

ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE

THE ROLE OF JUDICIARY IN DEVELOPMENTAL STATES: PROSPECTS AND CHALLENGES IN ETHIOPIA

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A Thesis Submitted to the School of Graduate Studies, School of Law, Addis Ababa University, in Partial Fulfillment of the Requirements for the Masters of Laws (LLM) Degree in Constitutional and Public Law.

January 2015

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SCHOOL OF GRADUATE STUDIES
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ACKNOWLEDGMENT

First and foremost, my heartfelt thanks go to God. This paper would not have been realized without his priceless support.

I am also indebted to my advisor Dr. Elias Nur who helped me a lot from the start to the completion of the paper. The structure and substance of the paper as it stands now demanded his scholarly insight and constructive comments. I have to thank him again for his fatherly and encouraging approach. I have, however, to add that all the blames on the paper should be pointed only at me

Azi, you deserve my deepest thanks for your patience and courage though I am not sure whether just “thank you” can express my intention. God bless you.

My Friends and Coworkers at Debremarkos University, Mulugeta Kebede and Anteneh Derese should also take some share of my thanks for their brotherly support in the time of my work.

ABSTRACT

It is a long time and boldly held view that a judiciary characterized by independence and accountability is important in constitutional democracies. The judiciary has also generally been one subject matter of discussion in literatures about law and development. It had been regarded as mere instruments of powerful bureaucracies of classical developmental states to suggest that courts did not enjoy autonomy as a separate and third branch of government in developmental states of second half of the twentieth century. The experiences of successful North East Asian developmental states, however demonstrate that legal institutions including courts can play some important roles for the success of developmental states. Despite the authoritarian nature of their regimes, courts in Japan and South Korean developmental state for instance contributed to their success through; Enhancing efficiency of their bureaucracies, creating economic predictability for the private sector, securing security and order, and socialization of development policies. Ethiopia has declared to pursue democratic developmental state model of development with the aim to facilitate development and deepening democracy. Different challenges with regard to the independence and efficiency of the judiciary and their impact in promoting constitutionalism and democratic governance in Ethiopia are identified by different studies. However, owing to recent emergence of the developmental state discourse, the role of the judiciary for achievements of goals of the developmental state in Ethiopia is not explored. This paper is aimed at filling the gap in that regard. After reviewing literatures on the concept, aims, kinds of developmental states and their varying institutional features and the functions of the judiciary in different forms of governance and development strategies, this paper explores the experiences of three foreign developmental states to draw lessons.. The paper shows that there are opportunities that the judiciary in Ethiopia can contribute some important roles for the success of democratic developmental state. It can help the state in securing stability and order, enhancing efficient and good governance, promoting economic predictability and consolidating political capacity of development oriented political leadership, all necessary elements for democratic developmental state to be successful. The paper also argues that in spite of some prospects for the judiciary to contribute its share in the context of democratic developmental state, there are some major challenges which can hinder its contributions; non-judicial constitutional review, developmental political settlement related problems, absence of comprehensive administrative procedural act, poor working conditions of judges, limited accessibility to judicial proceeding and remedies, and low public perception on the judiciary are the different challenges which this paper argues need attention and remedial action.

TABLE OF CONTENTS

Content

ACKNOWLEDGMENT	11
ABSTRACT	111
TABLE OF CONTENTS	IV
ACRONYMS	v11

CHAPTER ONE: INTRODUCTION.....1

1.1.Back ground.....	1
1.2.Statement of the problem.....	5
1.3.Research questions.....	6
1.4.Objectives of the study.....	7
1.5. Scope of the study.....	7
1.6.Significance of the study.....	8
1.7.Research methodology.....	8
1.8.Limitations of the study.....	9
1.9.Organization of the paper.....	9

CHAPTER TWO: THE DEVELOPMENTAL STATE THEORY AND ITS PERSPECTIVES; CONCEPTUAL FRAME WORK.....11

2.1.Introduction.....	11
2.2. The developmental state: definition.....	13
2.3. Aspiration and objectives of developmental states.....	14
2.4. Types of developmental states.....	15
2.4.1. The classical (authoritarian) developmental states.....	16
2.4.1.1. The institutional features of classical developmental states: focus on East Asia.....	17
2.4.1.2. Limitations of classical developmental states.....	22
2.4.2. Democratic (new) developmental states.....	23
2.4.2.1. Defining democratic developmental state; the need for it.....	23
2.4.2.2. Additional institutional features required for democratic developmental states.....	25
2.4.3. The case in Ethiopia.....	28

CHAPTER THREE: THE JUDICIARY AND ITS ROLES IN DIFFERENT TYPES OF GOVERNANCES.....30

3.1. Introduction.....	30
3.2. Separation of power and the judiciary.....	31
3.3. Rule of law and the judiciary.....	33
3.4. Judicial independence and its role in democratic governance.....	35
3.5. Judicial independence and its role in authoritarian form of governance.....	38

3.6. Judicial independence and its roles in law and development orthodoxies.....	41
CHAPTER FOUR: THE ROLE OF THE JUDICIARY IN DEVELOPMENTAL STATES: EXPERIENCES OF FOREIGN COUNTRIES.....	45
4.1. Experiences of early developmental states (from North East Asia).....	45
4.1.1. Japan.....	45
A. Economic predictability and the judicial role.....	45
B. Effective state intervention: judicial review and its role.....	48
C. Stability, order and political capacity: the judicial role.....	51
D. issues and limitation on the independence of the judiciary.....	52
4.1.2. South Korea.....	54
A. Economic predictability and judicial role.....	54
B. Effective state intervention: judicial review and its role.....	56
C. Stability, order and political capacity: the judicial role.....	59
D. Issues and limitation on the independence of the judiciary.....	61
4.2. The judiciary and its role in South Africa; an example of new developmental state.....	62
4.2.1. Introduction.....	62
4.2.2. Power and roles of the judiciary in South Africa in light of objectives of the developmental state.....	64
4.3.3. Judicial independence and current challenges in democratic developmental South African state.....	66
4.4. Comparative lessons to be drawn.....	68
CHAPTER FIVE; THE ROLE OF THE JUDICIARY IN DEMOCRATIC DEVELOPMENTAL STATES; PROSPECTS AND CHALLENGES IN ETHIOPIA.....	73
5.1. Constitutional basis of the democratic developmental state.....	73
5.2. Judicial power in the FDRE constitution; summary.....	74
5.3. Role of the judiciary for the success of democratic developmental state in Ethiopia.....	75
5.3.1. Securing stability and order.....	75
5.3.2. Promoting economic predictability.....	77
5.3.3. Enhancing efficiency of state bureaucracy.....	79
5.3.4. Promoting good developmental governance.....	81
5.3.5. Consolidating political capacity necessary for democratic developmental state.....	84
5.4. Prospects for and challenges on role of the judiciary in Ethiopia.....	85
5.4.1. Prospects	85
A. Constitutionally entrenched independence of the judiciary.....	86
B. Moderate judicial administration legal framework.....	87
C. The start of structured judicial training.....	89
D. Constitutional and policy recognition of legal pluralism on some social fields.....	91
5.4.2.Challenges	94
A. Non-judicial constitutional review.....	94
B. developmental political settlement related problems.....	105

C. Absence of comprehensive administrative law.....	109
D. Poor working conditions of judges.....	114
E. The problem of accessibility to judicial proceedings and remedies.....	116
F. Low public perception on independency of the judiciary.....	119
CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS.....	122
6.1. Conclusions.....	122
6.2. Recommendations.....	125
BIBLIOGRAPHY	129

ACRONYMS

EPRDF -Ethiopian People Revolutionary Democratic Front

ESID - Effective States and Inclusive Development

FDRE - Federal Democratic Republic Of Ethiopia

HOF - House of Federation

JLSRI- Justice and Legal Systems Research Institute

PSD-Hub - Private Sector Development- Hub

UNDP- United Nation Development Program

UNRISD- United Nations Research Institute for Social Development

CHAPTER ONE

INTRODUCTION

1.1. Background

The judicial system can be defined as the governmental branch responsible for enforcing the law, interpreting and adapting it to concrete cases and solving disputes and conflicts.¹ The laws interpreted and enforced by the judiciary include constitutions, and other legislation enacted by the legislature and regulations issued to implement various laws. It is also important to notice that many different roles have been assigned to the judicial system at different times and settings. Ideologies and politics may also influence the way judges and Courts operate.²

There are different theories on the relationship between development and the law (including its enforcement mechanisms such as the judiciary). These theories range from modernization theory to the notions of the new developmental state.³ The early law and development movement was short lived, and it was followed by other theories such as the institutional approach to development and the notion of developmental states. Santos and Trubeck⁴ have identified as the dominant law and development movements attempting at constructing the role of legal institutions in general, and the judiciary in particular, in the pursuits of development.

While the rapid growth of Japan and other East Asian tigers (Taiwan, Hong Kong, and South Korea), is attributed to classical developmentalism, the attempts of some countries that pledge to pursue developmentalism in the 21st century, such as South Africa and Ethiopia are categorized as pursuits in the path of *new developmental states*.⁵ Though many African, Latin American and Asian countries attempted state driven development efforts in the classical developmental state

¹Natalia Langenegger and Vivian M. Ferreir(2013), Rights, Democracy and Development; The Judiciary's Role In Developing Countries p3: available at <http://www.google..bv.5752919,d.Bgq>, last visited on 30/11/2013

² Ibid

³ Kevin Davis & Michael J. Trebilcock (1999), What Roles do Legal Institutions Play in Development?, a research paper for International Monetary Fund's Conference on Second Generation Reforms, November 8–9, 1999, p. 3

⁴David M. Trubek and Alvaro Santos(2006) introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice, in: David M. Trubek and Alvaro Santos(eds), the new law and economic development; a critical appraisal, Cambridge and New York, Cambridge university press 2006 ,pp 1-19 at pp 2

⁵ See on this point David M. Trubek(2008), developmental states and the legal order; towards a new political economy of Development and law, In: University of Wisconsin Legal Studies Research Paper, No. 1075. Madison: University of Wisconsin Law School;UNDP Ethiopia (2012), "Democratization in a Developmental State: *The Case of Ethiopia*; Issues, Challenges and Prospects", *Development Brief*, No. 1, 2012 andOmano Edigheji,(ed), constructing a democratic developmental state in south Africa, potentials and challenges, cape town, human science research council(HSRC) press, 2010.

period (since 1960s-1970s), literatures on institutional features of developmental states have focused on East Asian states such as Japan, South Korea, Taiwan and Hong Kong because of their success in developing their economies.⁶ This fact combined with reasons such as the failure of many countries to develop their economies under the neoliberal policies⁷ have led states such as Ethiopia and south Africa to look for and emulate the experiences of the Asian tigers, successful developmental states to attain their development goals.⁸ *New developmental states* (a path pledged by countries such as South Africa and Ethiopia) are therefore believed to learn some institutional features of successful developmental states from countries such as Japan and South Korea and adapt them in to their locally specific political, economic and social conditions.

Development oriented political leadership, the ability of the leadership to maintain political stability and order, and the capacity of their bureaucracies to design and implement industrial policies and nurture market forces are the institutional characteristics to which success of East Asian developmental states is attributed.⁹ They had effective interventionist bureaucracies in a sense that their bureaucracies were characterized by the ability to make development promoting policies and consistent decision making (bureaucratic autonomy).¹⁰ The ability of their bureaucracies to negotiate with and solicit consensus of stake holders in developmental decision making (embeddedness to business elites) were also part of the reasons for the success of Asian tigers.¹¹ This in turn invites thinking about what courts as part of legal institutions played in the East Asian developmental states.

Even if some literatures considered legal institutions in general and courts in particular were irrelevant in classical developmental states, recent studies on the experience of East Asian developmental states such as Japan and South Korea have claimed they were important for the

⁶Peter Meyns and Charity Musamba (Eds.): *The Developmental State in Africa: Problems and Prospects*. Institute for Development and Peace, University of Duisburg-Essen (INEF) Report, 101/2010), pp 9

⁷ See for instance PistorKatharina & Milhaupt Curtis, *Law and Capitalism: What Corporate Crises Reveal About Legal systems And Economic Developments Around The World*, Chicago: Chicago Press, 2008 and Stiglitz Joseph, *Towards a New Paradigm for Development: Strategies, Policies, and Processes* in: Ha-Joon Chang (ed.), *The Rebel Within*, London, Wimbledon Publishing Company, 2001, pp. 57-93

⁸David M. Trubek, *supra* note 5 pp 4-5.

⁹Peter Meyns and Charity Musamba, *supra* note 6, pp 23-25.

¹⁰ *Ibid*

¹¹Peter B. Evans (1989): *Predatory, Developmental, and Other Apparatuses: A Comparative Political Economy Perspective on the Third World State*: *Journal of Sociological Forum*, Vol. 4., No.4. , pp 561-587 at pp 575.

development of these countries.¹² It is claimed that the judiciary in successful East Asian developmental states contributed to development of the same in different ways;¹³ through promoting economic predictability, forcing governmental bodies to be effective in developmental governances and securing political stability of these states

Literatures on the concept of developmental state also identified limitations of early classical developmental states and advised particularly African countries which wanted to construct developmental states in the context of constitutional democracy to address the limitations.¹⁴ The authoritarian nature of governances of most of the successful East Asian developmental states is particularly what these authors identify as one which new developmental states cannot afford.¹⁵ This in turn demands for the construction of democratic developmental states which Ethiopia and South Africa as mentioned above have since recently declared to pursue to attain their development objectives.

There is thus an emerging consensus that in addition to the institutional features of successful Asian developmental states (which are worth emulating), there are additional attributes required of new developmental states. These supplementary attributes include accommodative political system, protection of human and democratic rights and transparency and accountability which are necessary conditions to establish a democratic developmental state.¹⁶ This implies the insufficiency of bureaucratic capacity to construct a developmental state in a constitutional democracy because the political choice of the model should secure public support. This in turn demands developmental governance based on persuasion instead of coercion.

What one can deduce from this is that the need to construct effective developmental state in the 21st century requires constitutional democracies and a judiciary with a role the scope of which

¹²Katharina Pistor and Philip A. Wellons, the role of law and legal institutions in Asian economic development, 1960-1995, New York; Oxford University Press 1999 p 1.

¹³Tom Ginsburg; judicial independence in East Asia: lessons for china in: Randall Peerenboom,(Ed.), Judicial Independence in China: Lessons for Global Rule of Law Promotion:Cambridge, Cambridge University Press(2010), pp. 247-260 at pp 251-258.

¹⁴Omano Edigheji(2005):a Democratic Developmental state in Africa, a research report no 105, Johannesburg, Center For Policy Study Institution and Eun Mee Kim, limits of authoritarian developmental state of South Korea in: Omano Edigheji,ed, constructing a democratic developmental state in south Africa, potentials and challenges, cape town, human science research council(HSRC) press, 2010, pp 97-126. See also Peter Meyns and Charity Musamba, supra note 6, pp 26-28

¹⁵ Ibid

¹⁶Omano Edigheji, supra note 14 pp 14-15.

goes beyond the role that was entrusted on courts in classical developmental states such as Japan and South Korea. This in turn may demand democratic developmental states to have a judiciary with a power to review governmental actions which consequently can help them construct a bureaucracy coherent and strong in nature without the need to violate human rights in general and property rights in particular. Such a judicial role can indeed result in creating a strong and good government which is indispensable in developmental process.

Promoting economic development, equity and deepening democracy are the goals of democratic developmental states.¹⁷ The judiciary is also important in enhancing social justice and protection of individual rights. With the power to review constitutionality of laws and governmental decisions taking developmental objectives of states as is the case in South Africa¹⁸, the judiciary can also prevent democratic developmental states from being turned to predatory states. This may in turn demand a judiciary which can function independently and characterized by accountably so that it can respond to social needs.

However, the effort to have an independent judiciary with its significant role in democratic developmental states is not without challenges and Ethiopia is not an exception although the nature and extent of challenges may vary from state to state.

1.2. Statement of the problem

The role of the judiciary in authoritarian East Asian developmental states was important particularly in terms of ensuring economic predictability, controlling lower level of bureaucracy or creating a coherent bureaucracy and maintaining political stability and order.¹⁹ On top of these functions of the judiciary in the classical developmental states, the judiciary in new (democratic) developmental states operates in the context of democratic governance, and is expected to expand the scope of judicial role and level of judicial independence in developmental process.²⁰

¹⁷ See for example Growth and transformation plan 2010-2014/15, , ministry of finance and economic development of federal democratic republic of Ethiopia November 2010 Addis Ababa, pp 21-27.

¹⁸South Africa: department of justice and constitutional development(2012) , the transformation of judicial system and role of the judiciary for developmental south Africa, p 21, available at <http://www.justice.gov.za>, last visited on 25/11/2013

¹⁹ See the discussion in the back ground part of this research page three paragraph 2.

²⁰Tom Ginsburg, supra note 13 pp 251.

Ethiopia is, as mentioned in above, currently attempting to construct a democratic developmental state with the aim to attain equitable economic development and democracy. This signifies that the importance of the judiciary in Ethiopian developmental state is expected to exceed the scope of the judicial functions in East Asian developmental states. Ethiopian courts, same as the courts of East Asian developmental states during the 1950s and 1960s, are expected to particularly help in the pursuits of building a strong and good bureaucracy; it should meanwhile facilitate the effective and efficient operation and function of the market. In addition to these classical function of a judiciary in a developmental state, courts in the new developmental state are expected to engender the process of democratization and promote social justice in the state through holding the government accountable for its actions/inactions and protection of democratic and human rights. These judicial roles in turn may help the democratic Ethiopian developmental state to have quality development policies implemented and prevent it from being turned to predatory state.

The Constitution of Federal Democratic Republic of Ethiopia (hereafter FDRE Constitution) has declared the separation of powers between the three branches of government and establishment of an independent judiciary with power to adjudicate justiciable disputes.²¹ This includes disputes among individuals and between individuals and governments. In spite of some prospects which show the opportunity that the judiciary can play its role in Ethiopia's pursuits to realize the path of new (democratic) developmental states, there are some problems which may hinder it from functioning independently and effectively. This has a possible negative impact on the country's effort to achieve its goals of attaining democratic developmental statehood which aims at development and democratization. The prospects and challenges that exist in Ethiopia in relation with the role of the judiciary in a democratic developmental state constitute the research problem addressed in this thesis.

²¹ Art 50(2), 78 and 79 of the FDRE constitution

1.3. Research Questions

The thesis addresses the following research questions.

- a) What is the role of the judiciary in developmental state to maintain embedded autonomy of the state/reducing rent-seeking or creating a political condition which curbs clientelism or predatory state?
- b) What role does the judiciary play for expanding the market/ investment in developmental state?
- c) What is the experience of Japan, South Korea and South Africa in terms of role of the judiciary in the developmental state context? What lessons can Ethiopia learn from East Asian countries and other democratic developmental states?
- d) How can an independent judiciary promote political stability and order? To what degree and scope should it be independent?
- e) What role can an independent judiciary play to insure social justice and good governance? How are social justice and good governance related to democratic developmental state?
- f) Does Ethiopia have a legal and institutional framework within which the judiciary can play its role in constructing democratic developmental state independently both in terms of scope of activity and level? What are the prospects and challenges? Is there any necessity to revisit the Ethiopia's laws in the pursuit of having an effective, independent and accountable judiciary enabling the state attain objectives of democratic developmental state?

1.4. Objectives of the study

The main objective of this research is to demonstrate the existing prospects and identify problems on the role of the judiciary to construct democratic developmental state in Ethiopia and attain its objectives, thereby suggesting possible solutions to tackle the challenges after exploring the realities and practice in Ethiopia and the experience of other countries; Japan, south Korea and south Africa. With this general objective in mind, the study has the following specific objectives.

- a) To examine the nexus between an independent and socially responsible judiciary and political stability for a successful democratic developmental state.
- b) To examine the importance of an independent judiciary for building a state bureaucracy with embedded autonomy and which is also transparent in and accountable for its action?
- c) To discuss the significance of a judiciary for economic predictability in developmental states.
- d) To examine lessons from experience and practice of other countries with developmental state model (Japan, South Korea and South Africa) on the role and independence of the judiciary)
- e) To assess the legal framework within which the Ethiopian judiciary is functioning in the context of democratic developmental state.
- f) To identify the prospects and challenges of the judiciary in its role towards attaining objectives of democratic developmental state in Ethiopia.
- g) To identify and suggest possible solutions on the problems which can constrain the proper functioning of the judiciary in Ethiopian democratic developmental state.

1.5.Scope of the study

The study is limited to discussing the role of ordinary courts and constitutional court or a court with power to interpret the constitution in developmental states in general and in Ethiopia in particular, the prospects and challenges in Ethiopia being at the center of discussion. Accordingly, this study will not consider administrative tribunals other than some incidental considerations. Furthermore, this study is limited to discussing the prospects and challenges of the judiciary in Ethiopia at federal level, due to time and financial constraints and because regional courts as a branch of regional governments can be a separate source of study.

1.6.Significance of the study

The research is devoted to the role of judiciary in developmental state in general and prospects and challenges in Ethiopia in particular. It adds to the existing literatures on the nexus between the judiciary and development in the context of developmental states. Since the central purpose of the research is to identify the prospects of and challenges on the role of the judiciary in Ethiopia, it is believed that it contributes to serve as a reference for policy makers in pursuits of reform or empowerment of the judiciary so that courts can play an optimal role towards achieving the objectives of a democratic developmental state, i.e., development and democratization.

The assessment of experience of Japan and South Korea on the role of the judiciary and its level and scope of independence during the decades of their experience as developmental states enables lessons to be drawn regarding the function and role of the judiciary in Ethiopia. The research is also significant because it identifies the opportunities and the major problems followed by suggestions of possible solutions based on which remedial actions can be taken. Generally, the study would be vital for readers on the role and required level and scope of judicial independence in Ethiopian democratic developmental states. Moreover, it can help readers understand possible solutions with which the challenges can be tackled to properly empower and reform the judiciary at the threshold expected of a democratic developmental state.

The discussion of literatures on the institutional features of developmental states can help readers have better understanding of the concept of developmental state in different contexts, and clarifies the role of legal institutions in attaining goals of a developmental state.

