules designed to guarantee rectitude of decision were either ignored or replaced by another set of rules that prevailed long before the adoption of the Codes. The variance between the rules and the practice can partly be explained by the historical

background mentioned earlier. As a result the reform program should not only identify the rules which hamper the unfolding of the process, but it must also have a package that ensures their proper application. The priority should be to make the institutions comply with the rules first as only then can one tell the point where the procedural rules have become bottlenecks in the process.

As rectitude of decisions is intimately related to the temporal aspect of the process the reform program should also take inventory of the basic problems which hinder timely unfolding of the process. The delay that was observed in the process not only adversely affects the courts capability to give accurate decisions but it also erodes the confidence of its users. The adverse affect of delay in the process is particularly visible in the criminal justice process which had a very low conviction rate. The delay in the process has undermined the accuracy of the results by increasing the risk of error. Besides, the effect of delay has resulted in a high attrition rate in criminal proceedings. Only a small percentage of cases initiated by the prosecution reached the final stage as many of the cases are dropped for different reasons including the non-availability of witnesses, the disappearance of defendants and the deterioration of other forms evidence.

The reform program in Ethiopia needs to consider a number of elements which potentially affect the time to disposition. It is clear from the data that the demand for judicial services is raising at an increasing rate. Increase in demand can result in greater accumulation of backlog unless the courts raise their productivity to dispose at least as many cases as the incoming ones every year. As shown in this thesis many of the federal courts have managed to have a clearance rate of more than 100% for

consecutive years thereby lowering their backlog. Achieving this requires adoption of a sound case flow management system which helps them shape the process of litigation. The discussion in this thesis has also demonstrated that some level of efficiency can be attained in the judiciary without necessarily changing the rules or raising the number of judges. Over the years for which data is provided in this thesis the courts have shown significant improvement in reducing time to disposition. The number of cases disposed within a year has improved without necessarily increasing the number of judges.

The main focus of access to justice in Ethiopia should be ensuring effective enjoyment of rights. This demands identifying the main barriers of access to justice in the country. Initiatives on access to justice should begin from an appropriate understanding of the context under which the Ethiopian legal system operates. Recognition of the pluralist nature of the system in Ethiopia is an important point of departure for access to justice initiatives. Attempts to make the system more accessible will not work without due consideration of this fundamental fact. Current initiatives should learn from earlier failures to involve the customary arrangements as important institutions for development. The Constitution explicitly recognizes the role of these institutions in some disputes but further possibilities should be explored to give them more space in the administration of justice. Studies have shown that a significant percentage of disputes are submitted and resolved by these institutions. This is not surprising given the simplicity, low cost, speed and participatory nature of these institutions. The access to justice initiative in Ethiopia should take these institutions as important resources in the administration of justice.

Linking the TDR with the formal justice system through the small claims tribunals could be a good beginning. Many of the tribunals operate in rural areas where the tie between members of the community is stronger and functional literacy is lower. Allowing justice at the grassroots level to be administered by local custom could enhance the participation of the citizens in the administration of justice. It will make the dispute resolution less adjudicative and more mediatory. The disputes will also be administered by rules that are better known by the fact finders and the litigants. This will raise the level of satisfaction of the public and the legitimacy of the administration of justice. It will also make the process less expensive to its users. To make the small claim tribunals real alternatives to dispute resolution they should be organized under a new thinking. The binary thinking of adjudication must be minimized in these tribunals. They should not legally be bound to follow the strict procedural rules like the ordinary courts. Neither should they have decision making as their primary objective. Instead they should be given wider latitude to use local custom and should have mediation and reconciliation as their primary objectives. The grounds for nomination, removal and tenure of their members should also be changed from the current system to reflect their objectives and mandate.

Giving more space to the TDR and revitalizing small claims tribunals will ease the burden of the ordinary courts further ensuring greater access. Further the judges must try to persuade the parties to settle their case without necessarily going to the full trial. This requires a change of mindset of all actors and changing the incentives structure for lawyers and private parties in the rules.

The role of the other barriers of access to justice should also be placed in a proper perspective. The number and proportion of judges and lawyers in the country is very low. To ensure greater access there should be more judges and lawyers at a closer distance to the population. Achieving this requires increasing their number faster than the population growth. Under the current context this can only be achieved through production of more graduates from the law schools. But this will also mean that the judiciary will have no better option than to recruit young lawyers to fill in the posts for the newly opened courts. In the meantime training programs are being given to bring more judges to the scene. Without a proportional increment in the number of lawyers, the impact of these initiatives will be limited, particularly in those areas where private lawyers are not willing to serve. The main problem of access to justice in Ethiopia is not that lawyers are too expensive as is the case in many systems. The problem is that there are not enough of them to provide their services even to those who can afford to cover the fees. Under such circumstances one may be tempted to suggest strengthening publicly funded legal aid as a way out. But this will be constrained by the supply of professionals in the market apart from the resource limitations which are likely to remain for some time to come. Shifting to contingency fees would likewise have a limited impact as the private market is already constrained by the factors mentioned above. Given the increasing number of law schools that are offering legal education in different parts of the country, the main way out of such a dilemma may be involving the faculty members and students in this process. Participation of civil societies in this process should also be encouraged, although their impact will be limited as they focus on urban areas.

