JUSTICE SECTOR REFORM, JUDICIAL INDEPENDENCE AND A DIMINISHED JUDICIAL POWER IN ETHIOPIA: LESSON FROM SOUTH AFRICA

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INTRODUCTION

Among the contents of the *Washington Consensus* in the early 90s was the policy prescription for developing countries' governance need to improve and align their justice delivery and legal system with free market and international standard. Through multilateral and bilateral engagements, justice sector reform and rule of law initiatives in developing countries became a juggernaut agenda and defining role in the interdisciplinary discourse of law and development. Over the last four decades, donor-driven justice reform efforts have largely followed two parallel paradigms: one primarily concerned with promoting development and economic growth, the other centered on state-building and the consolidation of peace in countries emerging from violent conflict.

Since early 2000, Ethiopian government had been attempting, *albeit* in a piecemeal mode, to engage in the improvement of justice system reform with technical and financial support from overseas. Locally known as *"Ethiopian Justice Sector Reform Program"*, the initiative contains major components ranging from court administration or judicial training and Law Executing Organ capacity building to Legislative capacity building and Legal Education upgrading. However, fundamental question remains as to the abstract contents and theories that the reform initiatives pursue especially in its judicial training component. In most cases, the reform was highly politicized and used by the Ethiopian government to ebb and dwindle the philosophical understanding of judicial independence

in the country. Led and tightly controlled by the executive organ of the government, judicial training program in Ethiopia has been impugned for allowing systematic interface in the institutional and professional independence of the judiciary in the country. Closely scrutinizing the content, trainers and mode of delivery of judicial training program provides an impression, arguably, that the program has been reduced to a simple instrument or mean of attaining a certain political end.

Having drafted somewhat a democratic *looking* constitution in early 90s, Ethiopia remains among the hostile state towards human rights norms and liberties. Besides the sluggish practice of its own constitution, the regime's theorization of *developmental state* has failed to stand the test of growing economic inequality. In reference to the *judicial independence* and *power of the judicial review*, Ethiopian constitution, appallingly, puts a trust on political entity as opposed to the judiciary in interpreting the constitution. That means the constitutionally guaranteed rights *[the bills of rights]* are not given meaning by the court. Unlike the South African judicial system, Ethiopian judiciary is devoid of the power to interpret the constitutionally guaranteed rights. The constitutions rather entrusts the political unit of the government, i.e., the *House of Federation [HoF]*, the power to give meaning to the constitution and the bills of rights. House Federation contains hand-picked political appointees from the ruling political party

Notwithstanding the above difficulty, what is more exacerbating is a deliberate lack of *legislative scrutiny* that would have mitigated the risk or threats posed by judicial lack of a mandate to adjudicate the constitution. With no institutionalized system of legislative scrutiny and no culture of deliberation in the parliament, any statute and proclamation would easily be enacted irrespective of whether or not it is incongruous to the spirit of the constitution. Arguably, with a diminished or disabled judicial function and power, Reform Program in Ethiopia is just a futile effort.

Against the above scenery, the paper scrutinizes the reform process through the lens of judicial independence and function, i.e. judicial power in Ethiopian context. Concentrating on the application of Justice Reform program and Judicial Training component of the program, I will peruse into the constitutional disability of Ethiopian

judiciary in giving meaning to bills of rights. The paper is reconnoitering the contents and management of Judicial Training programs and how that will play into the judicial independence and judicial function in Ethiopia. By bringing South African Experience into the scene, the paper will draw a parallel conclusion as to what Ethiopia can learn as a lesson.

I. THE LANDSCAPE OF ETHIOPIAN JUSTICE SYSTEM REFORM PROGRAM

Baseline researches and assessments have been carried out by international legal consultants regarding the problems involved in justice service delivery system of developing countries including Ethiopia. According to the Comprehensive Justice System Reform Program Baseline Study Report, the Ethiopian justice system has the following core problems:

> "Firstly, it is neither accessible nor responsive to the needs of the poor. Secondly, serious steps to tackle corruption, abuse of power and political interference in the administration of justice have yet to be taken. Thirdly, inadequate funding of the justice institutions aggravates most deficiencies of the administration of justice. The perception of the independence of the Judiciary is very low. The system of justice in Ethiopia is generally characterized by delays in the dispensation of justice, lack of institutional capacity in law enforcement, court and inefficient system of law enforcement and congestion. This creates obstacles in the promotion and protection of human and democratic rights, inefficiencies in law enforcement as well as in the administration of justice. "[1]

In a similar fashion, another study that had been conducted in a subsequent year further revealed the practical and structural deficiencies of Ethiopian Justice System in the following terms:

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[1] Center for International Legal Cooperation; *Comprehensive Justice System Reform Program Baseline Study Report*, 14 (2005) available online http://www.cilc.nl/uploads/CILC%20Ethiopia%20D%2005-0103.pdf [hereinafter *Comprehensive Report*]

> "The system of justice in Ethiopia is generally characterized by delays in the dispensation of justice, lack of institutional capacity in law enforcement, court and inefficient system of law enforcement and congestion. This creates obstacles in the promotion and protection of human and democratic rights, inefficiencies in law enforcement as well as in the administration of justice."[2] The most blatant deficiencies in Ethiopian justice system is closely linked to the insufficient number of qualified judges and public prosecutors, the inappropriate and inefficient administration of the courts at both federal and state levels, and the lack of clarity and coherence in respect of existing laws and codes."[3]

Having discussed above the practical and structural deficiencies of Ethiopian justice system, we will stress on the multitude of reform prescription recommended in response to the problems. This will help to deeply gauge into and appraise the success and/or failure of Ethiopian judicial reform. The paper does this by juxtaposing the initial needs, i.e., needs assessment of the sector, and recent achievements since the implementation of the reform program started. Accordingly, the components of the reform program, i.e., the content of the program will be highlighted in the upcoming sections of this research.

Ethiopian justice system reform program proclaims itself to focus on different institutions and organs of the government associated with the justice service delivery of the country both at regional and federal level. The main components are: *Court Administration (Judicial Reform), Law Enforcement Organ, Law Revision and Legislative system, and Law School Curriculum Reform.*[4] Based on this, theoretically speaking, the component of the court administration claims to strengthen the judiciary by providing in-service and pre-service training of judges and court clerks, development of records and case load management systems in order to bring access to justice[5]. Law revision and legislative system component, in its room, is supposed to support for law reform including the

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[2] Commission on Legal Empowerment of the Poor, (CLEP); *Background issue paper on Legal Empowerment of the Poor: Access to Justice*; Addis Ababa, Nov 12, 2006)
[3] See *Comprehensive Report* at 49
[4] Legal Vice Presidency The World Bank, Ethiopia Legal and Judicial Sector Assessment, 70-76 (2004)
[5] See *id*

identification of new areas for law development, compiling and preparation of laws and regulations, strengthening of legislative process including training, technical advisory services.[6] Similarly, the prosecution and other enforcement organs were supposedly made the subject of the reform in order to strengthen their skills and capacity so that criminal justice administration of the country becomes consistently functional and the corporate objective of the reform thereto would be attained. Law school curriculum is another area of reform that follows the step of updating the cultivation system of the legal community task-forces.