1.7. Research methodology

The study will employ a qualitative method of research. Accordingly, it will descriptively analyze literature reviews on the concept and institutional features of a developmental state. It will also analyze literatures and laws on the nature and role of judiciary in both classical and emerging developmental states, the case of Ethiopia being the center of focus. The experience of Japan, South Korea and South Africa in relation to judicial power and role for their developmental states will be analyzed. Japan is selected because it is the country mentioned as the first state which experienced developmental state in the 20th century in a relatively democratic context.²² The experience of South Korea would also be reviewed because it is mentioned as a country which ran developmental state in authoritarian context of governance²³. The study will also consider the experience of South Africa because it, as mentioned in the background, currently pledges to pursue the policies of a democratic developmental state.

Laws, policy documents and institutional frameworks with regard to judicial power and function in Ethiopia will be analyzed with the view to identify potential prospects for and challenges on the judiciary to play roles expected of it in the context of democratic developmental state.

²²Omano Edigheji supra note 14 pp 15

²³Eun Mee Kim, supra note 14

1.8.Limitations of the study

More time and budget could have allowed a comprehensive study and interviews with the officials or other concerned offices and persons in the regional states of Ethiopia and federal institutions. Yet, despite some efforts to interview experts in public offices of the federal government such as courts and ministry of justice did not bear fruits owing to non-availability and the unwillingness of interviewees. This limitation forced the researcher to rely on relevant literatures, documents and laws. The fact that most literatures on developmental states have given little attention to the role of the judiciary in the pursuits of developmental states, can also be regarded as a limitation, which is outweighed by the significance that this study can have for other researchers.

1.9.Organization of the paper

The paper is divided in to six chapters. After this introduction, Chapter Two reviews the existing literatures that discuss the concept, emergence and aims of developmental states. The researcher will also try under this chapter to identify the institutional features of developmental states. Chapter Three deals with the need for independent judiciary in modern societies and its general position, scope of power and function in different forms of governances. It will also provide summaries on the general and theoretical assumptions on the place of law and courts in the different law and development moments.

Chapter Four is devoted to the role the judiciary played in East Asian developmental states and the institutional set up and the practice so far in South Africa. The role of the judiciary in classical developmental states, their level and scope of independence will be discussed and the experience of Japan and South Korea will be reviewed. This chapter is also concerned with the role of the judiciary in democratic developmental states and practical experience of South Africa from which relevant lessons can be drawn to Ethiopia will be reviewed.

Chapter Five is on the democratic developmental state in Ethiopia and the role of the judiciary towards constructing the same kind of state and helping it attain its goals. The chapter will primarily discuss democratic developmental state and its constitutional foundation in Ethiopia. After brief summary of judicial power envisaged in the FDRE constitution, this chapter will consider the potential role of the judiciary towards both constructing a successful democratic

developmental state in Ethiopia and helping the same achieve its goals. The chapter further identifies the prospects for the judiciary to contribute its role properly, and the potential challenges in Ethiopia. These opportunities and challenges inform the analysis of possible options, the consideration of which can help policy makers take remedial actions.

The final chapter (chapter six) forwards the findings of the study and some recommendations.

CHAPTER TWO

THE DEVELOPMENTAL STATE THEORY AND ITS PERSPECTIVES; CONCEPTUAL FRAME WORK

2.1. Introduction

The law and economic development study which can be traced back at least to the nineteenth century, was a question that attracted the attention of classical thinkers like Marx and Weber.²⁴ However, systematic and organized efforts to reform legal systems with the aim to create nexuses between law and development became part of the practice of international development agencies only after World War II²⁵

Although the world has witnessed various versions of law and development doctrines since the 1950s (from modernization theory to new developmental states), Trubeck and Santos²⁶ have identified primary forms of law and development orthodoxies that can be aligned to three dominant moments since Second World War;²⁷ the first moment (in 1950s-1960s), the second moment, (in 1980s up to 1990s) and the third which for them is still emerging since 1990s.

The period of emergence of different law and development moments has also showed the development of different development theories; the classical developmental state, the neo liberal reaction and new developmental state.²⁸ They have generally varied on two major dimensions: the extent to which states have to play a role (state intervention), and the extent to which economies of developing countries can grow best when they are fully liberalized and thus open to the world economy.²⁹ Consequently, the theories vary in their emphasis on the centrality and nature of function of legal institutions in general and the judiciary in particular in state's efforts towards sustained development.

The term developmental state (classical) has been used primarily to refer to the role of the state in the development of Latin America and Asia in the past where states played an active role in stimulating and directing economic growth through;³⁰ inducing social transformations, and

²⁴David M. Trubek and Alvaro Santos *supra* note 4

²⁵ Ibid

²⁶ Ibid

²⁷Trubek, D.M. *supra* note 5, pp 1-2.

²⁸ Ibid

²⁹ Id p 3

³⁰ Ibid

changing and channeling economic behavior of their citizens towards state development policies. Added, in this moment, law was assumed to be used as a tool for economic management and a lever for social change.³¹

During the 1970s, developmental states and their policies started to show signs of failure and to be somewhat out of fashion for different reasons.³² Subsequently, the neoliberal idea of development emerged in 1980s under the influence of the Washington Consensus and brought to light a strong belief in markets as necessary and sufficient arenas to the development of economy of developing countries.³³ Consistently, attention was shifted from the establishment of administrative state to institutions of private law and legal institutions were regarded as a foundation for market relations.³⁴

Bad results of the neoliberal program to the development of third world countries, many of which under its policies went in to economic crisis, led scholars to reach a consensus on the idea that markets are incapable of creating, by themselves, the conditions for their success and sustainability to argue in favor of state's moderate intervention.³⁵ While excessive and inefficient state intervention is mentioned as one reason for failure of many developing countries in the classical developmental states to grow their economy, some north East Asian countries however, managed to exceptionally develop their economy sustainably.³⁶ The effect was that the experience of East Asian countries combined with critics against neoliberal policies and its legal institutions led to emergence of researches on the possibility of new developmental states and new practices of development policy makers.³⁷ This suggests the need to study the experience of successful East Asian developmental states and their legal institutions to creatively draw lessons for countries determined to construct developmental state in the 21st century. The subsequent

³¹David M.Trubek and Alvaro Santos, *supra* note 4, pp2.

³²Failure of most Latin America, East Europe and Asian countries to develop in their effort under developmental state path combined with the hegemony of neo-liberalism and the Washington consensus which promoted a more restricted and passive role for the state is mentioned as parts of reasons for extenuation of classical developmental state , see PistorKatharina &Milhaupt Curtis *supra* note 7.

³³David M. Trubek, *supra* note 5, pp5.

³⁴David M.Trubek and Alvaro Santos *supra* note 4,

³⁵Stiglitz Joseph, *supra* note 7, pp76-80.

³⁶David M. Trubek, *supra* note 5 pp5.

³⁷Trubek for instance observed that countries are returning to more active role to promote both growth and equity, a new body of theory (new developmental state) but, not a simple return to the development policy and legal models of the past that prevailed in Asia or Latin America in the 1960s and 1970s. *Id* pp 6.

topics will discuss the concept of developmental state, institutional features of successful East Asian developmental states and literatures on democratic or new developmental states.

2.2. The developmental state: Definition

Chalmers Johnson coined the concept capitalist developmental state in his study of industrial policy of Japan in the second half of the twentieth century to mean market –conforming method of state intervention.³⁸ Even if one can find different definitions of the concept following Johnson’s articulation, the following two definitions are considered in this paper with the aim to highlight essence of developmental state.

Johnson himself defined developmental state; “as one that is determined to influence the direction and pace of economic development by directly intervening in the development process, rather than relying on the uncoordinated influence off market forces to allocate economic resources.”³⁹ Johnson contrasted Japan’s plan rational system to a market rational system on one hand and to a command central planning on the other. He contended that markets a creation of the state and politics⁴⁰ and hence the important elements of such state is its ability to mobilize the nation around economic development within a capitalist system.⁴¹

Evans also defined developmental state as a state whose government plays an active role in its development through different measures which include the provision of tax breaks, subsidies, and tariffs etc to accelerate the development of industry.⁴² This definition places emphasis on the centrality of government intervention and the means of intervention to boost economic development.

Four points of importance can be gathered from the two definitions in above. Firstly, even if states which construct successful developmental state are reluctant to rely on markets to promote development, their intervention does not totally undermine or outlaw market forces. Their role is

³⁸ In his attempt to reply to literatures which reviewed the book, MITI and the Japanese miracle, Johnson clearly argued that state intervention was used to improve the outcome of market forces and not to displace market forces so that a market-conforming kind of state intervention. Chalmers Johnson, *the Developmental State; Odyssey of a Concept*: in; Woo-Cumings, Meredith, ed, (1999), *The Developmental State*, Cornell.CA; Cornell University Press pp 49.

³⁹ Chalmers Johnson, *MITI and the Japanese Miracle: The Growth of Industrial Policy, 1925-1975*, Stanford: Stanford University Press, 1982, pp 319

⁴⁰ Id pp 24

⁴¹ Id pp 302-310

⁴² Ebrahim Shabbir Deen, *the developmental state; an illusion in contemporary times*, *African Journal of Political Science and International Relations*, Vol. 5, No .9, 2011, pp 424-436 at pp 425.

rather to harness domestic markets and private sectors. The second point worth noting is the importance of primacy of politics in choosing and construction of developmental states for effective implementation of development policies. This is to say that the inability of markets to deliver development necessary for societies for different reasons may lead to agreements between and among societies and elites of a given state for creation of strong state capable of deriving development and developing competitive private firms.

The third important point is that because developmental states are to lead development of society without undermining market forces and principles, they may utilize different incentives to accelerate development of industry as the result of increasing private investment or creation of state and business industrial coalitions. The last important point one can derive from the definitions is that developmental states need to balance the interaction between industrial policies and market principles, the maintenance of which may demand institutionalization of state – society relations and crafting of comprehensive administrative law.

2.3.Aspiration and objectives of developmental states

Historically, the emergence of developmental state in our common sense is said traced back to the sixteenth century of the Spanish Netherlands which after then actually had been used by different countries for their industrialization.⁴³ Industrially advanced countries in the west primarily constructed a strong state fostering the growth and victory of private enterprise to become today powerful nations in the world and to consider free trade policy and liberal legality as right path of development.⁴⁴ Even if the concept of developmental state is developed to describe the experiences of countries which succeeded in industrialization in the second half of the twentieth century, the claim that all early industrializing states were developmental state also stems from assessment of institutional characteristics of the theory of mercantilism.⁴⁵ The

⁴³ Amiya Kumar Bagchi(2004), the developmental state in history and in the twentieth century, New Delhi, Regency Publications, pp 9-15.

⁴⁴ Ibid

⁴⁵ As opposed to theory of how economies are supposed to operate, the theory of mercantilism was a theory of a coherent intervention of political state in the economy at the heart of which is pragmatic adaptation or experimentation to find the best. Political state was by then required to excite capitals in experimentation in different ways such as aid because of the reason that capital was considered to be a way ward and timid in lending itself to new undertakings or industries. See Woo-Cummings Meredith, introduction: Chalmers Johnson and the politics of nationalism and development, in: Woo-Cummings Meredith (Ed), the developmental state , Cornell.CA; Cornell university press (1999) pp4-5

aspiration behind such theory and conviction of states was strengthening national autonomy and power⁴⁶ suggesting the importance of economic development for sustainable and strong nation state.

The general and common aspiration of East Asian developmental states, it is said, was also chiefly catching up with the advanced world by breaking out of the path dependency⁴⁷ that has not led to economic transformation needed to overcome poverty. It seems that this kind of goal was inspired by dependency theory which rejected the notion that different countries should experience similar forms of development/ development path. Exponents of the same theory argued that development in many under developed countries would inevitably be conditioned by the complex economic, political and cultural relationship with more developed countries.⁴⁸ Thus, economic nationalism was the source of ambition for East Asian states to construct developmental states in the second half of the 20th century and helped them to mobilize their society along the project of economic development, but still within the context of capitalism. This also suggests that the interest of states in East Asia to maintain national autonomy was the aspiration, the goal being achieving economic development capable of helping them realize their aspiration without necessarily pursuing the path dependency.

2.4. Types of Developmental States

East and South East Asian countries are usually mentioned in development thinking when reference is made to the developmental state. But, this does not mean that other countries did not embark on development endeavors of their own in the 1960s and '70 though their experience is mentioned as failed developmental states.⁴⁹ Currently, there are debates whether countries other than East Asian states can emulate the experiences and institutional features of early

⁴⁶Amiya Kumar Bagchi supra note 43.

⁴⁷ Proponents of modernization theory, a short lived law and development moment in 1950s and early 1960s held that economic development should be preceded by modernization which involves the process of transition from traditionalism to modernity previously experienced by developed countries, W.W. Rostow, *Stages of Economic Growth: A Non-Communist Manifesto*, Cambridge: Cambridge University Press, 1960, pp 12

⁴⁸Kevin Davis and Michael J. Trebilcock, supra note 3, pp 15-19.

⁴⁹African countries managed to develop their economy and social condition shortly after their independence, but failed to sustain their developments. Different competing reasons are mentioned for their ultimate failure which includes their statist approach, predatory nature of states and the reaction of neoliberals. See Peter Meyns and Charity Musamba supra note 6, pp 9.

developmental states. These debates led to the emergence of classification of developmental states in to two: classical and emerging or to authoritarian and democratic ones.⁵⁰

2.4.1. The Classical Developmental States; Focus on East Asian States

During the 1970s and 1980s, some Asian countries (including Japan and South Korea) continuously achieved remarkable economic and social development in contrast to other regions of the world that suffered serious economic stagnation.⁵¹ What is remarkable here is that their development process is understood as substantially different from the Western model of development indicating an 'Asiatic value'⁵² of their development process, based on which the universality of western values started to be challenged. In an attempt to make distinction between capitalism in the west and capitalism in East Asian states, a certain author has recently noted that Asian capitalism is collectivist capitalism as opposed to the westerner individualistic capitalism.⁵³ Such a distinction of capital between the west and industrialized states in the East Asian states is not without implication on the specific roles of legal institutions in general and function of courts in particular in the two regions. Much will be said in chapter four of this paper.

While the Asiatic nature of development of East Asian is derived from analysis of the contribution of culture in Asian developmental states, some commonly defining institutional features of early developmental states are also drawn from experiences of East Asian countries. As a result, the reason to discuss features of classical developmental states separately being the fact that such characteristics are drawn from literatures on east Asian developmental states, the need to emulate such institutional features in new developmental states and other necessary additional features will be a point of discussion in the topic devoted to emerging or democratic developmental states.

⁵⁰ Id, pp 11

⁵¹ Nobuyuki Yasuda, Law and Development from the Southeast Asian Perspective: Methodology, History, and Paradigm Change: in Christopher Santos(Ed): Law and Development in East and South East Asia : London ,Rutledge Curzon (2003), pp 19-52

⁵² Asian values are argued as hostile to political pluralism and opposition. They are also associated to collectivist spirit of the people which together with first helped governments in East Asian developmental states mobilize their people around their national goal, economic development. The tolerance of authoritarian governments in those states is thus at least partly attributed to these values. See Kanishka Jayasuriya, Understanding Asian Values as a Form of Reactionary Modernization, Journal of contemporary politics, V.4, No. 1, (1998), pp77- 86.

⁵³ Nobuyuki Yasuda supra note at 51, pp 39.

2.4.1.1. Institutional Features of Classical Developmental States

While it is possible for one to find specific variations on the nature of East Asian developmental states, the followings are identified as common natures of developmental states, largely drawn on experiences of success full developmental states from the same region.

A. Development-Oriented Political Leadership

Numerous analysts of experiences of East Asian countries observed and underlined the essentiality of political elites whose economic and political ideology is economic development for a success full developmental state to emerge and flourish.⁵⁴ what political elites for instance in Japan and south Korean developmental states did to attain their development goals was maintaining political stability and creating state institutions which gave the bureaucracy sufficient scope to take development initiatives and act authoritatively in pursuit of the desired development goals.⁵⁵ This is to say that the general roles of political elites of these states who were committed to development were maintaining bureaucratic autonomy and political stability and order.

The ability of political elites to force their bureaucracies to respond to the needs of the groups upon which the stability of the system rested is linked to their capacity to maintain bureaucratic autonomy.⁵⁶ This has an implication on the institutional mechanisms with which the leader ship controlled or supervised the bureaucracy including lower bureaucrats. While self restraint of administrative and political elites characterize Japan and South Korean developmental states, circumstances which gave birth to development oriented elites is mentioned as reason explaining their self discipline.⁵⁷ But, this does not mean that these countries did not have any institutional controlling mechanisms as will be discussed in Chapter Four.

⁵⁴ Peter Meyns and Charity Musamba, *supra* note 6, pp 23-24.

⁵⁵ Ibid

⁵⁶ Id, pp 10

⁵⁷ Recently, three authors argue that systemic vulnerability to power of political elites attributeS to origin of developmental states. Based on their observation of circumstances conditioning developmental states in east Asia, they held that an interaction of three separate constraints; broad coalitional commitment as of necessity, scarce resource endowment and severe security threats make difficult for rulers to stay in power without improving institutional performance and hence giving rise to developmental state. See Richard F. Doner, Bryan K. Ritchie and Dan Slater (2005), *systemic vulnerability and the origin of developmental states: North East and South East Asia in Comparative Perspective*, a paper for international organization foundation, No 59, Cambridge ,Cambridge university press,2005,pp 331-332.

The institutional mechanism by which political leaders could maintain the necessary political stability and order for their success is thus worth considering. Literatures on the experience of East Asian developmental states relate the ability of political leadership to maintain political stability partly to the then regime types (authoritarian).⁵⁸ It is, however, contestable whether authoritarian form of governance can alone (if it can after all) bring political stability or not, particularly in countries with large and multicultural populations. The current global and domestic political conditions (global and internal pressures for democratization) may also make authoritarian governance less relevant for new developmental states implying the need to rethink alternative mechanisms by which political stability and order can be secured.

B. Autonomous and Effective Bureaucracy

Following an assessment of experiences of successful developmental states in East Asia, a number of influential scholars held that the achievement of East Asian developmental states required a strong and capable bureaucracy.⁵⁹ The institutional capacity is associated to Embedded autonomy of their bureaucracies.⁶⁰

Bureaucratic autonomy of developmental states such as Japan and South Korea as a factor to their success story is understood as a bureaucracy who is not easily manipulated by particularistic and rent seeking interests from outside.⁶¹ This in turn does mean that state bureaucrats were capable of making coherent and sound policies, and consistent decisions effectively which in turn promoted development. But, what contributed to the establishment of a bureaucracy of those kinds in classical developmental states (including Japan and South Korea) is an important question here.

At the expertise level, the merit based mode of recruitment and promotion of members of bureaucracy combined with informal internal networks helped successful developmental states of East Asia to have autonomous public administrations.⁶² This suggests the importance of professional priority over other competing factors in recruitment and promotion of individual bureaucrats which in turn implies the fact that these developmental states used internal

⁵⁸Ebrahim Shabbir Deen, *supra* note at 42.

⁵⁹Peter B. Evans *supra* note at 11

⁶⁰Ibid

⁶¹Ibid

⁶²Id pp 576-577.

controlling(such as performance based promotion) as part of administrative controlling mechanisms. The position of leadership in the societies of East Asian developmental state and homogenous nature of the society is also mentioned as explaining factor for ability of leaders to insulate their bureaucracy (self discipline and leading by example).⁶³What roles courts played in maintaining effective bureaucracy and how their functions were interrelated with other controlling mechanisms will be considered in Chapter Four.

However, there is contention whether the bureaucracy in Japan and South Korea was autonomous from political elites. The authoritarian nature of regimes of East Asian developmental states led authors to contend that bureaucracies were not insulated from political leaderships⁶⁴. Added, even if it is difficult to conclude that authoritarian governments can better control their administrative agencies than democratic governments can do, the fact that new developmental states including Ethiopian developmental states are expected to operate in the context of democratization make experiences of classical developmental states on the this issue less generalizable. Be that as it may, insulation of bureaucracy both from particular interests and the leadership depends on the commitment of political elites to build a developmental state structure. Local specific conditions may however demand different institutional setup with which commitment of political elites can be translated in to reality.

Another institutional element necessary for building a bureaucratic capacity required for successful developmental state is embeddedness of the bureaucracy,⁶⁵thus the idea of embedded autonomy. Evans held that in addition to state autonomy, embeddedness is also necessity for developmental states to maintain close contact with dominant interests in society.⁶⁶ This way, the strong capacity and effectiveness of bureaucracies in policy design and implementation is also attributed to the ability of bureaucracies to negotiate and soliciting necessary resource inputs and consensus required in the transformation process. This helps states to have a bureaucracy characterized by consistent and participatory decision making.

⁶³Ibid

⁶⁴Laura Routley ,Developmental State; a Literature Review, Working Paper to UK Department for International Development No. 03.,University of Manchester,2012, pp 6

⁶⁵Evans Peter B. (1995): Embedded Autonomy: States and Industrial Transformation, Princeton: Princeton University Press, pp 12

⁶⁶Id p 50

There is, however, a fear that political elites may face the difficulty of insulating their bureaucracies embedded in the society. Evans showed his fear on the possibility that a close connection between the bureaucracy and society in determination of priorities and capital collection could lead to state capture by unproductive group interests.⁶⁷

The effect can be increasing corruption as the result of conspiracy between bureaucrats and opportunistic private firms resulting in developmental failure. Such a concern can, of course, be serious in countries with deeply divided society where harmonizing different group interests and mobilizing different ethnic groups along a certain development goal is challenging.⁶⁸ One can imply from this the necessity to deploy institutional control of public administration other than or in addition to those utilized by Japan and South Korea. This will be discussed in Chapter Four and Five.

C. Promoting production-Oriented Private Sector

In assessing the linkage between the government and private sector in East Asian developmental states, it is also noted that the linkage was strategic and selective in the sense that political leaders managed to create a business coalition with productive industrial and financial capitals.⁶⁹ This is to say that state intervention was characterized by encouraging productivity and competition capacity of domestic firms at any level and state policies such as industrial subsidy, provision of credit and rewards were linked to standards of performance and productivity.⁷⁰ This implies that the purpose of developmental states in East Asian countries being to create a private

⁶⁷ Ibid

⁶⁸ Ethnic diversity is claimed to cause poor governance in development because of the fact that it tends particularly in African to result in Clientelism in state -society relation which in turn is likely to create an environment of competition between different groups for particularistic benefits. See Rod Alence, Political Institutions and Developmental Governance In Sub-Saharan Africa, *Journal of Modern African Studies*, V.42., No.2. 2004, p 163-187 at pp 178. Ethnic diversity and social division among business, bureaucratic elites and society in general in south East Asian states is also said resulted in less successful states as it hindered consensus among elites and society on the idea of developmental ideology and led to increasing corruptive practices and weakening political and bureaucratic capacity of states. See Bernard G. Bishop (2003); APECC, *Industry Policy and the Role of Law* in: Christopher Antons(ed), *Law and Development in East and South East Asia*, simultaneously published in London and New York, Routledge Curzon, 2003 pp 52-70 at pp 56.