Non-availability of lawyers means that the cost incurred in this regard is low. Neither is the court fee that high. In any case many people get a document certifying that they are poor and get waiver from paying the fees. Litigation in Ethiopia does not involve experts many a time as a result of which their cost is not a concern for many. As indicated in the thesis parties do not even cover the expenses of their own witnesses enabling the former to shift some of the costs to people who do not have the obligation to cover them.

The main barrier of access to justice in Ethiopia is the expense which people incur to travel to the court site and related opportunity cost. Under the current legal regime the smallest of claims is allowed to reach the highest court of the land. This must be discouraged. Some sense of proportionality between the claim and the resources spent by the parties and the public to process them must be introduced into the system. Delay reduction and introduction of ICT must also be taken as important component of access to justice apart from their role on efficiency. Repeated appearances not only increase the duration time and become a cause of delay, they also raise the cost for people who travel from other areas especially for those with small claims. Making courts more efficient would therefore minimize the cost barrier of access to justice. Using ICT can minimize the impact of distance on litigation, the cost and related inconveniences. Physical appearance in courts has been minimized by introducing e-filing and video sessions in some pilot courts. Introduction of this technology reduces the psychological barrier which people from the rural areas are bound to face when they go to the urban centres to lodge their complaints.

The concept of judicial independence is not known in Ethiopian history. Since their establishment the formal courts in Ethiopia were under the direct control of the executive. Doubling of the heads of the executive institutions at all levels as judges was a common practice until recently. Such institutions like judicial administration commission came in to the picture only since 1973. Even then the model which was adopted when introducing theses institutions gave wide powers to the executive in the day to day administration of justice. The majority of the members of the commission were from the executive arm of government. Besides, the powers of these institutions were limited. During the military regime the legal framework for judicial independence became even worse. The PDRE Constitution as well as the other laws put the judiciary under the direct authority of the head of state who could remove judges and put new ones in their place if he deemed it fit. Besides, the term of office of the judiciary was reduced to only five years. Side by side with this legal framework the judiciary was staffed by judges who lacked the minimum professional requirements for the duty. Many of them were church educated as only law school was producing only a handful of graduates every year.

The shift in the model of judicial administration in Ethiopia since 1991 has created a better legal framework for judicial independence and accountability. The FSC has taken over the previous responsibilities of the MoJ. Administrative matters that affect the court are fully within the competence of the president of FSC. The JAC, unlike in the past, is not only chaired by the President of FSC, but is also composed of a majority of judges. The, nomination, discipline and removal of judges are within the power of JAC insulating the judiciary from possible interference from the executive.

The legal scheme has therefore avoided the areas which potentially put the independence of the judiciary in danger

The basic challenge and direction of the reform should be ensuring the independence of the judiciary in their day to day operations. This would be affected more by other factors than by the legal framework. Many factors that happened in the past will affect the level of actual independence of judges. As there was not enough supply of judges in the past, the massive recruitment of judges for the newly established courts both at the federal and state level will affect the actual realization of independence. Partly compelled by the short supply of lawyers, the minimum age to become a judge is fixed at the age of 25. The number of legally trained attorneys in the market is very small. Thus even if they are willing to join the judiciary, which they are not, the demand cannot be satisfied. This means that the Ethiopian judiciary has no better option than to recruit young graduates to the judiciary for some years to come. This will definitely affect the level of professional competence and therefore the practical level of independence of the judiciary. The reform program must address this dimension to ensure greater competence in the judiciary. Having younger judges on the bench is not inherently bad but it needs to be supported by strong judicial training which has already begun. The root cause to the problem however can only be addressed by strengthening legal education and increasing the supply of legally trained lawyers through expansion of law schools.

Given the historical background that courts were for a long period of time under the executive, efforts must be made to clarify the nature of judicial independence and the legal framework that currently exists. Because of the past arrangements many

members of the executive and citizens may nature and magnitude of the personal and institutional independence of the judges and the courts. Such perceptions can only be minimized through training programs not only to the members of the judiciary but to the members of the executive as well.

Ensuring the independence and accountability of the judiciary requires provision of basic resources by the government. Conducting trials in public is one of the duties of the judiciary as a mechanism for making it accountable. This, however, presupposes sufficient court rooms which are not available for many courts in Ethiopia. Such facilities should be seen as basic inputs for strengthening judicial independence and accountability.