II. ETHIOPIAN JUDICIARY: INTRODUCING PRACTICAL AND STRUCTURAL DEFICINCY

Ethiopian judicial system normally exhibits two fundamental problems, which I would like to term as *practical deficiency* and *structural or constitutional deficiency*. The first category of problems arise from the long-held traditions and behavior of judicial practice which represents an extremely deteriorating independence and impartiality,[7] poor professional competence, weak behavioral accountability or ethical responsibility of judges. Ethiopian judicial system practically exhibits a higher degree of dependence on the executive branch of the government, low level of professional competence and integrity of the judiciary. As a result of that, the accessibility of justice and tradition of rule of law is already delusional for average Ethiopians.

Unfortunately, owing to the rising gear of *"state developmentalism"*, which illegitimately justify the heavy involvement or dominance of political party in the judicial operation of the country, the existing system of justice service delivery appears to have been friendly only towards, if not exclusively designed for, the political elites who can interfere or intervene and influence the decision of the court to bend the arch of justice towards their interests. This gives an impression that the principle of accessibility of justice is luxurious

[6] See *Id*

[7] "Independence and impartiality is an alliterative pairing found in every human rights treaty, despite in fact being disparate concepts with different legal histories. 'Independence' means putting judges in a position to act according to their conscience and the justice of the case, free from pressures from governments, funding bodies, armies, or any other source of state power or inappropriate influence that may possibly bear upon them"

for majority of Ethiopians which results from the nature of corrupted judicial system and politically infected justice institution. In fact, as has been observed over a range of time from a complete delay of trials and high number of court dockets-mainly because of the meager performance of the judiciary, the public trust and confidence in the judicial system of Ethiopia has always been low. These and other problems that until today continue to be a bottleneck challenge in Ethiopian justice system are, for the coherent understanding and categorization purpose, characterized as a practical deficiency in the country's judicial system.

The second category of difficulty in the Ethiopia's judicial system is considered, rightfully so, as *structural deficiency*. This particular category of challenge presents systematic, constitutional, substantial and structural problem that remain to question the very existence of constitutionalism in the country. This is understood in the context of the Ethiopian judiciary's limited power, as handicapped in the FDRE constitution itself, to adjudicate constitutional disputes. As will be presented in the next part of this essay, one is sure to understand that the judicial power in Ethiopia is diminished below a widely practiced and accepted role of any judiciary.

It is obvious that in countries where the role judiciary as one branch of a government is trusted and respected-owing to the institutional legitimacy to safeguard and enforce human rights of its citizens- the court is not only given a constitutional power to strike down unconstitutional laws, but also seen as more supreme than the other two organs, i.e., legislature and executive branch. This is what is normally referred to as the principle of *"judicial supremacy"*, which means courts have the power of a *'final say'*, via interpretation of the constitution, on the country's important and national issue. Of course, this kind of constitutional benchmark follows either the tradition of *judicial review* by a Supreme Court (e.g. the judicial supremacy of the US judiciary as established since ***Marbury* v. *Madison*** in 1803) or an independent 'Constitutional Courts' (e.g. as in South Africa, Germany, Spain and *etc*). It is against these backdrops that one would be able gain a clear knowledge about the handicapped nature of the Ethiopian judicial review *vis-a-vis* judicial power.

The absence of judicial supremacy in Ethiopia leads the intellectual curiosity of any person to continue to scrutinize and evaluate the perception or conception of, if any at all, the ideology of "*legislative supremacy*" in the country. Considered the twin ideology of *"judicial supremacy"*, legislative supremacy is the theory wherein law making organ is more supreme than the other two governmental branches of the government. In conception of this theory lies the fact that the judiciary doesn't have the power of a *'final say'* on the constitutional dispute and content. The available remedial strategy that keeps the parliament or congress from passing *"unjust and arbitrary laws"* is through the institutionalization of the idea of *"parliamentary scrutiny"*.[8] This means, proclamations and statues are directed to be made through a highly deliberative and democratic participation of all the stakeholders that includes civil society and non-governmental organizations. The high degree of scrutiny, legislative oversight and participation is expectedly put in place just to redress the fact that the judiciary will not have an opportunity to review and detect the threat of [un]constitutionality of the laws to be enacted by the parliament. That's why different countries employ and introduce the technique of *parliamentary scrutiny* into their law making processes.

In Ethiopian legal system, the judiciary is constitutionally proscribed, as under article 83 which provides for "all constitutional disputes to be decided by the House of the Federation"[9] to review and have a *'final say'* on constitutional matters in the country. The task of giving the final words to the question in the constitution is assigned to the political entity, aka, the House of Federation. The exacerbating situation comes into light when Ethiopia regrettably fails to employ formal technique of *parliamentary scrutiny* that could have possibly mitigated the risk of enacting arbitrary and unjust statutes. Unsurprisingly, since the inception of justice reform program in early 2000s, the country's newly enacted laws, statutes, and regulations have remained hostile and

[8] Parliamentary Scrutiny is the technique that is institutionalized in the process of legislative drafting to provide statements of compatibility with all new Bills and disallowable legislative instruments, which encourages the human rights scrutiny processes with ongoing consideration of human rights issues in policy and legislative development.

[9] See Federal Democratic Republic of Ethiopia (FDRE) Constitution Article 83 (1)

aggressive towards the international principles and standards of human rights and rule of law. For example, the *2009 Federal Proclamation* to regulate the Charity and Civil Society Organization unfortunately emerged with a windfall prohibition on the involvement of advocacy and rights works. Today in Ethiopia, any NGO or SCO that gets more than *10%* of its gross income from outside Ethiopia is legally banned from engaging in advocacy projects and initiatives.[10]

Now, the structural conception of Ethiopian constitutional order and the power of judiciary is neither perceivable in the realm of 'judicial supremacy' nor 'legislative supremacy'. Given the heavy executive dominance and undue politicization of legislative drafting process in the country, it wouldn't be an overestimating task to categorize Ethiopia as a country that follows *"political supremacy"*, which of course is unprecedented and undefined theory in the constitutional history around the world. Any legitimate perception on how Ethiopian constitutional system and judicial power should be reconfigured, or reformed for that matter, must in the first place acknowledge this persistent luggage of deficiencies that continue to exist in the judicial system of the country. With this in mind, the immediate sections of the paper will assess the