⁶⁹ The fact that the linkage between state and business in developmental state Japan and South Korea was a growth coalition in nature is also criticized for unbalancing state-society relation. See Wade, R. (2010), *After the Crisis: Industrial Policy and the Developmental State in Low-Income Countries*, *Journal of Global Policy*. V.1, No.2., pp,158.: Evans also identified possible problems of such unbalanced relation as excessive clientelism and inconsistency in policy formulation and implementation making for the state difficult to jointly construct with potential industry elites. See Evans Peter B, *supra* note at 65, pp 60.

⁷⁰ Amsden, Alice (1989): *Asia's Next Giant. South Korea and Late Industrialization*, New York: Oxford University Press, pp 316.

sector competitive at international and domestic level, they used productivity and economic performance as a criteria for their alliance with the private sector.

This does, however, not mean that private sectors which did not form industrial coalition with governments were not allowed to participate in the economy. Authors noted that private property and contract security regimes were stable in East Asian developmental states such as of Japan and South Korea⁷¹ which in turn implies the economic condition that some private firms involved in the economy independently.

D. Performance-Oriented Governance

With an attempt to analyze the source of political legitimacy of political leaderships for their long stay in power in East Asian developmental states, almost all authors conclude that economic growth combined with income equality helped governments in East Asian countries to enjoy broad support from their society.⁷² The rapid economic growth, they argue, managed to provide an economic benefit both to the ruling elite and the whole population as the result of which political elites stayed in power for long time. In addition to creating economic growth coalition in such states, some influential authors also noted that the economic performance also generated in policies which sustain the institutional and political frame work.⁷³ What one can understand from this is that economic growth in East Asia countries gave rise to development of legal institutions in general and the judiciary in particular to govern the ever expanding economy effectively. This way of understanding is indeed consistent with views of some scholars who argue that economic expansion results in a demand to replace informal institutions by the formal ones.⁷⁴ This also reinforces the view that economic policies primarily influence economic development in East Asian developmental states which in turn influenced the policies and legal institution⁷⁵ implying the argument that the role of the judiciary in early developmental states has increased when economic growth increased from time to time.

⁷¹Tom Ginsburg, Does Law Matter for Economic Development? Evidence From East Asia, *Law & Society Review*, Vol. 34, No. 3 (2000), pp. 829-856 at p 836

⁷²Peter Meyns and Charity Musamba , *supra* note 6,pp 27.

⁷³ *Ibid*

⁷⁴ Douglass C. North, *Institutions: The Journal of Economic Perspectives*, Vol. 5, No. 1.,1991, pp 110- 111

⁷⁵ Pistor, Katharina and P.Wellons *supra* note at 12 pp2.

2.4.1.2 Limitations of the Classical Developmental States Concept

The defining features of the developmental state are as discussed above principally derived from analysis of the experiences of East Asian countries. It is true that developing countries elsewhere including Ethiopia are currently seeking ways to advance their own economic and social development based on such state concept.

However, even authors who defend the possibility of developmental state in other developing countries in general and in Africa in particular advise emerging developmental states to creatively emulate experiences of East Asian developmental states and adapt to their context.⁷⁶ Their suggestions for developing countries to be cautious in learning experiences of classical developmental states such as Japan and South Korea arise from some characteristics of these countries. The fact that success of most classical developmental states is associated with their authoritarian form of governance and embeddedness of governances was limited to business elites are among the most important limitations authors⁷⁷ call emerging developmental states to address.

Though, states such as Japan and South Korea had formal democratic constitutional systems and experienced elections in time of their developmental process, it is claimed that governments of these states managed to impose their policy choices coercively in cases of failure to persuade stake holders.⁷⁸ One important effect of their authoritarian nature of governance was, as mentioned here above, an administration whose embeddedness was limited to business elites and exclusion of other civil societies in the developmental governance, the second limitation of classical developmental states.

Thirdly, as discussed above, the fact that economic growth or industrialization was the major goal of East Asian developmental states can also be mentioned as a limitation. This is because, different from the first two law and development moments, development is currently defined

⁷⁶ Omano Edigheji supra note 14, and MkandawireThandika, Thinking about Developmental States in Africa, Cambridge Journal of Economics, V.25, No.3, 2001.

⁷⁷ Omano Edigheji supra note 14, pp 14.

⁷⁸ Ibid

broadly to include economic growth only as one element⁷⁹ with its implication on the scope and nature of role of legal institutions in new developmental states to vary. Much will be said on this point in Chapter Four and Five.

While these limitations provide part of the reason for some scholars⁸⁰ to argue against the possibility of construction of developmental states in Africa, authors⁸¹ in support of the possibility theory argue for developing African countries to pursue the democratic developmental state to address the limitations of classical developmental states. The concept of democratic developmental state and its additional elements is discussed in the following topic.

2.4.2. Democratic Developmental State

2.4.2.1. Defining Democratic Developmental State; the Need for It

While Japan is arguably cited as the exceptional democracy developmental state of the twentieth century⁸², there is a general trend in literatures on the possibility of new forms of developmental states that democracy is a necessary ingredient for newly emerging developmental states. Mkandawire⁸³ and Edigheji⁸⁴ are among authors who have contended that only a developmental state characterized by systems of check and balance is suitable in the African context so that a democratic developmental state.

Democratic developmental state is defined as one whose embeddedness is broadened to include society as a whole, and not just a minority of private individuals implying the need for inclusive

⁷⁹E. Wayne Nafziger: From Seers to Sen: the meaning of economic development, in : George Mavrotas and Anthony Shorrocks(Ed);Advancing Development; Core Themes in Global Economics: New York, Palgrave Macmillan,2007 at pp 1-15

⁸⁰ Robert, Wade, Chalmers ,Johnson and Peter Evans are among authors who argue how construction of developmental state is difficult in Africa. Cited in:Omano Edigheji, supra note 14, pp12.

⁸¹Omano Edigheji, and MkandawireThandika, are among authors who defend the possibility theorem and call for the construction of democratic developmental states in Africa.

⁸² Omano Edigheji, supra note 14, pp 14.

⁸³ Mkandawire, in support of a democratic developmental and socially inclusive order for Africa argued for a developmental state in Africa characterized by developmental leadership and elite , ideological hegemony, capacity to implement economic policies effectively, state autonomy and societal institutions characterized by a state-society nexus that strongly emphasizes democratic oversight. SeeMkandawireThandika, supra note 76, pp 291.

⁸⁴ Edigheji in his argument in favour of democratic developmental state in Africa identified the failure of what he calls classical developmental state to give attention to nature of political regimes as a weakness. He also linked in his argument about developmental failures of post-independence Africa to the undemocratic nature, weak internal institutions, and the repression and exclusion of domestic social partners from the governance process and stresses the importance of Evans' concept of embedded autonomy. See Omano Edigheji, supra note 14, pp 10-18.

embeddedness.⁸⁵ It is thus a state which can forge broad-based alliances with society and ensures popular participation in the developmental governance and transformation processes. This in turn can promote development based on consent of people, by the people and for the people, and equity.

While literatures in the past vary in argument about the causal relationship of development and democracy, what can one observe from the variety of arguments is their inconclusiveness. There is since recently, however, a wide range of agreement that development and democracy are mutually reinforcing social phenomena though many development scholars still contend that at least an onset of economic growth requires authoritarian system of government.⁸⁶ Much, literatures on the concept of emerging developmental states seem to agree and conclude that human capability enhancing should be the primary objective of new or emerging developmental states.⁸⁷ This in turn triggers thinking on what kind of democracy; liberal or social, representative or deliberative form is suitable context for the construction of effective developmental state and enhancing human capability.

Pointing some limitations of liberal democracy which places emphasis on electoral dimension and representative form of democracy and its relevance for the poor Africans, Edigheji called for a deliberative form of democracy as a compliment which for him promotes a democratic citizenship and is suitable for a developmental state.⁸⁸ Political competition or procedural democracy is yet believed can increase quality of developmental policies and implementation through holding leaders accountable.⁸⁹ An emphasis on participatory democracy for effective developmental state also seems to be essential in terms of minimizing the negative effect of structural rigidity which may institutionalize elite exploitation.

⁸⁵ Laura Routley, *supra* note 64, pp 32

⁸⁶ Dingping Guo; *Institutional Accumulation and Gradual Substitution: the Dynamics of Developmental Democracy in China*, working papers no 7, Victoria, University of Wellington, 2009, pp 10 -11.

⁸⁷ See for instance on this point the following readings; Christopher Santos (Ed): *Law and Development in East and South East Asia*, London ,Rutledge Curzon (2003); David M. Trubek and Alvaro Santo, *supra* note 4 and Leftwich, Adrian, *Developmental states, effective states and poverty reduction: The primacy of politics*. Geneva: UNRISD(united nations research institute for social development) Project on Poverty Reduction and Policy Regimes, April 2008.

⁸⁸ Omano Edigheji, *supra* note 14, pp 22.

⁸⁹ Rod Alence, *supra* note 68 ,pp 163-164.

The focus on the centrality of democratic decision making in developmental governance in general implies that democratization or maintaining democratic order is one imperative of democratic developmental state. Economic development is also considered to be equally a competing imperative, particularly for democracies in transition to both facilitate the transition in to democracy and sustain what is achieved in addition to improving living conditions of people.⁹⁰

2.4.2.2 Additional Institutional Features Required for Democratic Developmental State

It is to be noted that states which want to construct effective democratic developmental states need to have the institutional features to which the success of classical developmental states, as discussed in topic 2.3.1., is attributed and address the limitation of the same, as discussed in above. Accordingly, developmental ideology oriented political leadership, autonomous, but deeply embedded bureaucracy, and production and performance based state-capital cooperation are all necessary for success of developmental states in a constitutional democracy context. Another important similarity between early and new developmental states is, as can be grasped from discussions in above, state intervention in the economy without undermining market forces to facilitate transformation of social and economic structures.

However, as can be understood from the discussion above, new democratic developmental states need to be broadly embedded in society so that they can have a strong bureaucracy capable of negotiating and convincing the public to participate in development efforts meaning fully. This is particularly important if one takes circumstances which enabled classical developmental states to succeed despite their own limitations. In spite of the limitations discussed above, it is said that authoritarian political culture and social homogeneity, and geopolitical position in the cold war era of East Asian states contributed to the political and bureaucratic capacity required for establishment of effective developmental state⁹¹. Generally, addressing the limitations of classical developmental states to construct a successful democratic developmental requires the following additional elements.

⁹⁰ Omano Edigheji, supra note 14pp 7-10

⁹¹ Bernard G.Bishop, supra note 68 pp 54.

A. Accommodative Political System

The nature of the political system is an additional element or source of autonomy of the democratic developmental state⁹² in that a political system capable of creating and maintaining stability in the society is being considered as a necessary element for democratic developmental state to emerge. The discussion on classical developmental states also revealed that the ability of the leadership to maintain political stability promoted their developmental capacity. Such political capacity in turn helped them to mobilize and foster mutually-interlocking relationships between states and various social, political and economic interests and national resources for national development.⁹³

But, in states with deep social division like Ethiopia, maintaining political stability is linked to a political system capable of accommodative of diverse interests.⁹⁴ Such political system is helpful to reduce conflict and create an environment in which the state can govern authoritatively in policy making and implementation. Because, it can provide an environment for the formation of different parties through which diverse interest of groups can be channeled to the state and can affect policy making at state level. This suggests that broad political coalitions should both precede and require an effective developmental state. This in turn implies that while developmental settlement among and between political elites and society may lead to political coalition and power sharing among different parties, maintaining stability in the context of power fragmentation may in turn demand effective developmental performance. Interesting with regard to this is the consensus currently among authors on federalism that consociational democracy which demands power sharing through grand coalition is a mechanism by which conflict in states with divided society can be reduced or avoided so that political stability can be maintained.⁹⁵

⁹² Omano Edigheji, *supra* note 14 at pp 14-17.

⁹³ *Ibid*

⁹⁴ *Ibid*

⁹⁵ In discussing the possibility of democracy in deeply divided societies, the power sharing theory held that democracy is possible in divided societies, but if it is a consociational kind which is characterized by grand coalition governments that include representatives of all major linguistic and religious groups, cultural autonomy for these groups, proportionality in political representation and civil service appointments, and a minority veto with regard to vital minority rights and autonomy. See Arend Lijphart, *The Puzzle of Indian Democracy: A Consociational Interpretation*, *Journal of the American Political Science Review*, Vol. 90, No. 2., (Ju 1996, pp 258.

The political system as source of stability and state capacity to run developmental role, however depends on a number of factors which Omano Edigheji identified as the social base of political parties, the type of relationship between political societies and their members the system promotes and the constitutional system⁹⁶. Organization of political parties around ethno-regional criteria rather than ideological lines or developmental alternatives Edigheji contended induces conflicts and instabilities in the political system thereby hindering emergence of democratic developmental state rather than capacitating it. Secondly, the competition between various primordial groups for access to power and national resources and/ or the conflicting needs of citizens to participate meaningfully in the democratic process and the need of the dominant political elite to entrench themselves can be causes of political instability.⁹⁷ What law and institutions of its enforcement including the judiciary can help to maintain political stability in such possible conditions will be discussed in chapter five.

B. Developmental Settlement and Good Governance

Another additional element considered necessary for democratic developmental states is related with the ability of the constitutional system to establish system of governance capable of promoting stability and the political choice of the developmental goal together with mechanisms of effective implementation. A state with accommodative political system and which sets development as a national goal also demands its ability to produce developmental political settlement.⁹⁸ Political settlements on development priority are understood to be a central core around which elites agree and serve as a political foundation for rapid economic development.⁹⁹ Developmental political settlements for Adrian Leftwich are the rules of the game¹⁰⁰ which forms an institutional framework through which contestations play out. This is to say that political elites would form coalitions around developmental state path to score economic development and set the general frame work with in which it operates implying the institutionalization of the developmental state and mechanisms of its operation. Leftwich notes

⁹⁶ Omano Edigheji, supra note 14, pp 14-17

⁹⁷ Ibid

⁹⁸ Leftwich, Adrian, Beyond Institutions: Rethinking the Role of Leaders, Elites and Coalitions in the Industrial Formation of Developmental States and Strategies, Journal of Forum for Development Studies, V.37. No.1.,2010, pp.101- 102

⁹⁹ Ibid

¹⁰⁰ Leftwich, Adrian, supra note 87, pp 7

that, though the rules can be changing (for the sake of flexibility), it should do not constitute the rapidly changing content of politics¹⁰¹ to imply the necessity of developmental agreement for developmental state among political elites so that change in ruling party by other cannot undermine the developmental goal of the state.

Generally a constitutional system with defined developmental goal and an accommodative political system and which fosters inclusiveness, accountability, stability and authoritative governance, as well as broad and grassroots participation in the democratic process can be seen as an important requirement for development of democratic developmental state. A theoretical postulation of constitutional system of this kind for a successful democratic developmental state combined with potential challenges identified here-above in turn invites thinking on the importance of rule of law and independent judiciary as a gap filling, a concern to be considered in Chapters Three, Four and Five.

2.4.3 The case in Ethiopia

The current government of Ethiopia led by EPRDF has declared to pursue the developmental state¹⁰² so that both the government and the private sector will play their respective role in the economy. It is also important to note that Ethiopian government is to pursue a developmental state structure and play developmental role in the context of constitutional democracy.

The Ethiopian government has also repeatedly declared that democratic developmental state is a matter of necessity for the country arguing that one is not the anti thesis of the other.¹⁰³ Poverty being declared as the big enemy of sovereignty of the state and obstacle to its transition to democracy by the government, its major goals is as mentioned in chapter one achieving economic development and deepening democracy so that the normative state envisioned in the constitution can be sustained. In addition to its normative value as an objective, the instrumental importance of democracy for sustainable economic development is also recognized.¹⁰⁴ It thus

¹⁰¹ Ibid

¹⁰² Emanuele Fantini (2013), developmental state in Ethiopia, economic transformation and social diversification in Ethiopia available at http://www.ispionline.it/sites/default/files/pubblicazioni/analysis_163_2013.pdf, last visited, October 23/2013, pp 4.

¹⁰³ UNDP, Ethiopia (2012), "Democratization in a Developmental State: *The Case of Ethiopia*; Issues, Challenges and Prospects", *Development Brief*, No. 1, 2012, pp17.

¹⁰⁴ Ibid

primarily demands public participation in the political developmental settlement to generate political capacity of the government necessary to implement development policies effectively. The constitutional democracy context will also promote the institutionalization of state-society relation in developmental governance where in development policy and decision making will be transparent and accountability be secured.

Different issues and possible challenges on the possibility of success of democratic developmental Ethiopian state are however raised;¹⁰⁵ social diversity, democratization itself, Fragility of the civil service, prevalence of rent seeking and globalization. Diversity among political elites with regard to the political choice of developmental policies and land ownership are also issues some authors consider worth settlement.¹⁰⁶

Though the purpose of this paper is not to discuss the possibility or impossibility of developmental state in the constitutional democracy state Ethiopia, the mentioning of the potential challenges is with the aim to identify what an independent judiciary can help address which challenges. Much will be said on this in Chapter Five

¹⁰⁵ Id pp 14-16

¹⁰⁶ Ibid

CHAPTER THREE

THE JUDICIARY AND ITS ROLES IN DIFFERENT TYPES OF GOVERNANCES

3.1. Introduction

The judicial system is commonly defined as the governmental branch responsible for enforcing the law, interpreting and adapting it to concrete cases and solving disputes and conflicts.¹⁰⁷ Laws interpreted and enforced may include constitutions to test validity of subordinate statutes, regulations and administrative decisions. Different kinds of functions have been assigned to the judiciary in different times and places. And difference in ideologies and politics have been responsible for the shifts and differences in the way judges and Courts operate.¹⁰⁸

However, the role of the judicial system as one of the key institutions of the modern state, in spite of some varieties from state to state cannot be disregarded when it comes to the discussions about development. This in turn invites a consideration of the role of the state and market in the socio economic and political goals of a given society at given period of time.

The development of courts as a third branch of governments is associated with the notions of separation of power and rule of law and hence a discussion on judicial role for development in modern states cannot escape consideration of these two political concepts. The discussion on judicial independence and the need for it in general and in different systems of governance in particular in a separate chapter is thus with the aim to examine the significance of the two political ideals behind judicial independence in attaining developmental goals of a given society.

While advancing the normative state (constitutionally limited state power) is usually claimed to be at the heart of the two political notions¹⁰⁹, successful developmental states in East Asian region, it is argued, largely depended on the strong/prerogative state.¹¹⁰ The argument that

¹⁰⁷ Natalia Langenegger and Vivian M. Ferreir, internet source, supra note 1

¹⁰⁸ Ibid

¹⁰⁹ Kanishka Jayasuriya, the exception becomes Norm; law and the regime of exception in East Asia, Asian-Pacific law and policy V 2 No.1, 2001, PP 109-127 at pp 119-124

¹¹⁰ Ibid

democracy and rule of law are instrumentally important for development and vice versa¹¹¹, however, suggests some possible points of linkage between separation of power and rule of law on one hand and developmental state on the other hand. Such a linkage, if any, is important particularly for emerging developmental states which pledged to operate in the context of constitutional democracy.

3.2. Separation of Powers and the Judiciary

The notion of separation of powers is an enduring element of constitutionalism.¹¹² Although the invention of the concept is arguably traced back to works of John Locke, many scholars agree that the first person who gave it a paramount political importance is Montesquieu and remains to be the leading for consultation and citation on this subject.¹¹³ His contribution to this topic is important particularly because he emphasized the function of judiciary and its equality with the other two branches of government as a new contribution to the concept¹¹⁴.

The doctrine of complete separation of power assumes that power corrupts and separation of power is essential for democracy and liberty.¹¹⁵ Concern with nature of man (a desire to abuse power) being at the heart of Montesquieu's thought, the concentration of all powers, he contended would result in despotic government, tyranny or suppression of all forms of liberty.¹¹⁶ This paper is concerned with the horizontal aspect of the doctrine as it demands a judiciary functioning equally with the executive and the legislative branches of government.

Later, a distinction between pure or complete doctrine of separation of power and modified separation of power gave rise to a system of check and balance and development of system of

¹¹¹Currently, there is a wide range of agreement that development as defined widely is as much instrumental to democratization and rule of law as the latter are for development. See for further reading *David M. Trubek and Alvaro Santos* (Eds), *The New Law and Economic Development: A Critical Appraisal*, New work, Cambridge University Press(2006);U pendra Bax, *the future of human rights*(2nd Ed), Oxford university press, 2005; Omano Edigheji,(ed,) *constructing a democratic developmental state in south Africa, potentials and challenges*, cape town, human science research council(HSRC) press, 2010 and Fana Hagos Berhane, *Law in Development: Concepts and Prospects* in: Elias N. Stebek and Muradu Abdo (Editors), *law and development, and legal pluralism in Ethiopia* , Addis Ababa , JLSRI Publications ,2013 pp 17-31

¹¹² Vile MJC, *constitutionalism and the separation of powers*, oxford: Charendon press (1967) p2

¹¹³ IBID

¹¹⁴ Id pp76

¹¹⁵Barron De Montesquieu, *Man and Society*in: Carl J. Friedrich (ed.), *An Introduction to Political Theory*, New York,Harper and Raw Publishers, 1967

¹¹⁶ Ibid

judicial review.¹¹⁷ Ever since, judicial review is considered essential for the maintenance and limitation of separation of powers.¹¹⁸

The function of the judiciary to review constitutionality of particularly legislative acts is however, criticized as paradox to democracy based on the assumption that people, not institutions of government are sovereign.¹¹⁹ Such an argument and counter arguments have finally given rise to competing, but equally legitimate interests namely; the need to have three independent branches of government and a system of check and balance among each other.¹²⁰ The agreement authors on the subject reached as a compromise is the establishment of constitutional frame work with in which all branches of government should collaborate given that they all have to serve the sovereign, which are the people.¹²¹ Such a framework means that the three organs of state enjoy an institutionalized autonomy to serve social objectives and the collaboration between them if any is with the view to achieve such objectives in light of which again, one checks the performance of the other.