The reform efforts should also look for institutional arrangements to make the judiciary as well as every judge accountable. The efforts to ensure the existence of an impartial third party in cases of dispute cannot be achieved without schemes to make the judiciary accountable. In this regard although some of the modalities for making the judiciary accountable are incorporated in the legal framework, solutions should be sought to ensure their proper implementation. Side by side, amendment of current legislation which could enhance the accountability of the judiciary should be perused. The composition of the JAC should be reconsidered to ensure greater participation of other stakeholders including the bar, legal education, and the executive and other members of society. With the increase of the number of graduates in the country, some more things should be done to ensure that the best people are attracted to become judges. This may include introducing examination of the candidates and raising the minimum age requirement. The current legislation which allows people

without any legal education to become judges needs also to be changed so that the bench would have only people with appropriate legal training. This should however be introduced to the regional states with some caution as the supply of professionals who speak their official languages may not be in adequate supply for some time to come.

The role of the public at large in ensuring accountability of the judiciary must be enhanced through a number of measures. This should begin from providing the public with information about the performance of the courts at all levels. It should also be supported by measures to publish the judgments of the courts particularly those at the highest level. The media should be given wider freedom than it currently has to report on matters transpiring in the courts with some limits only when this freedom endangers the right of individuals in the process or when it threatens the impartiality of the courts. Participation of the public in the trial process through involvement of lay judges should also be pursued.

The legal framework that affects the criminal and civil liability of the judges should also be revisited. Procedural immunity of judges in criminal cases which is enjoyed by the judges in the Oromiya State should be extended to the federal judiciary and other states. This will not only avoid repetition of some of the incidents that happened in the past, it will also insulate judges from unnecessary influences from the executive. On the other hand, the current regime for civil liability should be revised to introduce vicarious liability of the state to the faulty acts of judges.

Appendix A: Table of Laws

A Proclamation to Establish Kadis Courts No. 12 of 1942, Negarit Gazeta, 1st year No. 2.

A Proclamation to Provide for the Establishment of Local Judges No. 90 of 1947, Negarit Gazeta, 6th year No. 10.

A Proclamation to Provide for Business for Business Mortgage Proclamation No. 98 of 1998, Negarit Gazeta 4th year No.17

Addis Ababa City Government Charter No.87 of 1997, Negarit Gazeta 3rd year No. 52
Administration of Justice Proclamation No. 2 of 1942, Negarit Gazeta 1st year No. 1.

Agency for the Administration of Rented Houses Establishment Proclamation No. 133 of 1998 Negarit Gazeta 5th year No. 10

Amhara Social Courts Establishment Proclamation No. 17 of 2007

Civil Code Proclamation of 1960, Negarit Gazeta 19th year No. 2.

Civil Procedure Code, Decree No. 52 of 1965, Negarit Gazeta, 25th year No. 3

Commercial Code Proclamation No of 1960, Negarit Gazeta 19th year No. 3.

Criminal Procedure Code Proclamation No. 185 of 1961,Negarit Gazeta, Gazeta extraordinary, 21st Year No. 7.

Election Law Proclamation No 438 of 2005, Negarit Gazeta, 11th year No. 56

Federal Civil Servants Proclamation No. 262 of 2002 Negarit Gazeta 8th year No. 8

Federal Court Advocates Licensing and Registration Proclamation No. 199 of 2000, Negarit Gazeta 6th year No. 27

Federal Courts Proclamation No. 25 of 1996, Federal Negarit Gazeta, 2nd year no. 13.

Federal Courts (Amendment) Proclamation No. 138 of 1998, Negarit Gazeta 5th year No. 15

Federal Court of Sharia consolidation Proclamation No. 188 of 1999Negarit Gazeta 6th year

Federal Ethics and Anti-Corruption commission Establishment Proclamation No. 235 of 2001 Negarit Gazeta 7th year No. 23

Federal High Court Establishment Proclamation No. 322 of 2003 Negarit Gazeta 9th year

Federal Judicial Administration Commission Establishment Proclamation No. 24 of 1996, Federal Negarit Gazeta, 2nd year no.12.

Federal Tax Appeal Tribunal Establishment Proclamation No. 223 of 2001 Negarit Gazeta 7th year No. 18

Government Ownership of Urban Lands and Extra Houses Proclamation No. 47 of 1975 Negarit Gazeta 34th year No. 41.

Judicial Administration Proclamation No. 323 of 1975, Negarit Gazeta 32nd year No. 24 .

Justice Sector personnel Training Centre Establishment proclamation No. 364 of 2003 Negarit Gazeta 9th year No. 89

Labor Proclamation No. 466 of 2005, Federal Negarit Gazeta, 11th year No.56
Legal Notice No. 33 of 1943, Negarit Gazeta, 3rd year No. 2.

Legal Notice No. 34 of 1943, Negarit Gazeta, 3rd year No. 2.

Oromiya Social Courts Proclamation No. 66/2003

Provisional Military Government Establishment Proclamation No.1 of 1974 Negarit Gazeta 34th year No. 1

Property Mortgaged or Pledged with Banks Proclamation No. 97 of 2988, 4th year No. 16

Public Ownership of Rural Lands Proclamation No. 31 of 1975 Negarit Gazeta 34th year No. 26

Public Servants Proclamation No. 34 of 2003 Negarit Gazeta 9th year No. 65

Tigrai social Courts Establishment Proclamation 93/2005

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