[10] On January 6, 2009, Ethiopian Parliament enacted ***Charities and Societies Proclamation No. 621/2009 of Ethiopia*** (Civil Society Law or CSO law). According to the Proclamation, NGOs funded by foreign sources may no longer engage in human rights advocacy. The law imposes limitations on the activities of all civil society organizations that do not fit its definition of "Ethiopian" Charities/Societies. Under the Civil Society Organization (CSO) law, **"Ethiopian" Charities/Societies** are NGOs formed under Ethiopian law that consist exclusively of Ethiopians and receive no more than **ten percent** of their income from foreign sources.(art. 2(2), 2(15)). "Ethiopian Resident" Charities/Societies are NGOs formed under Ethiopian law that receive more than ten percent of their funds from foreign sources-art. 2(3). "Ethiopian Resident" NGOs, though formed under Ethiopian law and by Ethiopians, are regarded by the CSO law as foreign merely because they obtain more than ten percent of their income from foreign sources, which encompasses Ethiopians who reside outside of Ethiopia-art. 2(4). "Foreign" Charities, a third category of NGOs, encompass NGOs whose members include foreign nationals, NGOs formed under foreign laws or NGOs that receive funds from foreign sources-art 2(4) Once an NGO is labeled "foreign" or "Ethiopian Resident" under the above definitions—a label that will be ascribed to the majority of NGOs in Ethiopia under the CSO law—it is prohibited from participating in a plethora of essential activities reserved exclusively for "Ethiopian" Charities/Societies, including: j) the advancement of human and democratic rights; k) the promotion of equality of nations, nationalities and peoples and that of gender and religion; l) the promotion of the rights of the disabled and children's rights; m) the promotion of conflict resolution or reconciliation; n) the promotion of the efficiency of the justice and law enforcement services-art. 2(3)-(4), 14(5). Foreign and Ethiopian Resident NGOs are unjustly denied the right to appeal administrative decisions before court of law-at art. 104(2) (stating "any person aggrieved by any decision of the Director General may appeal to the Board within fifteen days from the date of the decision. The decision of the Board shall be final"). The CSO law imposes vague and arbitrary criminal sanctions on those who violate its provisions-art. 101(1)

*[mis]*implementation of Ethiopian judicial reform program by only leaser-beaming on the eminent status of judicial independence that continue to deplete as a result of extreme politicization of judicial training and education. Weighty consideration will be given to explain how, ironically, the regime of judicial training in Ethiopian context is flipped around to accomplish a narrow political strategy that seeks to take a full control by the ruling party of the institutional and professional identity of the judiciary.

III. JUDICIAL INDEPENDENCE: SCRUTINISING ETHIOPIAN JUDICIAL TRAINING INSTITUTE

Proclamation No. 364/2003 is the law that established a Justice Sector Personnel Training Centre (hereinafter the "Center" of the "Institute"). Similar types of judicial centers were established in major Regional States or units of Ethiopia (Ethiopia is a federal country with 9 regional governmental States). Both federal Statutes and that of the regional States have provided powers and duties for the Institutes to undertake training tasks for justice professionals (judges, prosecutors, registrars, public defenders and others).

From a feasible outcome the program, it is closely observed that judicial training program in Ethiopia appears to be a self-defeating task, mainly for reasons attributed to governmental misperception and tight political control or regulation or dominance in every public sector including the judiciary. As opposed to the ambition of any judicial education to equip judges with the required judicial skills and competence, the Ethiopian phenomena represent an overwhelmingly regressive program and outcome. With detail emphasis and scrutiny into the type and content of the training program, I will argue that once again Ethiopia wrongly perceived the relevance of the judicial education, thereby squandering the opportunity to transform the judicial regime in general and professional competence of the judges in particular. Exacerbating enough, an observation will be put forward to prove the detrimental consequence of the politicization of the training towards the judicial independence and accountability.

a. Epistemology & Science of Judicial Training: Independence, Competence & Accountability

Judicial training and education is a growing field.[11] Since the inception of first judicial training institutes in the 1950s and 60s, each decade has seen an expansion in the number and diversity of training institutions throughout the world.[12] In recent years, judicial training has become an increased priority for international donors as well as national governments. By promoting the rule of law, judicial training is seen as a means to bolster broader judicial reform efforts and foster both economic development and human rights. However, as will be dealt with in the paper, for example in Ethiopian context, judicial training programs can be difficult to implement effectively or it can be easily manipulated opposite to what it originally is designed to achieve.[13]

Judicial education and training has remarkable impact on judicial independence, judicial ethics and respect for human rights. It is viewed as 'an essential element of judicial independence, as it helps to ensure the competency of the judiciary.'[14] Judicial training is supposed to be a prerequisite in establishing and maintaining competent judiciary. It is a way of guaranteeing judicial independence-both professional and institutional-from executive dominance and external pressure.[15] The United Nations *Basic Principles of Judicial independence* imposes on states a national duty to guarantee freedom of judges to promote their professional training.[16]Judicial independence is not only the cardinal block for the protection of human rights, but it is also considered as one of the central

[11] Andrew Aall McPherson, *Considerations about Judicial Training*, International Judicial Academy, Spring Issue, (2014)
[12] *See id*
[13] *See id*
[14] C Thomas, *Review of Judicial Training and Education in other Jurisdiction: A Report Prepared for Judicial Study Boards* 13 (2006) available at www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Train.pdf
[15] D Piana, Unpacking Policy Transfer, Discovering Actors: the French Model of Judicial Education between Enlargement and Judicial Cooperation in the EU 5 (33) *French Politics* 34 (2007)
[16] The United Nations *Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 19859; Paragraph 9 reads: *"Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence."*

elements in the process of guaranteeing the right to fair trial, as acknowledged in numerous international and regional human right instruments.[17] The quality of the judiciary is an essential component in achieving access to justice. A key element in maintaining the high quality of the judiciary is continuous judicial training and education.[18] Particularly, in a current era that is characterized by an increasing demand for judicial independence to solve increasingly complex and sensitive issues to be settled by court litigation, the need for judicial training and education is perceived as greater than ever.[19] In addition, the value of judicial education can be related to specific outcomes, such as better case management and less costly litigation, as well as greater public confidence and trust in the judiciary.[20]

Intrinsically, judicial training heavily donates to effective judicial protection of human rights. The ethical responsibility of judges to be competent and diligent includes their duty to maintain and enhance their knowledge, skills and personal qualities through training[21] Similarly, the African Commission on Human and Peoples' Rights required African states to establish 'specialized institutions for the education and training of judicial officials' for the purpose of implementing the right to fair trial in Africa.[22] The relevant provision in the guideline reads:

> *"(A) States shall ensure that judicial officials have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of accused persons,*

[17] See Article 10 of Universal Declaration of Human Rights; Article 14 of International Covenant on Civil and Political Rights; Article 6 of European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 7 and 26 of African Charter on human and Peoples' Rights; Article 8 of and American Convention on Human Rights.
[18] See C Thomas at 13
[19] See id
[20] See id
[21] The Bangalore Principles of Judicial Conduct (2002) Value 6.3 states: *A judge shall take reasonable steps to maintain and enhance the judge's knowledge, skills and personal qualities necessary for the proper performance of judicial duties, taking advantage for this purpose of the training and other facilities which should be made available, under judicial control, to judges"*
[22] *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (2003), adopted by the African Commission on Human and Peoples' Rights, available at http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/

> *victims and other litigants and of human rights and fundamental freedoms recognized by national and international law.(B) States shall establish where they do not exist, specialized institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa.(C) States shall ensure that judicial officials receive continuous training and education throughout their career including, where appropriate, in racial, cultural and gender sensitization."*[23]

The duty to perform judicial work professionally and diligently 'implies that the judge should have substantial professional ability, acquired, maintained and regularly enhanced by the training which the judge has a duty, as well as a right, to undergo.'[24] Judicial training is perceived to offer judges a detailed, in-depth, diversified basis of skills, knowledge and behavioral enhancement upon first appointment.[25] Such training should not be limited only to aspects of substantive and procedural laws, but also include cross-cutting issues, including but not limited to 'gender, race, indigenous cultures, religious diversity, sexual orientation, HIV/AIDS status, computer and information technology, disability and so forth.'[26] Judicial training greatly contributes to courts' efforts of minimizing cost of litigation through better management using upgraded managerial skills of judges.