The advent of political parties, it is said further reinforced the collaboration between the three branches of government and sometimes undermined the doctrine of separation of power as one winning party may control all the executive and the legislative bodies resulting in the classification of powers to remain only formal.¹²² Thus, the more separation of power is undermined, the more prerogative state prevails even in a formally constitutional democracy. The case of Japan and South Korean developmental states with regard to the separation of power are examples confirming this view. It is claimed that the dominant nature of the Liberal Democratic Party, the ruling party in Japan of the time resulted in a fusion of the parliament and the executive body, which Johnson pointed it out as an advantage Japan exploited to design and implement industrial policies authoritatively.¹²³ The same was true in South Korean

¹¹⁷ Vile MJC, *supra* note 112, p85-86

¹¹⁸ *Ibid*

¹¹⁹ Eugene V. Rostow (1952), *the Democratic Character of Judicial Review*, Yale Law School Series, Available at <http://digitalcommons.law.yale.edu/fss-papers>, last visited may 25/2014.

¹²⁰ Le Sueur, AP & Herberg, JW. (1995) ,*Constitutional and administrative law*. London: Cavendish Publishing Ltd

¹²¹ Andre M B Mangu, separation of power, independence of the judiciary, and good governance in African union member states, available at www.cpahq.org/cpacq/cpadocs/goodgovernancein.African_union_memberstates.pdf last visited may 25/2014.

¹²² Brian Z. Tamanaha, „On the Rule of Law: History, Politics, Theory, Cambridge,Cambridge University Press, 2004, p71

¹²³ , Chalmers Johnson, *supra* note 37, pp 17

developmental state when the military supported ruling party, Democratic Justice Party controlled the executive and legislative power for a long time.¹²⁴ The judiciaries of these states, it is said, enjoyed at least an institutional autonomy, but were arguably collaborative with the other branches of government.¹²⁵ Much will be said on this point in chapter four which will examine the practical experience of judicial role in these states in time of their developmental state model.

An important nexus between the principle of separation of powers and the need for an independent judiciary one can make from the discussion here is thus that the judiciary should be independent enough and a system of check and balance to sustain accountability of the same should be in place so that courts can deliver maximum benefit to the sovereign. What is the benefit of sovereign towards the attainment of which courts should collaborate is in fact an issue linked to social needs over which the society prioritizes. This implies that collaboration in its own right may not be a problem for instances for the judiciary to function properly or independently if it takes the benefit of the people in to account. The check against the judiciary, if any should also be in light of the interest of the sovereign so that the purpose of dividing governmental power between three independent authorities will be met.

3.3 Rule of Law and the Judiciary

In spite of prominence of the concept of rule of law anywhere in the world, it is also characterized by having different meanings and understandings in different societies making attempts to define it difficult. Protection of fundamental human rights, democracy and institutionalization of general and stable rules enforceable by independent court are the different meanings different authors attempt to attach to the concept in defining its meaning.¹²⁶ Consequently, governments from different ranges of societies, culture, economic and political orientations have been unanimously advocating for it.¹²⁷ Disagreements on the meaning and scope of rule of law among different societies and scholars however, led to general classification of the ideal in to two perspectives; formal conception and substantive conception of rule of law.

¹²⁴ The ruling party was also known as Democratic Republican Party until 1979 which latter changed in to Democratic Justice Party: See Aurel Croissant, Electoral Politics in South Korea, in: Aurel Croissant, Gabriele Bruns, and Marei John, (eds), Electoral politics in South East and East Asia, Singapore: Friedrich Ebert Stiftung, 2002, pp 233-277 at pp 239

¹²⁵ Chalmers Johnson, *supra* note, 37, pp 17

¹²⁶ Gianluigi Palombella, „the Rule of Law Beyond the State: Failures, Promises, and Theory, International Journal of Constitutional Law, Vo. 7.No.3,2009, pp 442-467 at p 453

¹²⁷ Z. Tamanaha, *supra* note 122, pp 2

The formal understanding of rule of law, sometimes also called as liberal legalism demands that rules should be rational, public knowledge, clear, general, stable and institutionalized so that predictability and certainty in all life aspects including economic activities can be secured.¹²⁸ This conception of the rule of law, however give little concern to the actual content of the laws existing in a legal system. Nor does it concerns with how the law should be made; by tyrant, democratic majorities or any other ways.¹²⁹ Thus, even if the principle of legality demands even governments to act according to prescribed rules, the fact that little attention is given to the nature of such laws and procedure of their enactment may enable people in political power to use such laws to concentrate power and as instrument of exclusion.

An understanding of rule of law narrowly as formal legal infrastructure or framework is also criticized for ignoring the significance of informal institutions in some societies. Such critiques consequently conclude that the formal conception of rule of law can result in structural exclusion in societies where the principle of equality may not be implemented practically due to different extra-legal factors.¹³⁰

The substantive conception of law and its advocates go beyond formalism and are much concerned with the content or nature of law and the way laws come in to force. Emphasis is placed on whether a law is good or not and protects individual rights before it claims to be supreme and demands compliance with it.¹³¹ Generally, protection and entrenchment of fundamental or constitutional rights, justifiability of the rights before courts or similar institution, and the overall fairness and justness of laws as measured by extra-legal principles and acceptable political ideals are concerns of substantive conception of rule of law. It also demands a judiciary functioning independently to enhance such elements.¹³² The fact that delivery of benefit of any kind and justice to society is considered to be elements of the substantive conception implies that independent courts can go beyond an application of formal rules to invalidate a certain law or administrative action as unconstitutional or order the two branches of

¹²⁸ Paul Graig, Formal And Substantive Conceptions of Rule of Law; Analytical Framework in: Richard Bellamy(Ed), *The Rule of Law And Separation of Powers*, University of Essex, UK, Dartmouth Publishing Company, 2005, pp96.

¹²⁹ Joseph Raz, „the Rule of Law and Its Virtue in: Richard Bellamy (Ed,) *The Rule of Law and Separation of Powers*, University of Essex ,UK, Dartmouth Publishing Company, 2005, PP 80.

¹³⁰ Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, a Research Paper Prepared for Conference on the Rule of Law, Nagoya University, Japan, June 13, 2009.

¹³¹ Z. Tamanaha, supra note 122, pp 11

¹³² Paul Graig, supra note 128, pp 109.

governments to respond to social problems. It also suggests the possibility for content and meaning of rule of law to vary from society to society which, *inter alia*, differ in their level of economic, social and political development.

3.4. Judicial Independence and Its Roles in Democratic Governance

As already discussed above, the political ideals of separation of power and rule of law combined necessitated for an independent judiciary to interpret and enforce laws which govern the state-citizens interactions and interactions between citizens so that order, free commercial activities and good governance can be secured. The substantive conception of rule of law and the qualified notion of separation of power, as considered above, have expanded the level of judicial independence suggesting how independent judicial system is important in a normative state or constitutional democracy.

Historically, the collapse of the feudal system and the unification of nation state gave rise to a constitutional monarch that generated centralized economic and political governance with the formal conception of rule of law prevailing in the legal system.¹³³ In such cases, courts interpret and enforce general norms to decide cases involving private property, contracts and centralized criminal laws which combined resulted in a strong enough state capable of securing order and free commercial activities.¹³⁴ Courts however, are considered in such conditions as agents of monarchs or individuals in power as the latter were with absolute and unfettered power enabling them to interfere arbitrarily.¹³⁵ This suggests that a strong state capable of protecting private property rights and contractual entitlements is as well capable of violating such rights.

The emergence of new mercantile bourgeoisie which struggled against absolutist rule and unlimited powers led to constitutionally democratic system of governance with the effect of expanding independence of judicial system both in scope and level.¹³⁶ Following such a constitutional democracy set up, the rule of law broadly understood and its general application emerged to limit the whims of rulers by subordinating their acts to the law and ensured that

¹³³Kenneth W. Dam, the law-growth nexus; rule of law and economic development, Washington, D.C, Brookings Institution Press, 2006, Pp 76-77

¹³⁴ Ibid

¹³⁵Joseph B Diesch , the paradigm of an independent judiciary: Its history, implications and limitations in Africa, available at www.kas.de/upload/louslandshomepages/namibia/independence-judiciary/diescho.pdf last visited September 28,2014, pp 20.

¹³⁶ Id pp21

citizens, the state and its institutions are all subjected to the supremacy of the law.¹³⁷ The rule of law in addition to securing order and property rights and their transfer restricted competence of the state. Protection of property rights and contractual transaction against the state demanded separation of power between the three branches of governments and a judicial review of administrative and legislative acts against including constitutional guarantees.¹³⁸ Such an institutional arrangement assumes that a reliance on market forces is sufficient for economic growth.

An understanding of rule of law this way, however faces a challenge when industrial policies, the design and implementation of which depends on strong, but effective executive coexisted with market principles as was the case in North East Asian developmental states. In these states, governments as a matter of choice regulated in the economy implying that the rule of law and its application to limit the state may not be sufficient for economic development.

Judicial enforcement of administrative laws which empower the bureaucracy and provide rules of intervention in a democratic context and judicial review of administrative actions is also believed enhances bureaucratic efficiency which is attainable up on consistent and coherent bureaucratic decision making.¹³⁹ The validity of this argument, however, depends on the party system of democratic states. The dominance of legislative body and other state institutions by a single strong party, it is said, can help ruling parties in constitutional democracy control the efficiency of their agents with mechanisms other than judicial supervision such as internal control and ideological indoctrinations.¹⁴⁰

Politically, the rule of law is understood as the transformation of the absolutist state to a liberal constitutional state due to the political victory of the bourgeoisie against the exclusive political power.¹⁴¹ It is against this background most constitutional law experts concur that the independence of the judiciary is only possible in a constitutional democracy that involves the

¹³⁷ Ibid

¹³⁸ Id pp22

¹³⁹ Mark Hertogh and Simon Halliday(Ed),Judicial Review nd Bureaucratic Impact; International and Interdisciplinary Perspectives, Cambridge, Cambridge University Press, 2004 Pp15-17

¹⁴⁰ Tom Ginsburg, Comparative Administrative Procedure; Evidences from East Asia, Constitutional Political Economy, V 13. Pp 247-264 At Pp248-250

¹⁴¹ Joseph B Diesch, internet source, supra note 135, pp 23.

exercise of governmental power bounded by rules.¹⁴² The conventional assumption of democratic governance is power fragmentation in state institutions necessitating formalization of interactions between the state agencies and state and citizens with effect of judicial intervention in cases such rules are violated.¹⁴³ Thus, an independent judicial system through enforcement of rules of games helps to settle political disputes forcing power contenders to negotiate or form coalition for collective governance. The idea that social fragmentation and hence power fragmentation representing the nature of society is a reason for development of the constitutional review power of courts in federations¹⁴⁴ is also consistent with this view.

Political power fragmentation which is said is likely in democracies with deep social division and weakens the political capacity of development-oriented regimes also provides a space for courts to intervene in policy matters.¹⁴⁵ This is due to the reason that power division at the different state institutions makes it uneasy for governments to enact detail laws leaving a room for the judiciary to interpret abstract objectives of general laws with the effect of addressing specific policy issues such as of social protection.¹⁴⁶ It seems for this reason that authors on the new developmental state recommend rule of law for effective developmental governance in emerging developmental states whose political capacity is likely to weaken due to internally or externally induced democratization.¹⁴⁷

In sum, the judiciary in constitutional democracies may have the function of promoting economic predictability, securing order and stability through enforcement of criminal laws and human rights laws and adjudicating constitutional disputes between organs of government or government and citizens. However, the scope of activities over which a judicial system may have independent power may differ from democracy to democracy for different factors such as economic policy, power centralization or fragmentation and the existence of alternative institutions. The role of the judiciary with varying powers and its extent of positive contribution also depend on its institutional capacity to function efficiently. Personal autonomy of court officials from any kind of pressure or influence is also a Paramount factor.

¹⁴² Ibid

¹⁴³ Ibid

¹⁴⁴ Tom Ginsburg, *supra* note 140; .see also Assefa Feseha, Constitutional Adjudication in Ethiopia; Exploring the Experience of House of Federation, *Mizan Law Review*, Vol. I No.1, June 2007, pp 1-33

¹⁴⁵ Tom Ginsburg, *supra* note 140, pp 260-261

¹⁴⁶ Id , pp 258-260

¹⁴⁷ Ibid

3.5. Judicial Independence and its Roles in Authoritarian Forms of Governance

Conventional theories of judicial independence as considered in above held that constitutional democracy is a necessary requirement for an independently functioning judiciary. Recent studies however have found that type of regime or governance has only the effect of limiting or expanding the scope and level of judicial independence.¹⁴⁸

Authors such as Ginsburg admit that judges as a general matter have greater scope and levels of independence in democracies than in authoritarians.¹⁴⁹ This is to say that level of judicial independence may not be extended vertically to involve decisions against political leaders or may not be willing to decide against the same for fear of punishments or due to political pressures in authoritarians. One thing worth learning here is therefore that political competition should not be taken as a necessary requirement to empower courts to function independently at least in some activities. Furthermore, all formal democracies may not involve political competition between different parties and may not exhibit power fragmentation with its implication on the role of a judiciary in formal democracies to vary from one another.

While authoritarian governance can be commonly experienced by states with single party systems, constitutional monarchs, personality leaders and military leadership, the scope and level of judicial independence is argued to be wider and higher in the first two authoritarian forms of governance.¹⁵⁰

Authors on the subject matter identified several reasons why authoritarian governments may want to empower the judiciary and grant it genuine autonomy in certain areas;¹⁵¹ a credible commitment of governments to markets, the need to monitoring the performance of lower-level bureaucrats effectively and the need to legitimate the regime and its policies.

¹⁴⁸Tom Ginsburg, *supra* note 13, pp.251

¹⁴⁹ *Ibid*

¹⁵⁰Peter H. Solomon, Jr, judicial power in authoritarian states; *The Russian Experience in: Tom Ginsburg and Tamir Moustafa(Eds), Rule by Law: The Politics of Courts in Authoritarian Regimes, Cambridge and New York, Cambridge university press, 2008, pp326-337*

¹⁵¹Tom Ginsburg, Administrative Law and the Judicial Control of Agents in Authoritarian Regime in:Tom Ginsburg and Tamir Moustafa(Eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes, Cambridge and New York, Cambridge university press, 2008, pp 58-73. See also Hilton L. Root and Karen Ma, Judicial Systems and Economic Development in:Tom Ginsburg and Tamir Moustafa(Eds), Rule by Law: The Politics of Courts in Authoritarian Regimes, Cambridge and New York, Cambridge university press, 2008, p204-206*

With regard to credible commitment to markets as reason for authoritarian governments to empower the judiciary, many scholars noted that judicial independence promotes economic predictability on part of individual economic actors.¹⁵² Such a legal configuration is ultimately linked with economic growth as the result of increasing investment and trade, a goal which developmental states to a varying degree pursue. Protection of property rights and enforcement of contractual transaction are at the heart of this argument. Protection of such entitlements as the result of judicial enforcement of the general norms both against the government and individuals which prevent undue expropriation may also demand primarily a general order which in turn depends on enforcement of criminal laws.

The need to control lower level-bureaucrats is also another reason to empower courts and thus one area over which courts play a role in terms of promoting efficiency of the bureaucracy and consequently legitimacy of governments. It is said that all governments, democratic or authoritarian, face the problem of monitoring their own employees, who may abuse their office¹⁵³. This is to mean that the policy choice of political elites, a choice which may also be supported by majority of the society may not be implemented effectively by state bureaucracies. Such a principal-agent problem emanates from opportunistic behavior of bureaucrats or corruptive interests, lack of necessary expertise of individual bureaucrats or their different policy choices.¹⁵⁴ For this reason, a limited regime of administrative complaints by the public (including judicial review) is believed can let bureaucratic malfeasance exposed to the knowledge of the regime at the center and improve the quality of governance.¹⁵⁵ This concern is important particularly for states whose bureaucracy is with vast discretionary power to pursue the developmental vision and states with at the same time large size of the public administration. Judicial control of administrative agencies in authoritarian regimes can be utilized alone or in combination with other two controlling mechanisms; internal control and ideological indoctrination which are argued unsuitable for democratic forms of governance.¹⁵⁶ Though it is common for democracies to utilize internal controlling and ideological internalization, the utilization of or total reliance on these mechanisms is more challenging in democracies than

¹⁵²Tom Ginsburg, *supra* note 13, pp.254.

¹⁵³ *Ibid*

¹⁵⁴ Mark Hertogh and Simon Halliday, *supra* note 139

¹⁵⁵ *Ibid*

¹⁵⁶Tom Ginsburg, *supra* note 151

authoritarian systems.¹⁵⁷ The diversity of social backgrounds of individuals filling the bureaucracy, is also said, may exacerbate the difficulty¹⁵⁸ forcing political elites of democracies with deep social division to largely depend on judicial supervision to monitor their agents

The third important reason authoritarian regimes may want to empower courts is for their legitimacy and it may come in different forms; judicialization of regime policies such as industrialization, creating an image of rule-bound government in the eyes of foreigners and delivering a quality justice in areas over which the judiciary is empowered.¹⁵⁹ The point is that for the public and foreigners to some degree to place trust on the government, the regime should primarily give genuine autonomy to the judiciary in areas it intervenes so that it can generate legitimacy to the government in return. Such autonomy can help the judiciary to devise its own institutional measures related with neutral, efficient and speedy decision making. Such an institutional structure of courts can in turn help regimes disseminate their policy to the society as the latter is likely to accept even controversial policies on the belief that they are a court blessed policies.¹⁶⁰ But, for that to happen, public perception on reputation of the judiciary for its independence matters to a larger degree.

The judicial system in authoritarian regimes, unlike constitutional democracies is however not independent in political cases.¹⁶¹ While states can formally be a constitutional democracy, the absence of power sharing in state institutions or political competition, as mentioned here above, can limit independence of courts in political sphere. In such cases, leaders at the top often use courts as instruments of social and political control to silence their opponents and thus a transaction over which judicial independence is curtailed.¹⁶² An absence of independence or judicial role in such area can be manifested in different ways including absence of power of constitutional review or a presence of political pressure against judges in case of formal power.

¹⁵⁷ Ibid

¹⁵⁸ V. Fritz and A. Rocha Menocal (2007), Developmental States in the New Millennium: Concepts and Challenges for a New Aid Agenda. Development Policy Review, 25(5), pp 531-552

¹⁵⁹ Tom Ginsburg; supra note 13, pp255.

¹⁶⁰ Ibid

¹⁶¹ Ibid

¹⁶² Beatriz Magaloni, Enforcing the Autocratic Political Order and the Role of Courts: The Case of Mexico in: The Politics of Courts in Authoritarian Regimes, Cambridge, Cambridge university press, 2008, p 180-207

3.6. Judicial Independence and its Roles in Law and Development

Orthodoxies; Developmental State in Focus.

The discussions here-in-above indicate that an independent judiciary is important in both authoritarian and democratic forms of governances. Economic predictability, controlling administrative actions, legitimizing state policies and maintaining security and order are all the roles independent courts can play in whatever kind of governance. But as seen in the discussion above, variety of forms of governance in states can have implication on the scope and level of judicial independence to vary from state to state. Power fragmentation as the result of institutionalization of political competition(democracy) expands judicial independence and role to include litigation of political cases or policy issues in an independent third party, courts; ordinary or special constitutional courts.

With regard to development, the conventional theory claims that independent legal institutions in general and courts in particular are necessary for development.¹⁶³ But, as considered in the introductory part of this chapter, variety in political choice of development policies and strategies from society to society matters a lot on the scope and kind of roles courts can play independently.

As mentioned in chapter two, in the first law and development orthodoxy, law was seen in an instrumental fashion, as a tool to support state's policies and to generate economic growth. Public and Administrative Law with distributional purpose gained importance, allowing the creation of a powerful state bureaucracy for regulation of the economy and the definition of national economic policies even affecting private right without any judicial review. Because, states through their bureaucracies were considered drivers of economic development and role of private economic actors was not recognized, legal institutions in general and courts in particular were considered irrelevant.¹⁶⁴ Accordingly, the role played by law and its machineries including

¹⁶³John K.M.Ohnesorge, *The Rule of Law, Economic Development ,and the Developmental states of North East Asia*, in: Christopher Santos(Ed): *Law and Development in East and South East Asia* London ,Rutledge Curzon (2003) pp 70-99 at pp70.

¹⁶⁴Natalia Langenegger and Vivian M. Ferreir, *supra* note 1 internet source pp 4.

the judiciary in East Asia's remarkable economic growth under the developmental state literatures has been largely ignored, even disputed as irrelevant.¹⁶⁵

But, a recent study refuted this view and has concluded that law and its machineries (courts for instance) mattered in East Asian early developmental states to the extent of the role markets played in the economy.¹⁶⁶ This highlights that variety in political choice with regard on role of state and market forces in economic management and resource allocation is one factor that explains for functions of courts to vary from state to state. This in turn suggests the need to make clear distinction between statist and capitalist developmental states in studying the role of the judiciary towards development.

The second law and development, neoliberal rule of law paradigm calls for empowering free market and limiting governments.¹⁶⁷ Economic growth and credible commitment of governments to private property and contract enforcement being the focus of the second law and development moment, it demanded deregulation and hence a shift in power from bureaucracy to the judiciary and private economic actors.¹⁶⁸ This paradigm assumes that predictability of judicial enforcement of universal and formal rules promotes certainty¹⁶⁹ in the business environment which in turn expand contractual transaction and time horizon of transactions. The effect is increasing large scale investment and trade causing to economic development.

This development paradigm also reflects a shift from one strand of Weber's thinking to another in that while rationalization of culture and social belief is considered as creating cultural environment conducive for individual actors (the first strand), an emphasis on institutional constraint of government in the neoliberal moment is regarded as a shift from social culture (group) to protection of individual capitals.¹⁷⁰

The rule of law and independent judiciary orthodoxy thus seems to assume that its ascendant (modernization theory) was successful in terms of creating a society transformed from traditional

¹⁶⁵Katharina Pistor And Philip A. Wellons, Supra note 12.

¹⁶⁶ See John K. M. Ohnesorge ,Developing Development Theory; Law and Development Orthodoxies and the East Asian experience, U. Pa. J. International Economic law, V 28.N0.2. (2007), at pp 221-311; Kanishka Jayasuriya, the Rule of Law and Capitalism in East Asia, The Pacific Review, 9(3), 1996, pp. 367-388 at pp 387, and Christopher Antons, supra note 87.

¹⁶⁷David M. Trubek and Alvaro Santos, supra note 4

¹⁶⁸ Ibid

¹⁶⁹ Ibid

¹⁷⁰ Tom Ginsburg, supra note 71, PP 831-832.

institutions to the modern one which in turn implies, as mentioned in Chapter Two, that modern law can successfully replace informal rules in developing countries. The fact that modernization theory indicated cultural transformation as the first step for development and Weber himself noted the need for cultural transformation before technological innovation for sustainable development¹⁷¹ also confirm this understanding. Much, an emphasis on protection of individuals of their property and security of contracts including against government is also an indication for its assumption that individuals are the sources of capital and skill necessary for development.

This view, however has received different critiques; the fact that it places little attention on informal institutions and their role in developing countries is one source of criticism against it.¹⁷² The assumption that individuals are sources of capital for development also reminded authors to counter argue that developing countries lack an independent bourgeoisie capable of generating a socially responsible development or industrialization or if any, it may lack commitment to assume risks of productive investments.¹⁷³ The fact that some developing constitutional democracies may experience one party system or political parties may agree to form coalitions to govern collectively instead of involving in competition for power may also challenge the plural democracy assumption of this orthodoxy which demands strict respect and protection of civil and political rights with an independent judiciary.¹⁷⁴

The failure of the neoliberal movement and its economic policies to deliver the promise of development for developing countries indeed led to different critiques including those mentioned above, resulting to the need for consideration of experiences of East Asian developmental states and the emergence of new developmental states whose legal configuration is yet to be developed from their fragmented practices.¹⁷⁵

Thus, there are some attempts since recently to formulate theoretical frameworks about what the law and legal institutions can play in new developmental states. Law is regarded as objective,

¹⁷¹ Ibid

¹⁷² Id pp 833

¹⁷³ Kanishka Jayasuriya, *supra* note 166, pp 375-376.

¹⁷⁴ Ibid

¹⁷⁵ Trubek, D.M., *supra* note 5, pp 5.

instrument and a framework of development.¹⁷⁶ This is to say that laws including the constitution of given developmental state may define policy objectives of the state and it can also provide legal tools by which human behavior can be channeled to the objectives; incentives and penalties. Law in the context of developmental state is also believed to serve as an institutional framework defining the organization, specific function of institutions (public administration) responsible for implementation of development policies, the relation among these institutions, and their interaction with society and other state institutions.¹⁷⁷ This in turn may demand the need to have a comprehensive administrative law capable of defining the extent of power of public administration and its organization, the boundary between public sphere and private sector and their interaction

It is in light of these theoretical insights, the experiences of Japan, South Korea and South Africa will be assessed in Chapter Four to draw comparative empirical lessons for Ethiopia. This does not however mean that the role of the judiciary in developmental states as gathered from evidences of East Asian countries is sufficient for other developmental states to draw a framework as the political and economic contexts(both globally and domestically) within which developmental states are pursued obviously varies from state to state. The nature of society is also likely to vary from country to country in that some states may be characterized by social division and others with homogenous society with its implication on institutional arrangement of judicial independence and its role for development to vary from developmental state to developmental state. Much will be said on this point in the next Chapters.

¹⁷⁶Diogo R. Coutinho Linking Promises to Policies: Law and Development in an Unequal Brazil, *The Law and Development Review Manuscript* 1055,pp 21, available at <http://www.bepress.com/ldr> last visited september 25/2014

¹⁷⁷ Id pp 22

CHAPTER FOUR

THE ROLE OF THE JUDICIARY IN DEVELOPMENTAL STATES; EXPERIENCE OF FOREIGN COUNTRIES

4.1. Experience of Early Developmental States (From North East Asia).

4.1.1. Japan

A. Economic Predictability and the Judicial Role

As discussed in chapter two, prominent authors including Johnson noted that both industrial policy and the private sector contributed to economic development of Japan. This suggests that the private sector contributed to the development of Japan in two ways: by creating a growth coalition with the government, the latter helping it to be competitive producer at the international market level and the second category involving in the economy independent of the government. The argument that the government in Japan developmental state did not regulate all the economy¹⁷⁸ also supports this view. Protection of property and security of contracts which underpin productive investment and trade should thus have depended on a certain institution other than the bureaucracy in the second category of private businesses.

Before Japan had adopted the pursuits of a developmental state, it had put in place regimes of property law and contract security since the nineteenth century with the purpose to satisfy foreigners that Japanese justice was not barbaric.¹⁷⁹ The history of judicial independence on the same legal regime is also traced back to this point of time.¹⁸⁰ Kings of Japan, however started to give the judiciary an autonomous role in the same area since early twentieth century with the aim to promote economic predictability and generate revenue.¹⁸¹ The judicial power in protection of property rights and enforcement of contracts also continued during Japan's decades of developmental statehood.¹⁸²

¹⁷⁸ John Ohnesorg, Pathways to Administrative Law, a paper prepared for Conference on Comparative Administrative Law, Yale Law School, may 7-9, 2009, PP 7

¹⁷⁹ Tom Ginsburg, Dismantling the Developmental State; Administrative Procedure Reform in Japan and Korea, American Journal of comparative law (49), 2001, pp 585-622 at pp 590.

¹⁸⁰ Ibid

¹⁸¹ Ibid

¹⁸² Id p 7

The judicial system and its officials during these decades of developmental statehood, it is said were also less corrupt even compared to politicians and the bureaucracy of the same period.¹⁸³ The high quality of judges, their high level of status both financially and socially accounted to a judicial system characterized by absence of corruption and consistent decision making.¹⁸⁴ Professional quality of court officials was also strengthened through recruitment of candidates among the talented ones and a two years training¹⁸⁵ before entering the profession which entailed to a relatively efficient and consistent judicial decisions in disputes arising from private economic regimes

With regard to protection of property rights against arbitrary governmental interference, courts in Japan had formal power to review legality and constitutionality of administrative actions and laws.¹⁸⁶ Private individuals could thus bring issues of property right protection against all governmental actions in including lower courts, the Supreme Court with the power to give final decisions.¹⁸⁷ An assessment of the practice of Japan on the same issue also reveals that individuals litigated against legality of administrative actions and constitutionality of laws which obstruct their property rights in courts.¹⁸⁸ The judiciary particularly entertained disputes between private economic interests and public interest (both defined in the constitution of the state) in case industrial elites and state relation affected third party economic benefits.¹⁸⁹ Evidences for instance show that citizens of Japan challenged constitutionality of the law on land expropriation for public interest in courts during this period when Japan pursued the policies of a developmental state.¹⁹⁰

Japan's courts, however, rarely invalidated laws (by ruling public interest as unconstitutional) partly because public interest was defined narrowly to mean economic growth.¹⁹¹ Court rulings that seemed judicial review and some instances of actual judicial challenge yet forced political

¹⁸³ Frank K. Upham, Political Lackeys or Faithful Public Servants: Two Views of the Japanese Judiciary," *Law and Social Inquiry* vol. 30, (2005), pp 421-55

¹⁸⁴ *Ibid*

¹⁸⁵ *Ibid*

¹⁸⁶ Article 81 of the 1947 constitution of Japan

¹⁸⁷ Article 76 and 81 of the 1947 constitution of Japan

¹⁸⁸ Kuniko Shibata, the public interest in developmental state; the law, economy and planning in post war Japan , conference paper for the 13th international planning history, 10-13 July 2008, Chicago, 2008, p13

¹⁸⁹ *Id* pp 3-4

¹⁹⁰ *Id* pp 6

¹⁹¹ *Ibid*

and administrative elites to negotiate particularly with group interests whose economic benefit was at stake.¹⁹²

The ultimate effect of judicial enforcement of the rights to property and their secured transfer (during this period) was economic predictability. This role of the judiciary in the economic domain and the relative stability of property rights and contract enforcement regimes indeed led authors to note that developmental state pursuits in Japan demonstrated liberal legalism in the economic sphere.¹⁹³ Following the assessment of experiences of North East Asian developmental states, Pistor and Wellons also came with a supporting conclusion that legal institutions in general and courts in particular matter in developmental states to the extent private sector plays a role in the economy.¹⁹⁴

However, the commercial and civil litigation rate in Japanese courts during this period was lower than other Asian tigers thereby challenging the claim that judicial system becomes more active in democracies than authoritarian states.¹⁹⁵ Different factors accounted for the lower rate of judicial litigation in developmental state Japan. Scarcity of capital and entrepreneurship in the market made cooperation rather than competition between private economic actors inevitable.¹⁹⁶ This condition of capital in developmental state Japan combined with predominance of communitarian legal principle in the society led informal institutions to play significant role in dispute resolution particularly at the early period of economic growth¹⁹⁷. Lower level of foreign investment in the market, costly court proceeding both in terms of money and time, and coalition between government and industrial elites in major industrial sectors were also additional factors that explain the lower judicial litigation rate.¹⁹⁸ The judiciary was also at times considered by a certain part of the public as a part of western imposed institutions and this can also be taken as

¹⁹² Ibid

¹⁹³ For further reading, see Stephan Haggard, Andrew MacIntyre, and Lydia Tiede, *Rule of Law and Economic Development*, California, California University Press (2008), P209; Tom Ginsburg, *supra* note 71 and Katharina Pistor and Philip A. Wellons, cited at 12

¹⁹⁴ Katharina Pistor and Philip A. Wellons, *supra* note 12.

¹⁹⁵ Michael Trebilcock and Jing Leng; the role of formal law of contract and enforcement in economic development, presented at the symposium on Contemporary Political Theory and the Private Law at the University of Virginia School of Law on February 17 and 18, 2006, p40

¹⁹⁶ Kanishka Jayasuriya, *supra* note 166, pp 378.

¹⁹⁷ Tom Ginsburg, *supra* note 71 pp 832.

¹⁹⁸ Kanishka Jayasuriya, *supra* note 166, pp 378

one of the possible factors in enhancing the interest for individuals to settle their disputes out of courts.¹⁹⁹

It is said that for the reasons mentioned in above, informal institutions and their mechanisms of dispute settlement played a significant role in Japan in settling civil and commercial disputes particularly until the onset of economic development.²⁰⁰ Due to global integration of economy of Japan and democratization, judicial litigation and function had become more important particularly since 1980s.²⁰¹ But, as mentioned above, in the condition of limited capital and spirit of collectivism among members of society of Japan, the role of informal institutions in dispute settlement was paramount. Such condition helped courts to be moderately efficient in their performance as it allowed them to focus their resources on moderate number of cases²⁰² because this factor had clearly a positive contribution in rendering the case load of courts manageable thereby enhancing the quality of court decisions.

Much reliance on the informal institutions had, however, had its own dark side particularly after the beginning of expansion of the economy of Japan. It is said that factors beyond the control of potential judicial litigants such as costly judicial proceeding and limited access to legal service led to increasing group crime and corruption in many commercial and civil transactions.²⁰³ This suggests caution to understand when benefit of informal institutions outweighs the cost of relying on them and vice versa.

B. Effective State Intervention; Judicial Review and Its Role

In Japan, effective state intervention which resulted in successful economic development, as discussed in chapter two, is linked to the autonomy of the bureaucracy from capture by non productive private actors and its embeddedness to society. The issue to be discussed under this topic is what courts did play in terms of constructing effective bureaucracy in Japan developmental state. The examination under this topic is thus going to be made recognizing the

¹⁹⁹ Yasuda Nobuyuki, Transformation of Japanese Legal System in the Global era; Departure from Asian Developmental state model, a paper prepared for international congress on comparative law Asia- Mexico; economic reform and legal change in Asia and Mexico: a comparative perspective, Mexico city, October 4-5, 2005. PP20.

²⁰⁰ Tom Ginsburg, supra note 140, pp 255-258

²⁰¹ Michael Trebilcock and Jing Leng, supra note 195, pp42.

²⁰² Ibid

²⁰³ Ibid

other factors which, as discussed in chapter two, explain the features of bureaucracies of Japanese developmental state. State and society relations in developmental state Japan as mentioned above involved interactions between the state, industrial firms and average citizens involving in turn criminal law, administrative law and constitutional law.

The judiciary in Japan developmental state entertained corruption crimes and punished public officials including ministers.²⁰⁴ Such a judicial approach though in limited cases encouraged negotiation between firms and agencies implying that they were free from formal rules as long as they cooperate towards the developmental vision.²⁰⁵ Even if this condition led state and private firms' partnership and close interaction to be productive in early process of development, the fact that outsiders had little opportunity to know the partnerships and corruption crime cases depended on the initiation of the executive body, resulted in increasing corruption in the state as time went on with its further effect of forcing many ministers to resign in 1970s and the liberal Democratic Party to face electoral loss in 1990s.²⁰⁶

Japan also had a formal administrative litigation act since 1950s and had been applied by courts to refrain ministries and local governments to withhold legal benefits sought by productive firms if they clearly refuse to comply with administrative guidance from the outset.²⁰⁷ Courts also reversed administrative decisions for violations of informal administrative rules on ground of inconsistency.²⁰⁸ One can from this legitimately hold that judicial supervision based on formal rules and judicial deference in case of disagreement and agreement respectively between the two served as an incentive for administrative agencies to apply informal rules consistently and solicit consensus from business for industrial coalition. A judicial role of this kind can be linked to the embedded autonomy of the bureaucracy, an institutional feature of capitalist developmental state. Put other way, though state-business elite relation was largely informal, judicial review of administrative actions on ground of legality and consistency of application of informal rules helped the bureaucracy to remain coherent in decision making and embedded into at least industrial elites.

²⁰⁴ Setsuo Miyazawa, the Politics of Judicial Reform in Japan; the Rule of Law at Last, Asian Pacific Law and Policy Journal v.2.No.2.2001, pp92-121.

²⁰⁵ J. Mark Ramseyer and Minoru Nakazato, Japanese law: an Economic Approach, Chicago, University of Chicago press, 1999, pp 201.

²⁰⁶ Tom Ginsburg, supra note 179, pp 603

²⁰⁷ Mark Ramseyer and Minoru Nakazato, supra note 205

²⁰⁸ Ibid

State-industry relation was, however less transparent for outsiders or other emerging group interests entailing some state agencies and business to collude in corrupt practices.²⁰⁹ Informal relations between the two combined with legality and its direct legal effect on third parties as grounds of judicial review denied outsiders the opportunity to hold the coalitions accountable.²¹⁰ The result was as mentioned in above increasing corruption especially as time went on and a public grievance on state administration and the ruling party

With regard to the state bureaucracy-average citizens' relations, the judiciary in post war Japan held the formal power to review administrative actions and decisions against laws which defined the public interest in economic growth according to the newly introduced economic theory.²¹¹ While laws underlining the national policies were derived from the regime of exceptions, the modern constitution of Japan contemplated, individuals litigated against such laws based on their constitutional right to property, health and life.²¹² Though grounds of review was limited to legality and consistency of governmental actions, and even if remedy was limited to declaration in most cases and declaration with compensation in instances of economic loss²¹³, the fact that ordinary courts had the power to review administrative actions forced the government to politically negotiate with interest groups.

But, generally for reasons mentioned under the first topic in this chapter, judicial litigation rate between government agencies and individuals was also lower. The strict standards of reviewability as mentioned here above are considered as explaining factors.²¹⁴ Limiting grounds of judicial review to legality, consistency and reasonability of administrative actions is also attributed to the reason that national priority of developmental state in Japan was economic growth.²¹⁵ This suggests that promoting efficiency of the bureaucratic intervention and protecting private economic actors of their material benefit at same time were the main values attached to judicial review and thus less interest on social justice in Japan developmental state. The fact that administrative reform following economic liberalization and full democratization in 1980s which

²⁰⁹ Tom Ginsburg, *supra* note 179, pp 601.

²¹⁰ *Ibid*

²¹¹ Kuniko Shibata, *supra* note 188, pp3-4

²¹² *Ibid*

²¹³ *Id* pp 18

²¹⁴ Tom Ginsburg, *supra* note 179, pp 604

²¹⁵ *Ibid*

resulted in widening judicial review power in Japan and a shift in focus to welfare in Japan since the same point of time²¹⁶ strengthened this argument.

C. Stability, Order and Political Capacity; the Judicial Role

Securing security and order which is sometime equated with rule of law is also regarded as important precondition for an economic development to be a reality.²¹⁷ The protection of liberty of individual actors and their properties largely depends on the ability of a given state to maintain stability where in institutions of the state, including the judiciary can function properly.²¹⁸ A Political capacity of governments as a necessary element of developmental state thus depends partly on the ability of leaders to maintain social order and their legitimacy.

An absence of stability and order, which may undermine political capacity of political elites, is manifested in terms of prevalence of private predation, serious criminal activities, and lawlessness in general.²¹⁹ Effective judicial enforcement of criminal laws, human rights laws and other public laws is regarded as one mechanism to curb these conditions.

The social homogeneity of Japan combined with notion of respect for human dignity embedded in the Confucian culture of the society helped political leaders in the developmental state Japan to easily secure stability and political capacity to mobilize majority of the society along their developmental vision.²²⁰ The dominance of communitarian forces which emphasize on collective values and responsibility also had its own effect in promoting social cohesion and maintaining little prevalence of crimes to be litigated judicially importantly at early periods of industrialization.²²¹ In spite of all these social and cultural conditions, Japan as mentioned in above had a liberal constitution and a judiciary constitutionally empowered to review all governmental actions. As a result, the judiciary decided, though in rare cases, against the political interest of governments and over turned some laws as unconstitutional.²²² This is in turn associated with little possibility of gross human right violations by especially public authorities.

²¹⁶ Ibid

²¹⁷ Stephan Haggard, Andrew MacIntyre, and Lydia Tiede, *supra* note 193.

²¹⁸ Muna Ndulo, Rule of law Programs: Judicial Reform, Development and Post Conflict Societies, working Paper for Institute for African Development, University of Oslo, No 2, pp 1 available at www.sum.uio.no/research/networks/anlep, last visited September 20/2014

²¹⁹ Ibid

²²⁰ Nobuyuki Yasuda cited at 51.

²²¹ Ibid

²²² Tom Ginsburg, *supra* note 13, pp 256.

Even though courts, as mentioned above decided in favor of government in most cases between individual interests and public interests, court-blessed industrial policies also got social legitimacy and hence enhanced capacity to government.²²³

The ruling regime of the time enacted laws derived from regimes of exceptions of the constitution to regulate political behavior of dissent opinions and opponents.²²⁴ Some authors argue that the judicial system was collaborative to the social goal and interest as economic growth was the collective value to which society of the then Japan was ready to scarify their individual interest.²²⁵ In fact, if one takes the victory of Japan in terms of economic development and latter, as mentioned above, democratic development into account, the argument appears to be sound. It is also worth remembering that civil and political rights of individuals received little attention of international community in the developmental time of Japan with the effect of little external political pressure against political leaders²²⁶. The political culture of East Asian states including Japan which many argue was hostile to political pluralism²²⁷ and the geopolitical advantage Japan had at the time²²⁸ are also worth considering in the point at hand.

There are, however, critics who held that the judiciary in Japan developmental state was an instrument of government and lacked independent decision-making authority in politically sensitive cases.²²⁹ The two arguments invites thinking and investigation to better understand whether courts in Japan developmental state were mere instruments in matters of politics or agents of society. What other factors accounted for courts to deliver decisions in majority of political cases in favor of the government is an issue worth considering and includes whether courts were independent in such kind of cases both personally and institutionally. This is considered in the following topic.

D. Issues and Limitations on the Independence of the Judiciary

In Japan, during the developmental state period, the ruling party, liberal Democratic Party controlled the institutional apparatus needed to control courts. It allowed its cabinet to appoint all

²²³ Ibid

²²⁴ Ibid

²²⁵ Kanishka Jayasuriya, *supra* note 166, pp 378.

²²⁶ Tom Ginsburg, *supra* note 140 ,pp 252-254

²²⁷ Kanishka Jayasuriya, *supra* note 109

²²⁸ See my discussion in chapter two about institutional features of early developmental states.

²²⁹ Kanishka Jayasuriya, *supra* note 166

court officials including judges of the Supreme Court.²³⁰ The secretariat of the Supreme Court was in turn empowered to make rules of judicial administration and decisions with regard to promotion and allocation of judges of lower courts.²³¹

Though impeachment against all judges was to be submitted to the court to be established by the two houses of the diet and the constitution provided citizens with the opportunity to review appointments of judges of the supreme court in general elections of members of house of people's representatives,²³² the fact that the constitution made service of all judges terminable at every ten years interval since appointment²³³ can be considered as a serious challenge to independence of the judiciary. This allowed the cabinet to refuse reappointment of judges at the end of ten years term for different reasons it thinks proper. It is said that the cabinet in rare cases refused reappointment of judges for their liberal politics and led many liberal judges who anticipate the same decision to resign.²³⁴ From this, one can hold that the career insecurity of judges helped the ruling party to manipulate court decisions when necessary.

Moreover, even if most court officials who decided against the position of government in Japan developmental state did not face a direct interference from political or bureaucratic elites nor dismissal from the judicial bureaucracy at the top, administration of the supreme court punished them in terms of refusing promotion (to higher offices which can be related with payment or career success), allocating them in remote areas and courts with low prestige; such as family and branch courts.²³⁵ And this can be associated directly with the power of the cabinet to appoint and reappoint judges of the Supreme Court, who constituted both the administration department and judicial bench at the top of the judiciary.

However, in spite of the structural instrument of manipulation of court decisions at the direct disposal of the Supreme Court whose members are appointed by the cabinet, the instrument of influence was not used at all times in all cases. Firstly, the rules of the Supreme Court allowed all applicants who took a two years special training to be hired and no scrutiny was employed at the

²³⁰ See article 79 and 80 of the 1947 constitution of Japan.

²³¹ Article 77 of the 1947 constitution of Japan

²³² Article 79 of the 1947 constitution of Japan

²³³ Article 80 of the 1947 constitution of Japan

²³⁴ J. Mark Ramseyer and Eric B. Rasmussen; *Measuring Judicial Independence; The political economy of judging in Japan*, Chicago and London, the university of Chicago press, 2003, pp 8

²³⁵ *Id* pp 10-12

beginnings of employments.²³⁶ If any, it was only as mentioned above to recruit the talented ones. Secondly, the secretariat controlled and punished only individual judges who decided against position of the government in political cases.²³⁷ This is to say that the Supreme Court administration did not use structural incentives to influence in civil and commercial, and administrative litigations. It is said that the administration of the Supreme Court promoted and rewarded individual judges who decided accurately and consistently in disputes involving administrative matters and commercial issues.²³⁸

But, generally, the government in Japan developmental state maintained the institutional design to control courts when necessary though it used such a structural incentive only in politically sensitive cases. Such structural design combined with the dominance of the liberal Democratic Party in the diet and the executive²³⁹ made the judiciary an instrument of the regime to silence anti-government opinions and oppositions. This is to imply that absence of power fragmentation in the parliament helped the ruling party to draw industrial efficiency oriented but, politically suppressive laws from regimes of exceptions of the constitution on national security and applied by the courts over which the regime had a controlling institutional design. This is in fact a demonstration of the tension between the normative state and prerogative state the former as discussed in chapter three requiring power of government be limited and the latter vesting the regime with extensive power to lead the economic and social transformation.