Public confidence in the judiciary increases when judges demonstrate knowledge and skills in disposing of cases. Judicial training serves the purposes of 'preparing new judges for performing their duties, guaranteeing greater consistency in judicial decisions and updating judges in new methods, laws and other knowledge.' Initial training prepares new judges to professionally carry out their judicial work. In common law countries, since it is presumed that new judges have obtained the necessary knowledge and skills during their services as lawyers, the emphasis is on in-service training. In civil law

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[23] *See Id*
[24] United Nations Office on Drugs and Crime *Commentary on the Bangalore Principles of Judicial Conduct 123* (2007), available at www.unodc.org/documents/corruption/publications_unodc_commentarye.pdf
[25] *See id*
[26] *See id*

countries, the emphasis is on initial training as new judges can be appointed from law school graduates without requiring extensive experience as lawyers. Therefore, in civil law legal countries, it goes without saying that judicial skills and professional competence takes precedence in defining the training need of the candidates over political knowledge of their country during the initial training program.

Given its impacts and purposes, the demand for judicial training is apparent. The demand has been increased as a result of changes in judicial recruitment, growing caseloads and complex laws and legal issues.[27] At the present time, most jurisdictions have established judicial training institutions to meet the increasing demand for continue judicial trainings. For example, many European civil law countries such as France, Germany and Austria, and common law countries such as US, Canada and Australia have set up specialized institutes for judicial training.[28] France established the National Centre for Judicial Studies as early as 1959 until it later became the French National School for the Judiciary in 1972.[29] The goal is to transform its recruits 'from students into judges or judicial officers ready to work in the judicial service.'[30]

France has influenced judicial training institutions in Central and Eastern European countries, as these countries imitated the same model of judicial training on a large scale.[31] Following the European Commission's initiatives to provide public institutions

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[27] See C Thomas at 12

[28] See European Commission for the Efficiency of Justice (CEPEJ)—*Evaluation Report of European Judicial Systems: Efficiency and Quality of Justice (2008 data)199* (2010)199, available online at <https://wcd.coe.int/wcd/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1694098&SecMode=1&DocId=1653000&Usage=2> (last visited 31October 31, 2014); Many European states or entities have specialized institutes (judicial schools) for the training of judges (Albania, Austria, Croatia, Estonia, Finland, France, Hungary, Iceland, Monaco, Romania, Serbia, Slovakia, Slovenia, Spain, Switzerland- since 2009, but it is optional - ,"the former Yugoslav Republic of Macedonia" and UK-England and Wales). These institutes, sometimes attached to the Ministry of Justice (in Finland and Slovenia for example), provide initial and/or continuing education

[29] See the website of the Center at http://www.enm-justice.fr/anglais/home.php last visited October 31, 2014

[30] M LEMONDE 'EDUCATING FRENCH LEGAL PROFESSIONALS' IN C SAMPFORD, S BLENCOWE & S CONDLLN (EDS) EDUCATING LAWYERS FOR A LESS ADVERSARIAL 101-102 (1999)

[31] D Piana *'Unpacking Policy Transfer, Discovering Actors: the French Model of Judicial Education between Enlargement and Judicial Cooperation in the EU'* 5 (33)*French Politics* at 34 (2007)

with a number of opportunities to improve, reform and adapt judicial training programs, the French Judicial School utilized these opportunities and provided Central and Eastern European countries with 'a template for a catalogue of judicial training and education.[32]'

Countries outside Central and Eastern European Countries, including Ethiopia, started to adopt a modified form of the French model of judicial training. Apparently, Judicial and prosecutorial training centers and institutes in Ethiopia are based on French Model.[33] France provided technical assistance to Ethiopian Justice Organs Professionals Training Centre. Ethiopia is mainly identified as a civil law legal system and in fact, French Code had substantially influenced Ethiopia's adoption of modern codes and laws in the 1960th.[34]

Formal legal practice and education is of recent phenomena in Ethiopia, which proves makes it a *prima facie* case for the establishment of judicial training center to fulfill the wanting nature of professional development for all justice sector professionals (judges, prosecutors, private attorneys and public defenders). Normally, judicial training programs and curricula should respond to concrete problems, be based on a needs assessment, have specific objectives that shape the training program and be subject to periodic evaluation. The assumption is that judicial education and training is complementary to judicial independence contrary to the practical realities of how Ethiopian program function. As will be discussed below, owing to the political manipulation of the program, judicial independence have seen a formidable threat posed to it from the executive branch's dominant operation in the matter of the Judicial Training Institute.

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[32] See Piana

[33] No person would be a judge or a prosecutor unless he/she attends the judicial training. Apparently, pre-candidacy training became one of the criteria for becoming a judge under Art. 11(1)(f) of the Amended Federal Judicial Administration Council Establishment Proclamation No. 684,2010, *Federal Negarit Gazeta of the Federal Democratic Republic of Ethiopia* 16th year No. 41

[34] Ethiopia's modern codes started to appear after 1957. These codes are: The Penal Code; The Civil Code; The Commercial Code; The Maritime Code; The Criminal Procedure Code; and The Civil Procedure Code. For example, work on the drafting of the Ethiopian Civil Code started in 1954. The drafter was the well-known French scholar, Professor Rene David. The draft was deliberated upon by the Codification Commission before it was finally approved by Parliament. The Civil Code was published in the special issue of the *Negarit Gazetta* as *Proclamation No. 165/1960.*

In the subsequent section of the article, I will address the practice of judicial training and education in Ethiopia and how the governmental misperception and manipulation resulted in the possible erosion and threat towards the judicial independence, professional and institutional, over the course of time.

b. Micro-Cosmic Scrutiny into Judicial Training and Education

Judicial Training center is of a recent phenomenon in Ethiopia as established under Proclamation No. 364/2003. The training center is empowered with several duties and power related to judicial training service in the realm of the country's comprehensive reform program. Some of the missions of the training center, as enumerated in the proclamation are:

> *"(1)To train professionals who would join the Federal and State institutions of justice as judges, prosecutors, public defenders or registrars and other professionals who would work in areas that have close relationship with the justice system. (2) To provide sustainable and continuous job training to professionals who works in Federal and State institution as judges, prosecutor, public defender, registrars and others working in the justice organs to enhance their professional capacity. (3) To Conduct research on ways and means of correcting existing defects in the system with a view to developing a uniform and reliable working systems and procedures in the justice system that would be applicable in all places in the country, and to submit proposals to this effect. (4) To Discuss on issues concerning the justice system and suggest reform proposals that would strengthen the justice system on its own initiative or in cooperation with local and foreign educational and training institutions. (5)To organize, prepare and distribute the necessary training materials. (6) To perform other functions which would advance the objectives of the center."*

The independence and impartiality of the Ethiopian judiciary, both at professional and institutional level, was already weak before the establishment of the training center; and currently despite the rosy words the law enumerates in the establishment of the training

center, the principle of judicial independence and accountability seems to have been significantly worsening owing to invisible or systematic reasons that is being channeled through the operation of the training center, content and mode of delivery of the training program. Below, I will exhaustively discuss the masquerading agenda behind the Ethiopian judicial Training practices.