4.1.2. South Korea

A. Economic Predictability and Judicial Role

Japan colonized Korea in 1910 and transferred its basic institutional structures of government and legal system comprising the courts, legislations and police.²⁴⁰ South Korea also had a modern constitution and legal system which underpins protection of property rights and their secured transfer in its developmental state time, a legacy of Japanese colonization.²⁴¹ The judiciary was the state institution with its constitutionally entrenched formal power to protect

²³⁶ Id pp 9

²³⁷ Id pp 60-80

²³⁸ Id pp 94

²³⁹ Id pp19

²⁴⁰ Tom Ginsburg, supra note 13, pp 257.

²⁴¹ Ibid

private property rights and secure their transfer.²⁴² It had the power to review constitutionality of administrative actions and laws till 1972²⁴³, a power which is linked to the protection of economic interest of private actors against arbitrary expropriation by the government.

An assessment of practical experience of courts of South Korea on the issue at hand also shows that the judiciary in South Korean developmental state enjoyed genuine autonomy in enforcing regimes of property rights and contracts between individual actors when they chose it.²⁴⁴ In spite of the authoritarian nature of governance in developmental state time of Korea, the “economy-put first” policy²⁴⁵ of leaders induced them to be credible to economic predictability allowing courts to decide civil and commercial disputes without any fear and interference. Courts enforced general rules of property rights and contract even against governmental actions, particularly until 1972.²⁴⁶ Court officials of the developmental state South Korea were also known for their technical legal expertise and knowledge in interpreting and enforcing private economy regimes. Authors attribute this to the recruitment of judges from among the talented law students and their two years training after graduation.²⁴⁷ The quality legal expertise of judges combined with their higher status both financially and socially helped them decide cases of civil and commercial matters consistently and objectively²⁴⁸. Consequently, the public perceived them as servants of law at least in civil and commercial cases.²⁴⁹ Such a public perception combined with factors such as; the relative social division in South Korea, lower cost of judicial litigation and increasing number of judges resulted in an increasing judicial litigation rate compared to Japanese litigation rate.²⁵⁰ The judiciary thus played a significant role in terms of creating a stable and predictable business environment. This led a certain author to hold that the legal system of South Korean developmental state demonstrated a legal regularity in the economic sphere or economic constitutionalism.²⁵¹

²⁴² Ibid

²⁴³ Id pp 258

²⁴⁴ James Palais, *Politics and Policy in Traditional Korea*, Cambridge, Harvard University Press, 1976 pp 22

²⁴⁵ Huck-ju Kwon, *Advocacy Coalitions and the Politics of Welfare in Korea after the Economic Crisis*, *Policy & Politics*, Vol. 31, No.1, 2002, pp.69-83 at pp 74.

²⁴⁶ Tom Ginsburg, *supra* note13, pp 258

²⁴⁷ Id pp 257

²⁴⁸ Michael Trebilcock and Jing Leng, *supra* note 195

²⁴⁹ Tom Ginsburg, *supra* note13, pp 258

²⁵⁰ Michael Trebilcock and Jing Leng, *supra* note 195.

²⁵¹ Kanishka Jayasuriya, *supra* note 109, PP 120-122

It is however important to note that in South Korea developmental state, judicial litigation on the issue of discussion was much more lower than those in other western democracies due to different reasons;²⁵² cooperation between private economic actors and predominance of communitarian forces in the society, cooperation between some private firms and government (growth coalition) and denial of recognition to intellectual property right of foreign investors. These factors caused informal governance to play significant role in transactions both between private businesses and in the interaction of state and some private sectors.²⁵³ The importance of informal institutions, however, decreased gradually and judicial litigation increased since 1980s because of economic growth, internationalization of capital of domestic industrial firms, economic reforms and democratization of the state.²⁵⁴

Informal institutions as mentioned here-in-above played significant roles in terms of handling civil and commercial disputes so that they enhanced the efficiency of judicial performance as the was the case in Japan. True also, much reliance on informal institutions and their modes of dispute settlement caused negative implication on stability and predictability in the economic sphere²⁵⁵. This was particularly true since the start of expansion of the economy of developmental South Korean state because of the specific problems²⁵⁶ which Japan, as mentioned above, faced.

B. Effective State Intervention; Judicial Review and Its Role

South Korea as discussed in chapter two is one of the North East Asian states which managed to refute the neoliberal idea that state intervention in the economy is counterproductive. The discussion in chapter two also reveals a bureaucracy characterized by elements discussed in the same chapter contributed to the success of interventionist development policies of the state. The role the judiciary of South Korea contributed towards constructing an effective bureaucracy is thus the issue to be explored here.

²⁵² John K.M. Ohnesorge, *supra* note 163, pp76-80

²⁵³ Yasuda Nobuyuki, *supra* note 199, pp 20

²⁵⁴ Tom Ginsburg, *supra* note 140, pp 252-254.

²⁵⁵ Michael Trebilcock and Jing Leng, *supra* note 199, pp 40-44

²⁵⁶ *Ibid*

South Korea had a unified administrative litigation law since 1962 which included hierarchical and judicial control mechanisms of monitoring administrative agencies.²⁵⁷ As mentioned above courts had the power to review legality and constitutionality of administrative actions. Practically courts of South Korea, though in rare cases, reviewed administrative actions of their legality throughout the developmental state time and of their constitutionality till 1972.²⁵⁸ But, courts yet regularly reviewed decisions of lower bureaucrats.²⁵⁹ Such a practical role of the judiciary in supervising the bureaucracy particularly at the lower level indeed enhanced the consistent and efficient administrative decision making.²⁶⁰

State –industrial firms’ relation (industrial coalition) in South Korean developmental state was however informal and personal.²⁶¹ As a result, in spite of the existence of the formal law which provided judicial review, the bureaucracy in South Korea utilized informal guidelines to shape the behavior of private firms along its development policies.²⁶² But, this does not mean judicial review in state-business interaction was totally absent. Courts even reversed some administrative decisions for inconsistent application of informal rules by administrative agencies.²⁶³ Knowing its lack of legal power to coerce private firms and possibility of judicial intervention, the bureaucracy used extra-legal factors such as allocation of cheap credit and other incentives to gain consent of private firms to comply with its advises and guidelines.²⁶⁴

The effect of formal judicial power to supervise the bureaucracy and some instance of actual judicial review on the stat-business elite interaction was many fold. Firstly, judicial review on ground of inconsistent application of informal rules as mentioned above forced the bureaucracy to be consistent which can be linked to the autonomy of the same. Secondly, private firms which agreed to informal instructions of the state enjoyed significant influence in policy making and benefited from policy loans.²⁶⁵ This suggests the importance of formal power of courts to review administrative actions in terms of forcing the public administration and business elites to

²⁵⁷ Tom Ginsburg, *supra* note 179, pp 601

²⁵⁸ *Ibid*

²⁵⁹ *Id* pp 597

²⁶⁰ *Id* pp 596

²⁶¹ Iain Pirie, *The Korean Developmental State From dirigisme to neo-liberalism*, London and New York, Routledge, Taylor and Francis group 2008, pp 72.

²⁶² Tom Ginsburg, *supra* note 179, pp 601

²⁶³ *Id* pp 597

²⁶⁴ *Id* pp 596

²⁶⁵ *Ibid*

negotiate and hence cooperate towards common developmental goal. The bureaucracy enjoyed judicial deference as long as it managed to solicit consent of business elites for development partnership and the business elites enjoyed power to influence policy and cheap credit for waiver of its rights in the formal structure. This can be indeed linked to embeddedness of the bureaucracy at least to industrial elites and capacity of the state.

So the judiciary as one factor, one can say, enhanced the capacity of the bureaucracy until at least private firms started to rely on their capital. Private firms which were growth partners of the state at the beginning of developmental process started to resist administrative guide lines since 1980s because of their capacity to rely on their capital which reduced the capacity of the bureaucracy to influence.²⁶⁶

The informal nature of state-industrial elites relation was however not transparent and participatory, particularly to outsiders.²⁶⁷ The formation of partnership and the functional relation between the two were not open to the public and this combined with strict standards of reviewability such as legality and vested interest limited participation of outsiders in development governance.²⁶⁸ Even if the state had hierarchical controlling mechanism as mentioned above and corruption crime laws, the informal state-businesses' relation later led to corruptive practices.²⁶⁹ The state also faced social violence and economic crisis due partly to increasing corruption and issues of social equity in state politics since early 1980s.²⁷⁰ Industrial firms which developed their capital with the help of state latter became uncompetitive and indebted.²⁷¹ Patronage kind of state and business relation governance indeed led some authors to hold that the bureaucracy in South Korea was not autonomous as presented in literatures on the development story of the country.²⁷² These issues suggest a limitation on the generalizability of experience of South Korea regarding effective governance of state-businesses' relations.

²⁶⁶ Id pp 597

²⁶⁷ Iain Pirie, *supra* note 261

²⁶⁸ Tom Ginsburg, *supra* note 179, pp 601

²⁶⁹ Huck-ju Kwon, *supra* note 245, pp 80

²⁷⁰ Ibid

²⁷¹ Ibid

²⁷² John K.M. Ohnesorge, *supra* note 163, pp 81.

C. Stability, Order and Political Capacity; Judicial Review and Its Role

As discussed in the topic about Japan and chapter two on the issue at hand, political capacity and legitimacy of the state were crucial elements for the developmental states to attain development. And political capacity of leaders to mobilize the society along their developmental vision cannot actually be perceived without securing general security and political stability.²⁷³ And different factors such as serious human right violations, civil conflict and breakdown of central authority can upset stability and order.²⁷⁴

In South Korea, the Confucian culture which was implanted long before reception of modern constitutions and the relative homogeneity of its society contributed significantly in terms of avoiding civil conflicts and gross human rights violations.²⁷⁵ The need to have an independent and economically self-reliant state after separation of South Korea from North Korea also helped political leaders to unify and mobilize the society along national policies of economic development.²⁷⁶ This in turn helps them avoid social division and conflict and maintain state stability.²⁷⁷

The judiciary, however, still played its role and even went as mentioned above to the extent of deciding against governmental actions for their illegality and unconstitutionality, particularly till 1972. The state also had modern criminal law inherited from Japan and the judiciary enforced it without interference from governments with the effect of avoiding criminal prevalence and human rights violation.²⁷⁸

The judiciary through enforcement of criminal law and procedure also served as an institution of channeling standards of behavior towards economic growth.²⁷⁹ This is to say that industrial growth, as discussed in chapter, being the underling national priority in the high growth rate time until 1980s, the judicial enforcement of criminal justice laws derived from regimes of exceptions of the liberal constitution served as a political instrument to mobilize people along development

²⁷³ Stephan Haggard, Andrew Macintyre, and Lydia Tiede, *supra* note 193.

²⁷⁴ *Ibid*

²⁷⁵ Bernard G. Bishop, *supra* note 68.

²⁷⁶ Chalmers Johnson, South Korean Democratization; the Role of Economic Development, *The Pacific Review*, Vol 2, No. 1., 1989, pp 1-10 at pp 7

²⁷⁷ *Ibid*

²⁷⁸ Kanishka Jayasuriya, *Supra* note 109.

²⁷⁹ *Ibid*

policies to which majority of the society was also ready to scarify individual interests.²⁸⁰ One can thus fairly hold that the judiciary helped the development oriented leaders of South Korea to socialize their development policies and hence maintain stability on the ground for effective developmental governance.

Critics, however, argue that the military supported regimes of the republic South Korea developmental state suppressed civil, political and labor rights with judicially approved laws and decisions.²⁸¹ Authors noted that the judiciary in South Korea developmental state was anti politics arguing that it served political leaders to disseminate state practice or policy to the society, but limited political pluralism.²⁸² Critics further claim that the judiciary of South Korea as in Japan and other East Asian early developmental states was not independent of political leaders and played little role in facilitating democratization.²⁸³

Worth asking here is, however, if a function of independent judiciary on political issues alone could help South Korea to facilitate its transition to sustainable democracy. The discussion in chapter two demonstrated that the political culture of East Asian developmental state including South Korea was authoritarian and hostile to political pluralism. Some authors also claimed that this factor provided political elites of South Korean developmental state to stay the question of democracy and focus on economic development²⁸⁴, which was also as mentioned above a national priority among the different segments of the society. If as mentioned here-in-above, the social movements on particularly labor right and concerns of social equity since late1970s should indeed be interpreted to mean the emergence of new social interests, may be due to economic growth, one can legitimately contend that the judiciary served as a political instrument of exclusion of some segment of society and their interest.

The issue of whether the judiciary was responsive to social needs of the society in the political sphere so that one can legitimately hold it was collaborative with the other branches of government to meet needs of the sovereign or it was simply an institution of political elites thus

²⁸⁰ Ibid

²⁸¹ ibid

²⁸² Ibid

²⁸³ Tom Ginsburg, *Constitutional Courts in New Democracies: Constitutional courts in Asian Cases*, Cambridge, Cambridge University Press, 2003.

²⁸⁴ Chalmers Johnson, *supra* note 276

demands examination of whether political elites had a means of controlling the courts to obtain biased judicial decisions. This is considered in the following topic

D. Issues and Limitations on the Independence of the Judiciary

In developmental state South Korea, the different constitutions empowered presidents to devise an institutional incentive similar to that of Japan and managed to control judges of particularly lower courts. Presidents who came to power since 1960s till 1987, through the help of military usually amended the constitution in a way to help them control the national assembly and courts.²⁸⁵ These helped presidents to have a constitutional power to appoint chief justice and justices of Supreme Court and some times of constitutional councils with approval of the less challenging national assembly.²⁸⁶ The fact that the military supported regime dominated the national assembly can be linked here to the opportunity of political leaders to appoint justices of the Supreme Court including the president from candidates whose ideological orientation is along the ruling regime.

Moreover, the power to appoint other judges was vested on chief justice of Supreme Court to be approved only by conference of justices of the Supreme Court.²⁸⁷ Even if passing judicial examination was the requirement for candidates to get first employment in lower courts, the job of individual judges was terminable within ten years with possibility of reappointment by the Supreme Court conference of justices.²⁸⁸ The Supreme Court was also with the power to enact rules regarding judicial administration and guide lines of decision making by lower courts.²⁸⁹ This combined with the promotion system in which judicial career promotion depended on the degree of approval of decisions of lower courts by the Supreme Court kept lower courts to comply with legal opinions of their superiors.²⁹⁰

So, generally, even if political elites did not directly interfere in the function of the judiciary as mentioned above, they had institutional mechanism of controlling courts in place and could use it

²⁸⁵ Neil Chisholm, Legal Diffusion and Judicial Independence in South Korea and Taiwan; Judicial selection, Education and Promotion in Comparative Perspective, available at <http://www.go...001339/d.bGQ>, last visited September 25/2014.

²⁸⁶ Aurel Croissant, *supra* note 124, pp235

²⁸⁷ Rodrigo Gonzalez quintero, Judicial Review in the Republic of Korea: an Introduction, a Research paper no 34 prepared for Washington university on judicial review, September 30, 2010, PP 1-5.

²⁸⁸ Neil Chisholm, internet source, *supra* note 285

²⁸⁹ Ibid

²⁹⁰ Ibid

in time of necessity. The dominance of national assembly by the ruling party mentioned in chapter three, the constitutional power of the Supreme Court and conference of its justices to determine internal affairs of the judiciary and influence job security of judges were the institutional opportunities of the leadership to control courts. It is however, said that the executive body in developmental state South Korea sought favors from courts only in cases which involve higher bureaucracy and individuals.²⁹¹ It did as mentioned in above not seek for judicial bias in matters related with administrative actions at lower level of the bureaucracy, and civil and commercial disputes.

The amendment of the Constitution of South Korea in 1972 among other things resulted in taking away the power of the ordinary courts to review constitutionality of laws to a constitutional committee whose members were appointed by the president.²⁹² The determination of the Supreme Court to challenge the military government led the then president to fire the justices of the court and took review power of the same away.²⁹³ The Supreme Court, however, still retained the power to review legality and constitutionality of administrative actions²⁹⁴ even if the institutional design helped the executive body to secure favorable court decisions in cases it sought. Until the third wave of democratization in 1980s, the dormant constitutional council also helped the government to validate and legitimate laws which underlie industrial policies at the expense of individual rights in case of contention between governmental and individual interests as it never revised any law of the government²⁹⁵.

4.2. The Judiciary and Its Role in South Africa; an Example of New Developmental State

4.2.1. Introduction

South Africa is one of the African countries attempting to construct a developmental state in a constitutional democracy.²⁹⁶ The 1994 Constitution of South Africa established a democracy and has recognized all aspects of human rights including private property and their secured transfer

²⁹¹ Ibid

²⁹² Tom Ginsburg, Constitutional Courts in New Democracies: Understanding Variation in East Asia, Global Jurist Advances Volume 2, Issue 1 2002 Article 4, Published by The Berkeley Electronic Press, pp 7.

²⁹³ Ibid

²⁹⁴ Article 107(2) of the 1948 Constitution of Republic of South Korea

²⁹⁵ Tom Ginsburg, supra note 292

²⁹⁶ Omano Edigheji,(ed), supra note 111, pp 3.

with an independent judiciary to enforce them.²⁹⁷ The same constitution also entrenches a transformative social goal to rectify the legacy of apartheid which is said was exclusionary of the majority of black South Africans for equality of whom the current ruling party is claimed struggled for decades.²⁹⁸ The constitution in addition to its liberal approach hence incorporates promoting socio economic equality between societies of South Africa as its fundamental value obliging all branches of government to promote it. This constitutional value is with the effect of mandating the legislature and the executive to design laws and policies an implementation of which helps promote substantive equality between the poor black and rich whites. Structural change in the post-apartheid south African state being one objective of this constitution, it also both empowers and obliges the judiciary to check if the other branches of government are working to promote the objective and comply with the same objective.²⁹⁹ This judicial power is expressed in the constitution in terms of reviewing the constitutionality of all governmental actions including legislations and adjudication of socio-economic rights in courts.³⁰⁰

The motivation behind South African government to construct developmental state is also associated with the interest to overcome structural exclusion of the poor black, but majority of the South Africans and widen their access to public services.³⁰¹ Poor economic capacity of the blacks as the result of legacy of apartheid, it is said, has resulted in systematic discrimination or inequality between different races of the society making it for the formal right to equality far from being a reality.³⁰² Widening public participation in the economy in turn demanded the government to invest on health, education and other infrastructures with the view to increase productivity and employment of the poor, victims of structural rigidity. Worth noting here is that different from developmental states of Japan and South Korea, the primary objective of south African developmental state is not capital accumulation,³⁰³ but, as mentioned in above redistribution of resources and achieving social justice. This is due to the reason that

²⁹⁷ Amy Gordon and David Bruce, Transformation and Independence of the Judiciary in South Africa, Research Paper for the Center of Study of Violence and Reconciliation(South Africa), 2007, PP 20

²⁹⁸ Section 9(2) of the 1996 Constitution of republic of South Africa

²⁹⁹ Jackie Dugard, Judging the Judges: Towards an Appropriate Role of the Judiciary in South Africa's Transformation, Leiden Journal of International Law, 20 (2007), pp. 965–981 at p 970

³⁰⁰ The South African constitution, section 7(2)

³⁰¹ Anthony Butler, Consolidation First: Institutional Reform Priorities in the Creation of Developmental state in South Africa in : Omano Edigheji,(ed), Constructing a Democratic Developmental state in South Africa, Potentials and Challenges, Cape Town, Human Science Research Council (HSRC) press, 2010, pp 183-200

³⁰² Amy Gordon and David Bruce, supra note 297

³⁰³ Anthony Butler, supra note 301

developmental state in South Africa is to operate in an advanced economy compared with those in north East Asian countries.³⁰⁴ This is not without implication on issues of budget with which social policies are implemented and the power of judiciary.

4.2.2. Power and Role of the Judiciary in South Africa in Light of the Objectives of the Developmental State

As mentioned above, the post-apartheid constitution has established a liberal democracy and entrenched transformative socio economic objectives in South Africa. Protection of private property and their transfer, civil and political rights and promotion of socio economic rights are thus among the fundamental principles of the constitution.³⁰⁵ The judiciary is also empowered to protect and promote these rights. It is a normal practice for the judiciary in South Africa to protect private property even including against the government.³⁰⁶ The constitutional court even has a power to suspend bills before they become laws based on their unconstitutionality.³⁰⁷ Indeed, South Africa is said to have had predictable business environment³⁰⁸ which depended on the enforcement of general economic norms by courts. It is also important to notice that the constitution recognizes the importance of informal institutions and serves as alternative mechanisms of dispute settlement in South Africa.³⁰⁹

Administrative justice and the right of people to enjoy it is one feature of the constitution in South Africa.³¹⁰ While the bureaucracy in South Africa is said fragile, corruptive and discriminatory,³¹¹ the judiciary has the power to review all administrative actions and promote administrative justice.³¹² Diverse backgrounds of administrative elites, lack of commitment and positive attitude to common goals as enshrined in the constitution, and common training to the bureaucracy are mentioned as factors explaining the weakness of the administration.³¹³ As discussed in chapter two, the power of courts to review every administrative action can possibly

³⁰⁴ Ibid

³⁰⁵ South African constitution, preamble and chapter two

³⁰⁶ Amy Gordon and David Bruce supra note 297, pp 22

³⁰⁷ The South African Constitution, section 16(7)

³⁰⁸ Anthony Butler, supra note 301

³⁰⁹ Yonathan Fesseha, Pluralism and the South African Experience; Customary as a Constitutional Right in: Elias N. Stebek and Muradu Abdo (Editors), Law and Development, and Legal Pluralism in Ethiopia, Addis Ababa, JLSRI Publications, 2013 p 177-188.

³¹⁰ South African constitution, Articles 32 and 33

³¹¹ Anthony Butler, supra note 301, pp 193

³¹² South African Constitution, Supra note 298

³¹³ Anthony Butler, supra note, 301, pp 193

put the administration in pressure to remain consistent in decision making in addition to its importance to protect values of procedural democracy, transparency and accountability.³¹⁴ There is actually an effort on the part of the South African government to reform the attitude of judges and the public administration along the transformative objective of the constitution.³¹⁵ One can relate this with an attempt toward institutional building for democratic developmental state. The fact that courts are empowered to adjudicate socio economic rights of both individuals and group of people also have helped the judiciary to deal with policies and decisions of the bureaucracy that go against the constitutional objectives and the promotion of a democratic developmental state.³¹⁶ Indeed, the South African government is currently claiming that the political stability of the state, of course an important element of developmental state, depended on its ability to attain socio economic equality.³¹⁷

As mentioned in above, the judiciary in South Africa has a constitutional power to review laws both before and after their enactment and thus an institution capable of protecting the political and civil rights of the people. Thus, they are institutions where the ruling and opposition parties contest though the national congress party and other coalitions have dominated all aspects of life ever since the new constitutional order.³¹⁸ In fact, the coalition of the African national congress party with other parties to form central governance gave South Africa to experience some elements of consociational democracy where in power sharing among the different sections of society is reflected in all state institutions.³¹⁹ Such institutional feature of governance has resulted in power separation because of which enactment of laws undermining civil and political rights, and judicial independence itself becomes difficult.

³¹⁴ Clive Plasket, the Fundamental Right to Just Administrative Action; Judicial Review of Administrative Action in the Democratic Republic of South Africa, A thesis submitted in fulfillment of the requirements of the degree of Doctor of philosophy, Rhodes University, 2002 PP 2

³¹⁵ Amy Gordon and David Bruce, *supra* note, 297, pp30

³¹⁶ Anthony Butler, *supra* note 301, PP 183-193

³¹⁷ William Gumede, Delivering Democratic Developmental state for South Africa, a research paper work no 9 prepared for development bank of south Africa, 2009, PP 12

³¹⁸ Stephen Ellmann, the Separation of Powers in Post Apartheid South Africa, *Journal of International Law and Policy*, V.8 pp 455-483 at pp 456.

³¹⁹ *Id* pp 457

4.2.3. Judicial Independence and Current Challenges in Democratic Developmental South African State

Compared to time of apartheid and other African countries, the judiciary in South Africa is claimed to have the most genuine independence both formally and practically.³²⁰ Appointment and removal of judges from office largely depends or involves a judicial service commission comprised of members from legal professionals, judges, members of the executive and national assembly, members of opposition, delegates from national council of provinces and academic professionals³²¹ making it difficult for the executive to control the judiciary easily. Removal of judges whose tenure and salary is secured in time of good behavior further needs approval of two-third of the national assembly.³²² The power of the judiciary to review constitutionality of all governmental laws can also be linked to the level of independence courts enjoy in post -apartheid South Africa. There are however some limitations mentioned and challenges which the judiciary and the society in South Africa are facing.

One criticize forwarded against the judiciary in south Africa is based on the argument that it is not responsive to social needs of the majority of the society- the poor blacks.³²³ In spite of its wide scope of power and high level of independence, the judiciary is criticized for not responding to the socio economic objectives of the new constitutional orderadequately as it entertained only five socio economic rights.³²⁴ Limited access of people to constitutional court with the final say and the inability of potential litigants to consider and appreciate the budget implication of government policies combined with limited access to legal aid service are mentioned as factors explaining the problem.³²⁵

The fact that superior courts are filled with apartheid-oriented judges because of their seniority is also one factor mentioned for the passivity of courts to enhance the transformative constitutional value in South Africa.³²⁶ This indicates that the judiciary is likely to do less in promoting the objective of democratic developmental state in South Africa. The challenge is here two fold;

³²⁰ Jackie Dugard, *supra* note 299

³²¹ Amy Gordon and David Bruce, *supra* note 297, pp 25

³²² *Ibid*

³²³ Jackie Dugard, *supra* note 299

³²⁴ Amy Gordon and David Bruce, *supra* note 297, PP 26-29

³²⁵ *Ibid*

³²⁶ *Ibid*

firstly, because of limited direct access to the constitutional court and issues of expert skill to suggest a policy capable of solving socio economic inequality let the judiciary to remain less important in responding to the social needs. Secondly, the power of judiciary to interpret and enforce general norms including against government social policies denies the executive a space for policy choice leaving the poor segment of society without institutional voice. A certain author in support of this view contends that rule of law substitute's policy choice in South Africa.³²⁷ This suggests in turn that an enforcement of general norms by an independent judiciary may not be sufficient to attain substantive equality in its own right. A recognition of this challenge actually led the ruling party in South Africa since 2001 to initiate judicial reform which among other things includes; enactment of code of conduct of court officials to increase accountability, building a representative judiciary, reducing power of constitutional court to suspend draft laws, empowering the ministry of justice to regulate operation of courts and increasing veto power of the executive in appointment and removal of judges.³²⁸

However, though large part of the society and legal professionals are convinced that the judiciary is not responding to the transformative objective of the state, most court officials and other legal professionals challenged the initiative of the government to withdraw its bill at least for a time being. They claimed that the initiative reflects the attitude of the ruling party to undermine judicial independence guaranteed by the constitution.³²⁹ This implies that South Africa is in a dilemma to build a judiciary sympathetic to social and economic problems of the society on one hand and maintain independence of courts as promised in the constitution on the other hand. To some extent this reflects the tension between developmental state and its objectives, and judicial independence entrenched in the normative values of the Constitution in South Africa.

Another challenge or limitation raised with regard to the independent function of judiciary in South Africa is the tension between creating representative judiciary and quality of judges filling it.³³⁰ With the view to build public confidence on the judiciary and promoting use of courts to settle disputes, South Africa is since recently undertaking a reform to diversify the composition

³²⁷ Seeraj Mohamed, the Effect of Main Stream Approach on Economic and Corporate Governance on Development in South Africa: in Omano Edigheji,ed, Constructing a Democratic Developmental State in South Africa, Potentials and Challenges, Cape town, Human Science Research Council(HSRC) press, 2010 , pp 149-169 at p 155-165

³²⁸ Amy Gordon and David Bruce, *supra* note 297, PP 32-44

³²⁹ Ibid

³³⁰ Id p 45-49

of the judiciary in terms of geography, race and sex³³¹. Though judicial reform of this kind is believed can secure public confidence and create a judiciary capable of understanding the social, economic and political condition of the new order in South Africa, the concern with quality of judges which may be compromised for representation also has attracted attention of authors and legal professionals.³³²

All in all, the initiative for judicial reform of the ruling party in South Africa does not seem a coincidence with its declaration to construct democratic developmental state though large part of the initiative received a challenge from stake holders and is withdrawn at least for a time being. To maintain the normative state (constitutionalism) and hence an independent judiciary and building a judiciary capable of responding to the transformative social needs and thus a judiciary which tolerates or legitimate transformative policies of the prerogative state seem in tension.

4.3. Comparative Lessons to Be Drawn

The limitations and challenges considered in the discussion above on the experiences of the three countries suggest caution in emulation of their experiences. They suggest for states to consider their social, economic and political conditions and advise them to devise a local context relevant institutional mechanisms to avoid the challenges identified. The experiences of countries considered above imply the difficulty to find one judicial power framework that suitably fits all states due to their differences in local conditions such as; level of economic development, political culture of society, public confidence on state institutions, and social and economic organizations. However, this does not mean that legal institutions of states cannot have some similarities in terms of their role and scope of independence as highlighted above and summarized here in below.

Japan is the first country whose experience is explored in this chapter. The discussion on the same reveals that the judiciary had a formal power to protect private property rights and enforce contracts against including the government. Even if commercial and civil litigation rate was low particularly at the time of industrial take off, it increased when the economy of Japan started to grow. The government in Japan developmental state did not interfere in litigations of economic nature and courts experienced consistent decision making to create a predictable business

³³¹ Ibid

³³² Ibid

environment. Consistent and objective judicial decision making in the economic sphere is attributed partly to the higher technical expertise and legal knowledge of individual judges. And this can be associated with nurturing market forces essential for a successful developmental state.

The judiciary in Japan also played its role to build an autonomous bureaucracy, but embedded to at least business elites. As discussed in above, the power of the judiciary to review legality and constitutionality of governmental actions forced the strong bureaucracy and in some cases political leaders to solicit consensus of individual firms for growth coalition through negotiation. This, the writer of this paper believes helped the state of Japan have a capacity to enforce its development policies without undermining market principles. This, however, does not mean that other controlling mechanisms than judicial supervision did not help Japan to have an effective bureaucracy necessary for its development. In addition to judicial review, political leaders in Japan used hierarchical mode of supervision and indoctrination of its bureaucracy to minimize the principal-agent problem, which in turn kept its administrative agencies effective.

The informal system and its mechanisms of dispute settlement also played its role in resolving disputes between individuals and private firms and the state. This, in the condition of limited capital necessary for industrialization combined with communitarian culture of the society also promoted cooperation between citizens of Japan in investment and trade. Bureaucratic decision making also involved informal procedures on the condition business elites consented for state assistance.

Much reliance on informal rules and their machineries at private and administrative level, despite their advantage at early period of industrialization, however had its own dark side after the outset of progress. At the private level, more dispute settlement out of courts for different reasons amounted to increasing group crimes in economic transactions with the effect of increasing transaction cost and instability in business environment. At the administrative level, the informal/personal nature of state and industry relations also denied outsiders or emerging group interests the opportunity to challenge corrupt practices in courts with ultimate effect in increasing corruption and crisis around 1980s. It also raised issues of social equity. These two conditions as time went on led to social movements and economic crisis around the closing of 1980s. This was also the case in South Korean whose social culture and legal institutions were more or less similar to that of Japan in its developmental state time.

The formal structure and its machinery of developmental state Japan is also criticized for some reasons. As mentioned above, the government in Japan had the institutional design to control courts. The institutional mechanism discussed in 4.1.1 helped the government to control courts and secure favorable judicial decisions though it used such institutional opportunity only in politically sensitive cases. The informal nature of state and industry relation also denied outsiders or emerging group interests the opportunity to challenge corruptive practices in courts with ultimate effect in increasing corruption and crisis around 1980s.

Lower number of judges and lawyers and costly nature of judicial proceeding also led people to settle more cases out of court. The limited access to courts combined with the poor confidence of the public on courts partly because they were perceived as western imposed institutions and partly due to their limited autonomy in politically sensitive cases made people use the informal system. The dark side of such institutional practice forces one to claim for the balanced coexistence and function of formal and informal institutions. Access to formal courts can increase advantage of the informal and the institutionalization of the latter can in turn increase efficiency of the former.

The experience of South Korea discussed also highlights that independent function of courts can promote economic predictability in developmental states. Such a role of courts in South Korean developmental states is also attributed partly to the quality legal knowledge and independence of individual judges both financially and politically in economic sphere. It also suggests that relative social division and access to courts enhance the use of the judicial system to settle civil and commercial disputes.

Furthermore, the discussion informs us that while informal modes of dispute settlement among private economic actors and at administrative level can be used meaning fully at the early period of economic growth, economic growth combined with other factors such as democratization, economic reform and foreign investment increases the demand for judicial settlement of civil and commercial disputes.

The discussion on the judicial role for effective bureaucracy also leads one to imply that an independent function of courts to enforce administrative and criminal laws helped the state to build an effective bureaucracy. The challenges and limitations discussed in this chapter also

indicate that the presidents of South Korea in its developmental state exerted pressure on courts through the institutional mechanism they set. Even if they used such institutional arrangements in only politically sensitive cases and sometimes in cases involving higher agencies, the one-man rule kind of governance supported by the military helped governments to secure favorable court decisions in case of need.

The worst scenario was that the ruling party as supported by the military amended the constitution of the state frequently to control the national assembly and deny courts real autonomy in their function. Indeed, the different social movements and crisis which the state witnessed in its developmental state period can serve as lesson to identify what is not worth emulating of experience of South Korea. Even if the legal configuration with regard to judicial power and independence on political cases was tolerable at early times of development, the absence of the social and political conditions which enabled South Korean governments to maintain such institutional design with little pressure in other states suggests emerging developmental states to consider a different option.

South Africa, an example of new/ democratic developmental state is another country whose experience on the formal power of courts and the practice so far is discussed. The discussion on South Africa demonstrates that the objective of the developmental state is to ensure socio economic equality between its people through empowerment of the black poor segment of the society. Public investment to increase economic opportunity of the poor is at the heart of inspirations of the developmental state. One important lesson one can derive from South Africa is the constitutionalization of objectives of the democratic developmental state and the constitutional responsibility and power of all institutions of government to attain this objective. The liberal and transformative constitution thus empowers the judiciary to play its role to protect individual rights and attain the social objectives of the developmental state, a judicial power which can be interpreted to mean an institutional frame work to balance the normative and prerogative states in the constitution.

The judiciary so far enjoyed a genuine autonomy in protecting individual rights including of economic rights and resulted in a predictable business environment in South Africa. It even has gone so far to challenge all governmental actions of their unconstitutionality to protect individual rights. However, taking the social and economic condition of the majority of the society in

consideration of which the developmental state is under construction, the judiciary is criticized for its passivity. The government and society start to claim that the judiciary despite its strong independence is not responding to the social needs and raise issues of accountability of courts. Even if the judiciary entertained some few cases of socio economic rights, it cannot escape a blame for causing structural exclusion of the poor from economic and social benefits. It could not demand the government to implement social policies capable of fulfilling objectives of the developmental state, nor does it allow the executive a policy space to do the job.

While less representative composition of the judiciary and lack of accountability are being mentioned as factors to which the confusing roles of the judiciary attributed, one thing worth considering is that independence of courts may not be necessarily a solution to solve a social problem. The judicial reform initiative of the government indeed highlights its interest to build a judiciary collaborative to fulfillment of social needs through strengthening judicial accountability and composition reflecting the society.

In short, the discussions on the experience of countries considered suggest that courts in developmental states can play a significant role in creating conducive business environment and a bureaucracy which can lead economic development effectively. But, their scope of their roles depends on access to courts, their level of independence accompanied by accountability, legal culture of society and public perception on courts.

The combination of informal governance and judicial review in Japan and South Korea at both private levels and state level also highlights how the two institutions can be used to build bureaucratic and political capacity of states which want to construct a successful developmental state. In fact, alternative dispute resolution methods need to be institutionalized and state – private firms interaction should be based on uniform rules.

CHAPTER FIVE

The Role of the Judiciary in a Democratic Developmental State: Prospects and Challenges in Ethiopia

5.1. Constitutional Basis

Building a democratic state through facilitating the transition to democracy and ensuring economic development being the general objectives of Ethiopia, the government has also identified specific goals for the achievement of which it declares its commitment. High and shared economic growth to improve living standards of the people, good governance which includes; public participation, transparency and accountability, protection of human rights and attaining social justice³³³ are among the specific goals the Ethiopian government has pledged to meet. To achieve these specific goals and general objectives, the government should, as highlighted in chapter two, intervene in the economy to both encourage productive investment and empower capacity of citizens of the state.

Protection of private property rights and their secured transfer, and hence market economy has got a constitutional recognition in Ethiopia since 1995.³³⁴ The same constitution has also recognized civil and political rights and their enforcement by all state institutions.³³⁵ It institutionalizes multi party political system and free competition of political parties for state power.³³⁶ All these principles and provisions of human rights entrenched in the constitution reflect the need to comply with norms of democratic constitutionalism in governance. And of the different values discussed under Chapter Three includes separation of powers, rule of law and independent judiciary. One may consequently ask if the developmental state model has a space to operate in Ethiopia. This is in turn a concern with how the FDRE constitution addresses the prerogative state, which as discussed in Chapter Three, played an essential role in classical developmental states such as Japan and South Korea.

³³³ Ministry of Finance And Economic Development of Federal Democratic Republic of Ethiopia, Ethiopian Growth and Transformation Plan, 2010-2014/15, November, Volume 1, 2010 ,Addis Ababa., pp 21-17

³³⁴ Article 41(1), (2) of the FDRE constitution

³³⁵ See for instance Article 29, 30, 31 and 38 of the FDRE constitution. Article 13(1) of the same constitution also obliges all institutions including the judiciary at all levels to enforce and respect the human right constitutional provisions under chapter three.

³³⁶ Article 31, 38(2) and 54(2) and 56 of the FDRE constitution

The FDRE constitution includes provisions concerning social and economic objectives of the state as well as social and economic rights of its citizens.³³⁷ It provides rights of people to develop and improved living standard as its imperative aspirations, the government with the obligation to facilitate their attainment.³³⁸ It also requires all state institutions including courts to promote these rights and values.³³⁹ All these constitutional provisions appear to suggest that the government should play some positive role or be active to help Ethiopian people enjoy these rights and attain socioeconomic objectives of the state. The point is that democratic developmental state seems derived from some norms of the FDRE constitution with the aim to facilitate the process to establish a political and economic community envisioned in the preamble of the same constitution.³⁴⁰ Hence, the prerogative state is bound to insure the realization and sustainability of the normative state. In fact, literatures on democratic developmental state (as discussed in chapter two) recommend governments of democratic developmental states to lead their fragile markets based on uniform rules, consultation with stake holders and broadly inclusive or embedded kind of governance.³⁴¹

5.2 Judicial Power in the FDRE Constitution

In the FDRE constitution, judicial power both at federal and state levels is vested in courts.³⁴² Three tiers of courts at the two levels; first instance courts, high courts and supreme courts with a final judicial power over their respective jurisdictions³⁴³ are established in the same constitution. It also allows for the establishment of religious and customary courts.³⁴⁴ Law making bodies both at federal and regional levels of administration can also establish special or

³³⁷ Article 41(5),(6) and article 43(1). of the FDRE constitution

³³⁸ Article 41(5),(6) of the FDRE constitution.

³³⁹ The fact that article 13(1) of the constitution demands all state institution at all levels of government to respect and enforce all rights under chapter three suggest that the judiciary is expected to be responsive to development needs of the Ethiopian societies.

³⁴⁰ The reading of the preamble of the FDRE constitution gives us the impression that political community founded on rule of law and characterized by lasting peace, democratic order and advanced economy is the aspiration of the state for fulfillment of which its people are committed.

³⁴¹ For further reading on this point ,read Mark Robinson and Gordon White(Eds), *The Democratic Developmental State: Politics and Institutional design*, Oxford University Press,1998; Omano Edigheji, *supra* note 14 and Mkandawire Thandika, cited at 76

³⁴² Article 79(1) of the FDRE constitution

³⁴³ Article 78(2) and (3) of the FDRE constitution

³⁴⁴ Article 78(5) of the FDRE constitution

ad hoc courts which exercise judicial power based on legally prescribed procedure.³⁴⁵ While the Constitution provides for the possibility of establishment of federal first instance and high courts nationwide or in some parts of the country, the same document empowers regional high and supreme courts to concurrently exercise powers of these federal courts.³⁴⁶

The constitution provides for the independence of the judiciary at all levels in exercising its judicial power. Institutional and personal independence of courts are declared in the same document.³⁴⁷ Interferences of all governmental bodies and governmental officials in the function of the judiciary are prohibited and judges are required to be directed only by law in decision making. The Constitution also guarantees job security of judges by prohibiting arbitrary removal to strengthen their personal independence. Removal of judges from their job is possible only when a judicial administration council so decides and when this is approved by the House of Peoples Representatives.³⁴⁸ It further empowers judicial administration councils at both levels to determine professional rules of conduct and discipline of judges³⁴⁹ which can be linked to institutional independence and accountability of the judiciary. Supreme courts of both the federal administration and regional states are also empowered to determine their budgets and administer once approved by house of peoples representatives and state councils.³⁵⁰

5.3.Role of the Judiciary for the Success of Democratic Developmental State in Ethiopia

5.3.1. Securing Stability and Order

The theoretical discussion in chapter three and experiences of foreign developmental states discussed in chapter four suggests that development of states demands securing order and stability. Serious human rights violations, expansion of criminal activities and the prevalence of private predation over law are major causes for civil conflict and anarchism, leading to fragile security and order.³⁵¹ The ultimate effect as highlighted under chapter four is that limited capital

³⁴⁵ Article 78(4) of the FDRE constitution

³⁴⁶ Article 78(2) of the FDRE constitution

³⁴⁷ Article 78(1) and article 79(2), (3) (4) of the FDRE constitution

³⁴⁸ Article 79(4(C)) of the FDRE constitution

³⁴⁹ Article 81(6) of the FDRE constitution

³⁵⁰ Article 79(6),(7) of the FDRE constitution.

³⁵¹ Stephan Haggard, Andrew Macintyre, and Lydia Tiede, *supra* note 193, p.211

of particularly developing states may be diverted from productive investment to means of destruction and violence- curtailing economic development and democratic decision making.

An objective judicial enforcement of rules of game in the society is suggested as one solution to maintain security and order.³⁵² The rules of the game include laws which govern the relationship among citizens and between citizens and the state. So, even if stability and order are primarily preconditions for proper function of courts, the latter are significant to maintain the level of peace, security and stability already gained through minimizing if not avoiding the factors which can cause the breakdown of security and order

Experiences of early developmental states of North East Asia such as Japan and South Korea also suggest that little conditions of serious human right violations, criminal activities and predation helped their governments to focus on developing their economies and achieve their goals in a relatively short period of time.³⁵³ Even if different factors as mentioned in Chapter Four enabled Japan and South Korea to have stability and order in their developmental state time, courts had still played their own respective roles in terms of controlling crimes, protection of individual rights, supervision of the bureaucracy and socialization of state industrial policies.³⁵⁴

Therefore, the judiciary through objective enforcement of laws of the country that govern relations ships among citizens and between state and society can keep conditions of human rights violations, criminal activities and predation insignificant to endanger the constitutional order and stability so that the limited capital of the country can be focused on development efforts. This role of the judiciary is particularly important to maintain security and order in the current conditions of the state Ethiopia where in ethnic conflict among people and human rights violations are being demonstrated and considered by scholars as threat to smooth flow of resources among different parts of the country and expansion of investment.³⁵⁵ The fact that factors as considered here-in-above other than judicial role added to stability of order and security of Japan and south Korea in their developmental state time combined with the international trend of democratization, which can increase consciousness of people of their rights

³⁵² Ibid

³⁵³ Nobuyuki Yasuda, supra note 51.

³⁵⁴ See my discussions in 4.1.1 and 4.1.2 of chapter four.