While the Ethiopian Judicial Training Center enrolls both future judges (candidates) and sitting judges, since recent years, a judge can only be appointed to a bench if he or she has completed training (pre-service training program).[35] And here is where one can notice significant political manipulations of judicial training institute in the judicial appointment process because the training institute is used to ensure that potential judges are vetted to confirm their political allegiance to the ruling party despite the existing law that rendered it unethical and illegal for judges to be members of a political party[36]

i. Criteria to join the Training Institute (Screening Process of Trainees):

Quite contrary to the law against political affiliation of judges, applicants to the training centers, more often than not, are required to provide membership to the ruling or governing political party before they can be enrolled as candidate trainees at the judicial training Institute. There has been overwhelming number of occasions where applicant to the training center were required by the *Local Justice Reform Steering Committee*[37] to provide proof of political membership in order to qualify for the regional or the national judicial training center. The screening process of the trainees or the candidates normally takes place at the lowest local governmental structure (known as the "*Kebeles*" or *aanaa*

[35] The Amended Federal Judicial Administration Council Establishment Proclamation No. 684/2010, Article 11: Criteria for Appointment of Judgeship: (1) Any Ethiopian who fulfills the following criteria may be appointed as a federal judge: Completes a pre-candidacy training for a period and at the place determined by the Council and scores above average points in the final examination;

[36] The Amended Federal Judicial Administration Council Establishment Proclamation No. 684/2010, Article 11: Criteria for Appointment of Judgeship: (2) No person may simultaneously assume judgeship while serving in the legislative or executive branches of government or while a member of any political organization

[37] This committee is instituted into three levels or structures of governance: the *worde(aanaa level), zonal level, regional level and federal level*. It is made up of mayor, public prosecutor, judge, head of legislative council, police department, and other stakeholder in the "joined-up justice" The ultimate leadership responsibility rests in the hand of the executive membership, not the judicial member.

in Oromo) by designated committees, i.e., Justice Reform Steering Committee which is headed and controlled by the political executive officers, local cadres and mayor of the local city. During this entry process, an applicant has to show his or her membership to the ruling party as a necessary condition to be selected for the candidacy.

ii. Content of Pre-service and Special In-Service Training Program:

The Judicial Training Institute offers three main training programs: Pre-service, in-Service and Special In-Service Training Program. Out of these three, the most susceptible training program is the pre-service and in-service special training program. As much a politically manipulated as the process of enrollment gets, the politicization of the process of judicial training and eventually assigning or appointing judges becomes more visible in scrutiny of the content of the training itself. Overwhelming content and credit hour of the training and the circumstances in which they spend their time is mainly devoted to learn the political strategy, policies and objectives of the government and existing regimes. While there might be no problem with teaching judges about the political strategy *per se,* the question remains if that is meets true, original need assessment of Ethiopian judiciary.

In the earlier part of this research, it has been clearly mentioned that one of the driving force in initiating a comprehensive justice reform program in Ethiopia is primarily attributed to a complete lack of professional competence, legal skills, knowledge and professional ethics. Knowledge of party politics has never been the primary need in initiating a judicial training center in Ethiopia. The content and substance of the training that these judges are offered during their time at the center is rigorously designed and crafted to produce a politically conditioned mentality in a way that guarantees exclusive political interest of the government in the future. This is not to say that there weren't any substantive courses. The problem was that there were additional courses and trainings aimed at political indoctrination with the sole aim at creating acceptance of the hegemony of the ruling party and its specific policies.

Quite contrary to the science, essence and needs of judicial training, Ethiopia's tight political control and executive dominance over the operation of the judicial training institute casts a shadow of doubt towards the legitimacy of Ethiopian judicial training program in particular and the whole package of justice system reform in general

iii. Who are the trainers and leaders of judicial Training in Ethiopia?

Contrary to the widely accepted practice[38] of judicial training and the degree of legal professionalism the Judicial training program demands, Ethiopian high political office holders and leaders of the ruling party, who were themselves not trained in the law, are brought in to the training institute as trainers of judges. Even though senior judges were also assigned to teach on skill based trainings, e.g. judgment writing, criminal procedure, case handling and filing *etc*, the substantial part of the training has been set up to include high profile political leaders and presidents of the regional units to come present the manifesto of their political party to the candidates.

Similarly, the overall leadership of the institute, which is extensively run and controlled by the Ministry of Capacity Building, allows a complete dominance and control over the judiciary through the instrumentality of the training and education. Judicial Training Institute in Ethiopia is governed by a higher body known as the "Council" or the "Board" comprising of Ministry of Capacity Building (at the federal level for the federal training center)[39] and the Vice-President of the Regional State Cabinet (for regional judicial training centers).[40] Unarguably, following the leadership control and dominance, the judicial training institute in Ethiopia strongly exhibits a similar charter with governmental agencies or authorities that play regulatory role.[41] The political mixture of the training

[38] See for example, the Consultative Council of European Judges (CCJE), OPINION NO. 4. Paragraph 20 and 21: "It is important that the training is carried out by judges and by experts in each discipline .Trainer should be chosen from among the best in their profession and carefully selected by the body responsible for training, taking into account their knowledge of the subjects being taught and their teaching skills….When judges are in charge of training activities, it is important that these judges preserve contact with court practice.

[39] See **Proclamation No. 684/2010** Amended Federal Judicial Administration Council Establishment Proclamation, Article 5

[40] *See* Oromia Regional State Regulation No, 177/2007

[41] Regulatory Agencies are usually a part of the executive branch of the government, or they have statutory authority to perform their functions with oversight from the legislative branch. They are governmental body

institute/center's leadership can be a distress against the professional and institutional independence of the judiciary at any level. From the outset of judicial screening to performance appraisal, the interference of the executive or its political dominance over the operation and function of the judicial training institute causes a lot disservice to the professional and institutional independence of Ethiopian judiciary. This is another indicator of the practical deficiency of Ethiopian "Justice System Reform Program." By downplaying its role the existing implementation of judicial training and education in Ethiopia is nothing but a reinforcement of political strategy of the government to institutionalize the corrosion of judicial independence, in a way that guarantees the executive and political dominance for a long period of time.

iv. Training Methodology

The training takes place in different forms: class-room teaching, peer-review technique, and long-term externship in court and prosecution agencies. A significant amount of on-campus training time is devoted to peer-review and scrutinizing each-other's professional behavior with a motive to shape and share values among oneselves. Usually, every team has a leader, who is more often elected on the basis of loyalty to the government, to the constitution and ultimately to the governing party. During the time the candidates are enrolled in the training centers; their behavior and the statements they make are carefully scrutinized and always under surveillance. For example, a handful of candidates were permanently dismissed from the training program on the account that they optimally "criticized" the current Ethiopian constitution or the government. It was not uncommon for the board members of the training centers to "scorn" and "advise" candidates who express criticism or discontent with some aspect of the legal system. In 2009, one of the pre-service trainees/candidates was dismissed for good from the center just because he put forward his opinion during a class discussion that "article 39[42] of the Ethiopian

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that is created by a legislature to implement and enforce specific laws. An agency has quasi-legislative functions, executive functions, and judicial functions.

[42] EFDRE Article 39 of Ethiopian Constitution, which is considered the most controversial provision in the document, provides for the possibility of session in the country. Because Ethiopia is a collection of different group of people with absolutely differing group cultures, group identity, group language, traditions and group values, the Constitution seemed to have forecasted the future of the polity. For

constitution can result in the division/fragmentation of the country." A substantial part of techniques employed during the training program, particularly the pre-service training, appears to bolster the infallibility of policies and interests of the ruling political party by configuring personality of judicial trainees along with loyalty to executive dominance. This practice departs from the wide perception and practice of judicial training practice.

V. In a Nutshell: On Judicial Training and Education in Ethiopia

Judicial training center in Ethiopia prepares and produces judges. This puts the training centers in a primary position and supporting or effecting, one or another, the judicial screening and nomination. Given the role of the training center and the overly politicized operation, content and function of program, it seems as though the primary purpose or the essence of the institute, in Ethiopian context, is not building the capacity of judges but ensuring that executive possesses a dominant political role over the judiciary. That is a conspicuous violation of the principle of judicial independence.

The dilution of Ethiopian judicial independence seems as if it is a matter of state policy and strategy because it had been pursued in an institutionalized and legalized fashion. Through such a systematized recruitment and accession of the judiciary using legally established judicial training centers, the country is laying unfortunate recipe where both professional and institutional independence of the judiciary is threatened, fading a future hope of public trust and confidence in the profession.

IV. "NO JUDICIAL REVIEW": IS IT ETHIOPIAN CONSTITUTIONAL DEFICIENCY?

Judicial review is commonly understood as a doctrine that represents the procedure by which decisions of a public body can be challenged in the Courts, in most situations, to

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example, the Oromo people, who descended from the old civilization of the Cushitic Empire and settled in the central part of the country since time immemorial, have always demanded a more autonomous or self-governance. The sensitive part of the Article reads as follows: Article 39: Rights of Nations, Nationalities, and Peoples: Every Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to secession.

rectify a "public law wrong", breach of the Human Rights Act, or breach of common laws.[43] It is the doctrine under which legislative and executive actions of a government are subject to review, and possible invalidation, by the judiciary.[44] The power of a judicial review entails the annulment by the acts or legislation of the state when it finds them incompatible with a higher authority, such as the constitution.[45] Judicial review is a function performed either by a specialized constitutional court or by a court with more general jurisdiction, typically a supreme court. While a growing number of new constitutions provide for judicial review in a supreme court, the stronger trend in new democracies has been to create separate constitutional courts.[46]

Judicial review is an example of the functioning of separation of powers in a modern governmental system, where the judiciary is one of three branches of government.[47] Notwithstanding the fact that this principle could be construed differently in different jurisdictions, owing to the differing views on the hierarchy of governmental norms, the ultimate structure of the doctrine is a clear representative of value of separation of power and tradition of democratic society.[48] The doctrine of judicial review , *albeit* exhibits varying notion in the procedure and scope from country to country and state to state, it flaunts a unifying dogma that symbolizes the tradition of checks and balances.

Procedure and scope of judicial review can be understood in the context of two major legal systems, civil law and common law legal system, and also by two distinct theories on the ideology of legislative supremacy and a separation of powers.[49] First, two distinct legal systems, civil Law and common law have different views about judicial review. *Legislative supremacy* also referred to as parliamentary sovereignty, as one of the key ideas underlying the civil law code system, is that the legislative body should be superior

[43] See Generally David S. Law; *A Theory Of Judicial Power And Judicial Review*; 97 The Georgetown Law Journal 723 (???)
[44] *See* Barry R. Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91AM.POL.SCI.REV. 245, 247–48, 261 (1997)
[45] *See id*
[46] *See* Donald L. Horowitz; Constitutional Courts: A Primer for Decision Makers; *Vol.17 No. 4 Journal of Democracy* 125 (2006).
[47] *See id*
[48] *See id*
[49] *See id*

to any other branches of government.[50] The judicial body in continental legal system is slightly is prohibited from creating or challenging laws created by the legislative branch. The lack of judicial review denies the judicial branch a check on the power of the legislative branch. However, as will be discussed below, there is an independent entity from outside of political party, e.g., constitutional court, which reviews the parliamentary laws and interprets the constitution.[51]

In contrast to legislative supremacy, the idea of the separation of powers was first introduced by French philosopher, Charles de Secondat, Baron de Montesquieu, and was later institutionalized in the United States by the Supreme Court ruling in ***Marbury v. Madison*.**[52] The separation of powers is based on the idea that no branch of government should be more powerful than any other, and that each separate branch of government should have certain checks on the powers of the other branches of government; thus creating a balance of power among all the branches of government.[53] In the United States, judicial review is considered a key check on the powers of the other two branches of government by the Judiciary. Many countries where legal systems are based on the idea of *legislative supremacy* have since learned the possible dangers and limitations of putting so much power exclusively in the legislative branch of government. Many countries with civil law systems have since adopted some degree of judicial review in

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[50] *See id*
[51] *See id*
[52] History of the case as can be visited at http://www.history.com/this-day-in-history/marbury-v-madison-establishes-judicial-review tells that in 1803, the Supreme Court, led by Chief Justice John Marshall, decided the landmark case of *William Marbury versus James Madison, Secretary of State of the United States* and confirms the legal principle of judicial review--the ability of the Supreme Court to limit Congressional power by declaring legislation unconstitutional--in the new nation. The court ruled that the new president, Thomas Jefferson, via his secretary of state, James Madison, was wrong to prevent William Marbury from taking office as justice of the peace for Washington County in the District of Columbia. However, it also ruled that the court had no jurisdiction in the case and could not force Jefferson and Madison to seat Marbury. The Judiciary Act of 1789 gave the Supreme Court jurisdiction, but the Marshall court ruled the Act of 1789 to be an unconstitutional extension of judiciary power into the realm of the executive. Justice John Marshall argued that acts of Congress in conflict with the Constitution are not law and therefore are non-binding to the courts, and that the judiciary's first responsibility is always to uphold the Constitution. If two laws conflict, Marshall wrote, the court bears responsibility for deciding which law applies in any given case. Thus, Marbury never received his job.
[53]

order to mitigate the tyrannical risk of the influential.[54] They do this through the operation and functioning of professionally independent constituency or organ that is competently empowered to oversight the judiciary. This can be constitutional inquiry, cassation benches, or Supreme Court itself.

The conceptual comparison and contrast in both legal systems culminates in the common perception and constitutional demand that checks and balances are the ultimate goal in the doctrine no matter the difference in procedure, scope and application under both systems. In the following paragraphs, different models of power of judicial review will be examined in multiple contexts.

a. Model of Judicial Review: The diffuse vs The Concentrated

In the *decentralized* (diffuse) model of judicial review, control of constitutionality or unconstitutionality of legislative statutes and executive regulation conduct is exercised by all regular courts of all levels.[55] In other words, the supremacy of the constitution is controlled solely by the regular judiciary, and questions of constitutionality of a legislative or executive act or decision arises *incidenter*, i.e., in the adversarial process of a specific litigation between parties.[56] In the incidental judicial review, the court rules on the (un)constitutionality of a law or act just as a matter of course alongside all other factual and legal disputes involved in a case pending before it.[57]

Under the diffused model of judicial review, the consequence of the judicial determination of the (un)constitutionality is confined only to the parties to the proceeding, except when the case has been appealed to and given a final decision by

[54] Donald L. Horowitz; Constitutional Courts: A Primer for Decision Makers; Vol.17 No. 4 Journal of Democracy 125 (2006). As of 2005, more than three-quarters of the world's states had some form of judicial review for constitutionality enshrined in their constitutions

[55] *See* Takele Soboka Bulto, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice To Theory;* 19 (1) African Journal of International and Comparative Law 103 (2011); see also H. Hausmaninger, 'Judicial Referral of Constitutional Questions in Austria, Germany, and Russia', 12 *Tulane European and Civil Law Forum 25* (1997)

[56] *See id*

[57] See M. Cappelletti, *Judicial Review in the Contemporary World*, Bobbs-Merrill viii. (1971)

Supreme Court.[58] In such case, the effect of [un]constitutionality of a dispute becomes binding upon all entities in the country's territory.[59] In a diffuse system, since all courts are entitled to rule upon the [un]constitutionality of a law or act just as a matter of course in the adjudication of regular disputes that come before them from time to time, there is no such thing as "referral of constitutional disputes" to some other body.[60] To the extent that a concrete litigation before a regular bench requires constitutional interpretation or declaration of unconstitutionality, each court of all tiers is a constitutional court.[61] In just same way, the Supreme Court is just as much a part of the traditional judiciary, adjudicating concrete controversies between litigants, as are the lower federal and state courts.[62]

On the other hand, in the *centralized* system of judicial review, the power to pass judgments on the constitutionality of a law or conduct is vested exclusively in a separate body. This body's sole duty is to act as a constitutional judge.[63] Such an organ could be a Constitutional Court, a Supreme Court or a separate special body such as the French *Conseil Constitutionnel*.[64] Unlike the diffuse system where judicial review takes place in the context of resolving a concrete case that gives rise to it, the primary function of constitutional courts of the concentrated systems is confined to abstract review. This mode of judicial review, therefore, 'is not to adjudicate controversies between individuals or between them and their government, but rather to guide interpretations of that nation's constitution, regardless of how the interpretational issue arises'.[65]

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[58] See Hausmaninger
[59] See, JUDICIAL REVIEW IN COMPARATIVE LAW 93 (1989)
[60] See T.S. Bulto at 103
[61] *See id*
[62] See T.S. Bulto; see also H. Schwartz, 'The New East European Constitutional Courts', 13 *Michigan Journal of International Law741-3* (1992)
[63] See A. R. BREWER-CARÍAS at 185
[64] *See* A. Alen et al., 'The Relations Between the Constitutional Court and the Other National Courts, Including the Interference in this Area of the Action of the European Courts', 23(8–12) *Human Rights Law Journal* (2002): 304, 308.
[65] H. Schwartz, 'The New East European Constitutional Courts', 13 *Michigan Journal of International Law* 741-743 (1992)

b. House of Federation (HOF) Interprets Constitution in Ethiopia: Is it Usurpation of Judicial Power?

In Ethiopia judicial powers, at both federal and state levels, are vested in the courts.[66] The highest judicial power of the Federal Government resides in the Federal Supreme Court.[67] Unlike the United States, where the Supreme Court is the final interpreter of the Constitution, the Ethiopian Constitution clearly sets forth that Constitutional interpretation is ultimately performed by the Council of the Federation.[68] Judicial powers naturally include the power to interpret, apply and ensure the observance of the constitution. Short of this, the grant of judicial powers would add up to little substantive effect. Some scholars believe the rights and freedoms that are so extensively addressed in the Ethiopian Constitution are not adequately protected because of structural flaws in the constitution.

It is commonly understood that courts are considered the ultimate guardians and custodial of the rule of law. The judiciary serves this ideal by keeping the other branches in constant checks as to their compliance with fundamental rights and freedoms enshrined in a higher law and law of the land, i.e., mostly constitution. This proposition stands tall and becomes significant particularly in countries with parliamentary system. In such systems, having an independent and strong judicial organ with a power of, invalidating acts of the executive or the parliament is at the heart of constitutionalism This is, partly due to the fact that in, parliamentary structures, there is a structural fusion of executive and legislative powers. The experience in many legal systems, including Ethiopia, illustrates this fact.

Theoretically speaking, The FDRE constitution extends recognition to the idea that all judicial powers rest with courts, both at federal and state level are vested on ordinary

[66] FDRE Constitution, article 79(1):
[67] FDRE Constitution, article 78 (2)
[68] FDRE Constitution, article 83 (2): "All constitutional disputes shall be decided by the House of the Federation."

courts.[69] Yet, the House of federation is vested with the power to interpret the constitution.[70] Besides a growing concern on the legitimacy of the House of Federation to interpret and give meaning to a legal document, such as the constitution, this type of constitutional model, more often than not, casts strong doubts on the predominant concept of judicial power and judicial review in the given jurisdiction. Depriving courts the power to interpret the constitution (judicial review) in Ethiopia would leave much to be desired in the country's perception of the role of judiciary. It remains quite clear that Ethiopian judiciary has a diminished, unduly so, power below average. This problem continues to underestimate the success of the existing reform program in the country.

V. WHAT CAN ETHIOPIA LEARN FROM SOUTH AFRICAN CONSTITUTIONAL ADJUDICATION?

South Africa presents an unparalleled experience in international constitutional jurisprudence. Despite a sustaining controversy, and at times some level of frustration, among South African proponents and opponents of justiciability of socie-economic rights, one fact remains valid: that the Constitutional Court played a decisive role in assuring the social and democratic transformation of South Africa and in finalizing the Constitutional text. The *Certification*[71] *case* represented was one fundamental and landmark example that settled the disagreement as to whether or not *socio-economic rights*[72] should permissibly be included as justiciable rights enforceable by courts-a conflict eventually settled by the Court itself during the drafting process.

In South Africa, the Constitution marked an explicitly moral break from the past and reflected a fundamental choice to form a state with certain social values—including social justice as a means of advancing substantive equality.[73] The Court bears a more

[69] Constitution of the Federal Democratic Republic of Ethiopia, Federal Negarit Gazeta, 1st year No.1, 21st August, 1995, Arts.55 (1), 72(1), 79(1)
[70] See Id, Art.78 (1) and Art.79 (1) respectively
[71] Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (6 September 1996)
[72] Socio-economic rights are group of rights that mostly include the rights to housing, food, water, social security, children's welfare, health care, and education
[73] Eric C. Christiansen; *Adjudicating Non-Justiciable Rights: Socio-Economic Rights And The South African Constitutional Court*; Columbia Human Rights Law Review, Vol. 38, No. 2, 2007

significant proportion of the responsibility for policing the newly-entrenched moral pre-commitments of the constitutional generation. There was no uncertainty about the Court's judicial review authority; it had a clear mandate for its duties in the Constitution. Moreover, South Africa did not lack a judicial culture or judicial structures as many new democracies do. It had an established infrastructure for enforcement and adjudication that is typically underdeveloped in fledgling democracies. Also, the Court had extensive political and popular support from its initiation.[74] As a consequence, the Court was not focused on establishing institutional legitimacy, rule of law, or judicial systems. It was expected to transform the judiciary that had functioned under the apartheid system for decades.[75] The broad authority of the Constitutional Court allowed it to supervise the lower courts and to enforce the new constitutional values. Only a court with very extensive jurisdiction, liberal allowance of access, and broad remedial authority could oversee the reformation, or at least the functional obedience, of the judiciary.[76] Political control over the Court is also extremely limited due to provisions to ensure judicial independence.[77]

Following the certification case, South African judicial system continued to consider socio-economic cases that shaped-up the constitutional adjudication of the country. In 1997, the Constitutional Court decided its first substantive socio-economic rights case, *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal*[78] In the case, the duty of the

[74] See Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 Colum. Hum. Rts. L. Rev. 13 (1989-1990)

[75] See Eric

[76] See Eric "Broad jurisdiction allowed the Court to address counter-constitutional judgments in all courts whether their judges were reviewing the constitutionality of laws passed by national or provincial legislatures, reviewing executive or administrative action, or hearing appeals from a lower court. This allowed the Court to supervise the new guardians of the Constitution"

[77] 3 Debates of the Constitutional Assembly, Rep. of S. Afr. 447-50 (1996) [hereinafter Debates of the Constitutional Assembly]. Judicial independence was also a frequently discussed issue in the constitutional debates. [Reflecting how judicial independence was a recurring theme in presentations by members of various political parties].

[78] *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765 (CC) para. 8 (S. Afr.)* [hereinafter
Soobramoney Case]. Due to limited hospital resources, Mr. Soobramoney was denied dialysis treatment that could have prolonged his life under a state medical policy that restricted dialysis availability to patients whose acute renal failure could be remedied through such treatment or to patients eligible for a kidney transplant. Mr. *Soobramoney's* kidney failure could not be remedied and he was ineligible for a transplant

state in relation to socio-economic rights was affirmed in clear terms.[79] Even though the holding wasn't of any help to the plaintiff, Mr. Soobramoney, the case represented an important step beyond the mere abstract assertion of justiciability in the *Certification* opinion. The Court expressly finds that the state's affirmative obligation (in conjunction with the previously-asserted justiciability of social rights) yields judicially enforceable socio-economic rights. Second, the Court identified a standard of qualified deference to the legislature. Reviewing the state health care policies at issue, the Court stressed the existence of established, public guidelines that conform to legitimate medical opinions.

In 2001, the Court returned to the adjudication of socio-economic rights with the housing rights case *Government of Republic of South Africa v Irene Grootboom and Others*.[80] The case reviewed the obligations of the state as a result of Section 26, Housing: "[e]veryone has the right to have access to adequate housing" and "[t]he state must take reasonable legislative and other measures, within its available resource, to achieve the progressive realization of this right . . . .,"[81] and Section 28, Children: "[e]very child has the right to . . . basic nutrition, shelter, basic health care services and social services . . "[82].

In *Grootboom*, reasonableness, which was the fundamental concern of the court, requires state authorities (at all levels) to "devise, fund, implement, and supervise" measures related to the right of access to housing.[83] The Court acknowledged that "a wide range of possible measures could be adopted by the State . . . [that] would meet the requirement of reasonableness."[84] The Court held that the system unreasonably neglected to consider and address those in most dire need. The program "fell short of constitutional compliance"

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because of other health issues. The appellant wanted the Court to order the hospital to provide the treatment to extend his life. He relied on Section 27(3) of the Constitution, which states that "[n]o one may be refused emergency medical treatment," and Section 11 of the Constitution, which states that "[e]everyone has the right to life," to claim that after significant time without the treatment, his now-imminent death created a medical emergency upon which his life depended. See also S Afr. Const. 1996, ch. 2, §27(3).

[79] Soobramoney, para 36 ("The state has a constitutional duty to comply with the obligations imposed on it by s[ection] 27 of the Constitution.").

[80] *Government of Republic of South Africa v Grootboom 2001 (1) SA 46 (CC) para. 2 (S. Afr.) [hereinafter Grootboom]*.

[81] S. Afr. Const. 1996, ch. 2, §26.

[82] See Id. §28.

[83] See Grootboom, para 96

[84] Se Id. para. 41.

because it failed to "devise and implement within its available resources a comprehensive and coordinated program progressively to realize the right of access to adequate housing."[85] The Court issued a declaratory order requiring the state to remedy this failing and assigned the Human Rights

In subsequent socio-economic cases, the Court has demonstrated its willingness to go further, without having to yet delineate the boundaries of the its jurisprudence.

The Reasonableness Standard: rigorous adjudication of socio-economic rights before South African courts emerged with numerous optimistic jurisprudential norms, which of course must be considered as a learning lesson for infant democracies like Ethiopia. A lack of an affirmative response, or an allegedly inadequate response, to the positive obligation imposed on the government by the Constitution's social rights provisions will result in review by the Constitutional Court. The "obligations imposed on the state . . . are dependent upon the resources available for such purposes,"[86] but the fulfillment of such obligations will be examined with a *reasonableness inquiry*. For this reason, the heft of any adjudication of socio-economic rights is the assessment of the reasonableness of the government action or inaction when the right is viewed in context.[87]

The reasonableness standard, which generally encompasses the internal limitations clause, will guide the Court's analysis and "must be determined on the facts of each case."[88] Some components of the reasonableness review are evident in the case law: is the legislative or other government action comprehensive and well-coordinated; was there appropriate division of political and expert authority in its formulation; can it facilitate realization of the right in question; is it balanced and flexible to the extent necessary; and does it include all significant segments of society and take into account those persons in the most dire need? In essence, the Court requires a broad policy-based program with particular attention paid to those who are most vulnerable and

[85] See Id. para. 99.
[86] See Soobramoney, para. 11
[87] See Eric
[88] See Grootboom, para. 92.

implementation that includes "all reasonable steps necessary to initiate and sustain" a successful program to advance the social right.[89]

Constitutional interpretation in South Africa is an art guided by the manner in which the understanding of the founding values of the Constitution evolves. In different cases,[90] the Constitutional Court articulated a dictum that verifies that "Freedom is one of the underlying values of our Bill of Rights and courts must interpret all rights to promote the underlying values of 'human dignity, equality and freedom.' These values are not mutually exclusive but enhance and reinforce each other. The rich constitutional jurisprudence of South Africa had managed to convince itself that judicial power should extend to a new level of auditing the reasonableness of governmental policy actions and implementations. Irrespective of the dominant controversy as to the institutional legitimacy and competence to adjudicate the socio-economic rights, South African judicial system has transcended in its thinking that it owes its respective institutional commitment towards the transformation process in the country.

Obviously, South African constitutional and social facts might be different from other African countries'. Yet, the structural resemblance remains a considerable truth in the democratization process of any post-conflict country. Ethiopia should at least learn to launch an initiative focusing on Constitutional Reform that would ultimately enable judicial review of constitutional issues. The silent argument of luck of institutional legitimacy and competence of Ethiopian judiciary to adjudicate the constitution is groundless in that it arrogantly ignores the illegitimacy of House of Federation (HoF). This initiative might take the form of transforming Ethiopian Constitutional Inquiry into an autonomous organ that exclusively possesses the power to interpret constitutional dispute in the country without the involvement of HoF.

[89] See Grootboom,. para. 67; see also Eric
[90] See, e.g., *Pillay case*