³⁵⁵ Abu Girma Moges, an Economic Analysis of Fiscal Federalism in Ethiopia ; *Journal of North East African Studies* Vol. 10, No. 2 (New Series) 2003, Pp. 111–140 at pp.137

and demand for judicial protection also suggests that courts can be relied more in Ethiopia for the same purpose.

This is not, however, to say that the judicial resolution of civil conflicts and judicial enforcement of criminal and other human rights laws is the only institutional mechanism with which security and order can be sustained. Traditional modes of resolution of conflicts and individual disputes can still have significant role in restoring peace and order. This line of thinking is based on the fact that different communities of Ethiopia have different customary ways of conflict settlement.³⁵⁶ The experience of Japan and South Korea explored in Chapter Four also supports this view in that Confucian culture and its institutions prevented serious human right violations and utilized by society to restore peace in occasions of violations.

5.3.2.Promoting Economic Predictability

Another role an independent and accountable judiciary can play for the democratic developmental state to be successful in Ethiopia is ensuring economic predictability. It is said that nurturing market forces is an important factor for developmental states to attain economic development and one way of harnessing market forces is protection of private property rights and their secured transfer.³⁵⁷ This is because property rights and security of contract constitute powerful constraints on the behavior of both the state and private agents, but only when they are consistently enforced.³⁵⁸

The theoretical analysis in chapter three and the lessons from foreign developmental states discussed in chapter four lead to the conclusion that effective enforcement of property rights and their way of transfer promote productive investment and trade. The discussion of experiences of Japan and, South Korea and South Africa reveals that judicial enforcement of laws of private property enhances predictability in the economic transaction and hence increasing private investment and trade. Laws enforced by courts of those states in protection of private property rights against arbitrary governmental action and other predations include constitutions.

³⁵⁶ Yidnekachew Kebede et al, Case Study on Seven Customary Laws in Ethiopia: in Elias N. Stebek and Muradu Abdo (Editors), Law and Development ,and Legal Pluralism in Ethiopia, Addis Ababa, JLSRI Publications,2013, pp 195-223

³⁵⁷ Stephan Haggard, Andrew MacIntyre, and Lydia Tiede, *supra* note 193, pp 206

³⁵⁸ Ibid

However, the experiences of Japan, South Korea and South Africa highlight that enforcement of formal and uniform economic laws are not sufficient to encourage productive investment or they are not the only institutions to secure economic development. The empirical lessons drawn from experiences of Japan and South Korea also show that the absence of sufficient individual capital capable of taking risk in long term and productive investment needed an active role of their bureaucracies to solve the problem of collective action and cooperation for industrial development. That led, as mentioned in Chapter Four, to an important role of informal institutions and their machineries in economic dispute settlements both at administrative and private levels. The critics against the judiciary of South Africa, as mentioned under chapter four for causing structural exclusion of the poor and limiting policy space for the government to address problems of social justice through investment and productivity promoting intervention is also consistent with this view.

All these evidences suggest us that a clear distinction of economic sectors for public investment or public and private businesses cooperation and sectors in which private firms can involve independently be made in Ethiopian developmental state so that the role of the judiciary in the different sectors can be made clear: limiting power of the government in some economic sectors through judicial review and conditional judicial deference in some sectors. This will allow the judiciary to be one institution that promotes development and not one that merely focuses on restraining the government.

Ethiopia is with a society characterized by the operation of different informal institutions both in the civil and criminal justice.³⁵⁹ This indicates that some private economic firms may cooperate in investment and trade and solve their disputes without the intervention of courts. It is indeed said that a significant segment of the society in Ethiopia relies on informal dispute settlement mechanisms.³⁶⁰ The dark sides of much reliance on informal institutions learned from experiences of Japan and South Korea under Chapter Four in fact suggest Ethiopia to be cautious in institutional recognition of customary modes of dispute settlement. The fact that one may find multiple informal institutions across the country due to its multicultural society may also make

³⁵⁹ Yidnekachew Kebede, et al, supra note 356

³⁶⁰ Ibid

the possibility of getting customary institutions which can govern economic transactions uniformly across members of different ethnic groups difficult.

Therefore, judicial enforcement of private property laws supported by constitutionally tested informal institutions can enhance economic predictability in Ethiopian democratic developmental state there by boosting productive private investment and extend time horizon and scope of contractual transaction with a positive effect on economic development. Such a role of the judiciary is important in Ethiopia particularly because foreign investment is expected to have an important role in fostering development in Ethiopia when compared with the experience of Japan and South Korea.³⁶¹ This does, however not mean that the formal judicial structure can substitute the government and its policies to insure the level of investment and trade the country wishes to achieve.

5.3.3. Enhancing Efficiency of the State Bureaucracy

As discussed in chapter two and four, the success of developmental states is also attributed to the efficiency of their bureaucracy in directing and facilitating economic and social transformation. Literatures about judicial review discussed under chapter three tell us that that judicial supervision of administrative actions can improve efficiency of bureaucracies.³⁶² Consistent application of both formal and informal rules of governance by the bureaucracy due to likelier judicial review and enforcement of criminal laws was, as discussed in chapter four one attribute to the ability of public administrations of Japan and South Korean developmental states to design and implement development policies effectively. This is to say that even literatures on classical developmental states focused on factors such as the mode of recruitment of individual bureaucrats, internal control and culture for features of their bureaucracies (embedded autonomy) and hence state capacity, the role of courts was also important as one factor. Judicial review of legality and constitutionality of administrative actions in Japan and South Korea though in few cases also forced bureaucracies and political leaders of these states to negotiate and solicit consensus of private individuals for industrial coalition

³⁶¹ Ethiopian government has identified foreign investment as one which can assist the country in boosting private investment and pledged to make efforts to attract foreign investors. Ministry of finance and Economic Development, *supra* note 333, PP 54. See also the discussion on experience of Japan and South Korea in chapter four which highlights that the two countries relied little on foreign investment for their development with the effect of less demand for judicial litigation.

³⁶² See my discussion under topics 3.4 and 4.3.

The theoretical and empirical discussions thus suggest us that the judiciary in Ethiopia can help the developmental state transform its corrupted and fragile bureaucracy in to an efficient and development oriented administration. This is to say that judicial review of administrative actions based on grounds of constitutionality, legality and consistency can force the bureaucracy to apply even informal rules consistently and negotiate with stake holders in policy and rule making. The institutional condition in which bureaucracies are forced to negotiate with stake holders can in turn enable them mobilize the people along development agendas of the state persuasively and thus effective implementation of development policies can be secured. It avoids the possibility of top-down approach of developmental governance..This indeed can be related to a construction of a bureaucracy characterized by autonomy in decision making and embedded in society in policy formulation, peculiar features of bureaucracies of successful democratic developmental states.

As mentioned in chapter four which discusses the experience of Japan and South Korea, these countries also utilized much of the internal controlling mechanism to minimize the principal-agent problem and judicial review of administrative actions was limited particularly in South Korea. But, as discussed in chapter three, hierarchical control are more suitable in authoritarian forms of governance and this makes the experience of particularly south Korea less generalizable to be emulated by democratic developmental states. The limitations of experiences of Japan and South Korea discussed in chapter four also imply that emerging democratic developmental states should not rely much on internal control and indoctrination of bureaucrats to secure an effective intervention. The relative social homogeneity of Japan and South Korea and the political culture of the then society of these countries where individuals were ready to defer their individual interests for the time being in the interest of national wealth (collective interests)³⁶³ are also worth considering factors here. The point is that the social and political condition of these developmental states made the current scope of role of the judiciary in these states moderately tolerable.

In Ethiopia, the fact that the bureaucracy is said fragile and characterized by rent seeking is mentioned as a challenge for the democratic developmental state to attain its goals.³⁶⁴ Of the

³⁶³ Bernard G.Bishop, *supra* note 68

³⁶⁴ The government has since recently admitted that rent seeking is challenging its agenda of development and democratization. See for instance Addis fortune Ethiopian news paper, January 6/2015, pp 1 available at <http://addisfortune.net/columns/rent-seeking-discourse-seeks-achievable-targets> last visited January 7/2015

different reasons, the way individual bureaucrats are selected to state apparatus is considered as one factor explaining the nature of the bureaucracy.³⁶⁵ The writer of this paper is of the opinion that judicial supervision of the bureaucracy can lead political leaders to fill their bureaucracy with individuals capable of designing and implementing development policies effectively. This is because, the institutional set up within which a judiciary can check the legality and constitutionality of administrative actions in cases of grievances can provide political leaders with the condition to think about the possibility of their policies challenged because of poor performances of their administration. Such fear of political elites out of the possibility of judicial review can in turn lead them devise merit-oriented modes of requirement of individual bureaucrats capable of making decisions autonomously and designing and implementing development policies persuasively, instead of coercively.

The experience of South Africa, however suggest us to be cautious further. In spite of the fact that the judiciary has the power to review all governmental actions and laws and entertain socio economic rights related disputes between government and citizens, it is criticized for being passive in terms of responding to social needs, for the met of which the developmental state is being attempted in the same country.³⁶⁶ This is to say that the judiciary cannot so far force the bureaucracy in South Africa to design and implement pro poor development policies nor it can allow it policy space to initiate development policies. This in turn implies the need to have a legal framework within which the bureaucracy handle administrative complaints before judicial supervision comes in to scene.

5.3.4. Promoting Good Governance

The discussion in the topic above was about how judicial role can enhance the efficiency of the bureaucracy while intervening in the economy. Transparency, public participation, accountability and respect of individual rights are as discussed in chapter two and first topic of this chapter, however, other elements which characterize democratic developmental governance. Good governance which is some time equated with democratic decision making is, as mentioned in chapter two, also in addition to its intrinsic value to society believed improves quality and implementation of development policies.

³⁶⁵ Ibid

³⁶⁶ Amy Gordon and David Bruce, *supra* note 297, pp 26-29

Even if bureaucracies of Japan and South Korea are claimed to have been autonomous and embedded in society, the fact that their embeddedness was limited to industrial elites caused exclusion of outsiders and emerging group interests.³⁶⁷ This resulted, as seen in chapter four, in closed state and industry relation and thus absence of transparency and accountability in developmental decision making to the whole public. The effect was as mentioned in chapter four increasing corruption and social movements on issues of equity particularly since early 1980s.

Judicial review is as discussed in chapter three one mechanism to check actions of the government and its agencies. For instance, once an industrial coalition is established based on negotiation between the state and business elites, it is necessary to check if bureaucracies and business elites are cooperating towards development goals of the state and not conspiring for their individual interests. Judicial enforcement of Formal rules, but changeable through consultation, based on which the state-business elites cooperation are governed and productive private firms are selected for state support can enhance transparency of state industry interaction. This can in turn enhance public participation in the developmental process and equitable social benefits of development.

The judicial role in state and average citizens' relation which is needed to be transparent and characterized by accountability in democratic developmental state Ethiopia is also important. Bureaucrats may reach on decisions unreasonably and in violations of some principles of natural justices even if their decisions have nothing to do with economic growth. In the political economy context where rent seeking is being considered as a challenge for successful developmental state in Ethiopia, unchecked and vast power of the bureaucracy may allow individual bureaucrats decide arbitrarily with the aim to secure their personal gains. Judicial review of administration actions based on their legality, consistency, rationality, and their procedural regularity can keep the public administration transparent to the public and accountable of its actions/ inactions.

The experience of south African also suggest that even if courts do not review merits of cases administrative in nature, judicial check of administrative decisions of their legality, consistency,

³⁶⁷ Evans Peter B., supra note 65, pp 17

rationality and procedural regularity have facilitated judicialization³⁶⁸ in bureaucratic decision making. This in turn has provided South African citizens with an institutional opportunity to challenge maladministration and its negative implication on their rights to receive public services

An emphasis on transparency and accountability of governmental actions is also linked with protection of individual human and democratic rights. Collective interests may sometimes be given national priority over individual rights and interests in developmental state, be it democratic or otherwise, and a focus on good governance may appear counterintuitive to goals of developmental states. The distinction between economic bureaucracies which have direct role in guiding the economy and administrative agencies which provide public services may help to identify when judicial review is necessary and when judicial deference is desirable to promote flexibility and efficiency. Moreover, the fact that development is required to be democratic in Ethiopia also demands that individual rights in state and society interaction should not be disregarded at least when collective interest is not at stake. The constitutional democracy within which developmental state is to operate in Ethiopia also means that citizens will have an opportunity to involve in policy choice and making through different mechanisms; critics, engagement in political organizations and direct participation in decision making supporting government policies to the least. Judicial enforcement of civil and political rights as entrenched in the constitution can allow them to input to quality of development policies and their implementation.

Inclusive development which is also at the heart of democratic developmental state and which requires social justice be met in the course of economic development³⁶⁹ also implicates that citizens will have an institutional opportunity with which they can secure their benefit from the national development and hence their socio economic rights be observed. Even if this was not the case in Japan and South Korea particularly in their early development process as their major focus was on economic growth, little attention on the same issue had latter resulted in social movement and unrest³⁷⁰, which every state wishes to avoid. This suggests us that judicial

³⁶⁸ Tom Ginsburg(2008), The judicialization of administrative governance: Causes, consequences and limit, available at www.lexglobal.org/files/041-ginsburg-intro-in-asian-governance-volume.pdf, last visited september,25/2014.

³⁶⁹ Laura Routley, *supra* note 64, p32.

³⁷⁰ Richard Boyd and Tak-Wing Ngo, *Asian States: Beyond the Developmental Perspective*, London and New York, Routledge Curzon, pp 30

enforcement of rules of fairness and administrative justice can promote fair distribution of growing national income among citizens. Though the South African judiciary, as mentioned in chapter four, did little to attain the transformative constitutional goal of South Africa so far, the institutional design of the same with some contextualization can do a lot in terms of fair redistribution of income. Effective judicial protection of socio economic rights of citizens against arbitrary and discriminatory administrative actions can for instance help the state in achieving this goal.

5.3.5. Consolidating Political Capacity Necessary for Democratic Developmental State.

The political capacity of leaders in Japan and South Korea helped them mobilize their society along their developmental visions and successfully develop their economy. This is to say that the power legitimacy of political leaders because of their impressive economic performance did contribute them to further stay in power with their preferred development policies which in turn led the countries to sustainable economic development and later to democratization.³⁷¹ If the idea that effective development performance was the main source of legitimacy of policies of developmental states of these countries sounds strong, we should accept the argument that courts at least indirectly helped development oriented political elites to generate political capacity which in turn helped them design and implement their development policies effectively for a relatively longer time. This is because of the roles courts, as discussed under chapter four, contributed towards the developmental achievement of Japan and South Korea. The limitations and challenges regarding scope of judicial power particularly in South Korean developmental state and the consequences only suggest that the judiciary can play more to consolidate political capacity of development promoting policies and leadership.

The point is that the interplay of the roles of the judiciary in maintaining security and order, economic predictability, building an effective bureaucracy and good governance can generate legitimacy and political acceptance to the developmental state model of development in Ethiopia. The fact that as mentioned here-in above, personal relation based and closed state and industry relations resulted in an increasing corruption and later social unrest in Japan and South Korea

³⁷¹ Tom Ginsburg, internet source, *supra* notes 368, pp 6. See also the discussion on the introductory part of chapter four.

also suggest that absence of transparency and accountability, due partly to absence of comprehensive judicial review of administrative actions can lead to erosion of political capacity of development oriented leadership in Ethiopia.

The idea that democratization and social division weakens political capacity of advocates of developmental states³⁷² is also worth considering here. This is to say that democratization and diverse back ground of individual bureaucrats can for instance limit the ability of strong personal leaders or parties to control their bureaucracies through mechanisms other than courts such as internal control suggesting the need for democratic institutions to substitute them. Democratization and constitutional recognition of ethnicity as pillars of governance in Ethiopia³⁷³ thus narrows the opportunity of political leaders to personally control bureaucrats and impose their personal visions on the society without challenge. A judiciary with a power to supervise governmental actions against developmental needs of the society can thus fill the gap and generate the necessary political capacity to development enhancing policies and political elites.

5.4. Prospects for and Challenges on Role of the Judiciary in Ethiopia

5.4.1. Prospects

This topic is concerned with examining the prospects for the judiciary to play its own positive roles towards constructing successful democratic developmental states in Ethiopia. As discussed in chapter three of this research, judicial systems are required to be independent for the benefit of society of a given state and held accountable for their functions against social needs. Accordingly, courts seen as agents of the sovereign (people) can contribute directly or indirectly positively in state effort to resolve nationally focused social problems if they are independent from any kind of interferences and characterized by accountability. The instrumental importance of courts in societies with varying problems can also be affected positively or negatively and will be discussed in the following sub topics.

Compared with the experiences of Japan and South Korea, courts of which played different roles for their development and seen from the theoretical discussion on role of courts in different types of governance in chapter three, it is fair to hold that there are some prospects for the judiciary to

³⁷² Bernard G. Bishop, *supra* note 68, pp 56-68

³⁷³ See the preamble, article 39(1),(2),(3), and article 46(2) of the FDRE constitution.

contribute the roles discussed here above in Ethiopian democratic developmental state; maintaining security and order, securing economic predictability, promoting efficiency of the bureaucracy, facilitating good governance and generating political capacity for development oriented leadership.

A. Constitutionally Entrenched Independence of the Judiciary

The FDRE constitution as discussed in this chapter, topic 5.3 has established independent courts with judicial power at both federal and state levels of government. While the executive and law making bodies involve in the appointment of president and vice president of supreme courts at all levels of government, the constitution empowers judicial administration councils in appointment of judges of all levels of courts at the two levels of governments.³⁷⁴

The theoretical discussion in chapter three reveals that a judiciary whose independence is constitutionally guaranteed can properly deliver its function and promote development. The discussion on the experience of foreign developmental states (Japan, South Korea and South Africa) in chapter four also demonstrates that their constitutions entrenched judicial independence and helped their judiciaries to retain their institutional independence. That in turn helped courts play some positive roles in the development of Japan and South Korea as discussed in chapter four.

The independence of the judiciary in the FDRE constitution is even more entrenched than those of Japan and South Korea though these countries had formal liberal constitutions. As the discussion in chapter four demonstrates, job security of judges in these two countries was not constitutionally entrenched because of the fact that employment of judges was terminable at every ten years since appointment. Terminable judicial employment of individual judges provided executive branches of governments of Japan and South Korea with institutional opportunity to undermine personal independence of judges in cases of necessity.

From foreign developmental states whose experiences is discussed in chapter four, only the constitution of South Africa has guaranteed tenure security of individual judges. As mentioned in the discussion under topic 4.2.3., South Africa which is constructing new developmental state is indeed praised for having a judiciary capable of deciding case independently. The constitutional

³⁷⁴ Article 81(1) and (2) of the FDRE constitution

basis of institutional and personal independence of courts led law professionals and court officials to challenge efforts of the executive body to control and regulate the judiciary³⁷⁵ in South African developmental state.

Thus, the fact that personal and institutional independency of the judiciary is entrenched in the constitution can at least normatively speaking be mentioned as a prospect because it provides the first step for the organ to function properly. Institutionalization of rules of the game and specific functions of democratic institutions including courts, and the system of check and balance is indeed, as discussed, in chapter two considered necessary element for the success of democratic developmental states.

B. Moderate Judicial Administration Legal Framework

The manner of judicial administration and composition of the organ responsible for administering internal affairs of courts is also another factor linked to the scope of independence of courts both personally and institutionally.³⁷⁶ Judicial administration councils or commissions are the organs that are responsible for the administration of judicial affairs in many modern democracies.³⁷⁷ Their powers includes enactment of rules and principles of conduct of court officials, rules of systems of professional promotion, entertaining and deciding on disciplinary matters and providing lists of candidate judges for appointment to relevant authority; executive body or law making body³⁷⁸ as the case may be. Much, it is said that empowerment of such a commission to administer judicial affairs is help full to strike a balance between independence and accountability of courts;³⁷⁹ the qualified notion of separation of power in modern democracies.

The ability of judicial administration commissions or councils to secure independence and accountability of courts at the same time however depends on how it is composed. The judicial administration organs which were responsible for supervising judicial affairs in developmental states Japan and South Korea were, as discussed in Chapter Four, composed of justices of their supreme courts. The fact that composition of such organs was limited to judges of supreme

³⁷⁵ See my discussion under topic 4.2.3.

³⁷⁶ Neil Chisholm, internet source, supra note 285

³⁷⁷ Thomas E. Plank, the Essential Elements of Judicial Independence and the Experience of Pre-Soviet Russia, William and Marry Bills of Rights Journal, V. 5. No 1., 1996 pp 1-75 at pp 20-21.

³⁷⁸ Ibid

³⁷⁹ Id pp 22

courts, who were in turn appointed by the executive body, undermined personal independence of judges.³⁸⁰ This is to say that even if institutional independence of courts was retained as mentioned in chapter four, exclusive power of judges of supreme courts of Japan and South Korea to determine and decide in internal judicial affairs left little room for individual judges in lower courts to deploy subjective reasoning in their decision making.

Even if inclusion of judges of lower courts in to composition of judicial administration commissions is claimed to enhance judicial independence, it is said that accountability of courts can be undermined.³⁸¹ Non representative judicial administration organ is likely to defend autonomy and interest of judges with less focus on the fact that judges are needed to be independent to serve society. Even if lack of accountability of courts was not a problem in developmental states Japan and South Korea due to the ability of political leaders to control their higher judicial bureaucracies, the latter interfered in personal autonomy of judges of particularly lower courts through different institutional mechanisms discussed in chapter four; promotion, geographic allocation and reappointment.

In South Africa, the organ responsible for judicial administration (judicial service commission) is, as mentioned in topic 4.2.3., composed of representatives of different segments of society; members from legal professionals, judges, members of the executive, members of opposition and academic professionals. This makes difficult for the ruling party in South Africa to control and manipulate the judiciary which latter as discussed in the same topic forced the party to initiate judicial reform; increasing number of the executive body in the judicial administration organ and enactment of code of conduct of judges being parts of the initiation. But, for reasons mentioned in chapter four under topic 4.2.3., such as less representative nature of the judiciary, the legacy of apartheid oriented judges and absence of rules of code of conduct, the judiciary in south Africa is criticized for being less responsive to social problems of majority of population of the state. This can in one or another way be linked to limitations on accountability of the South African judiciary making it less sympathetic to the poor.

In Ethiopia, judicial administration council responsible for determination of internal affairs of the judiciary, appointment of judges of higher and first instance courts and deciding cases on judicial

³⁸⁰ See my discussion in chapter four: under topics 4.1.1 and 4.1.2.

³⁸¹ Thomas E. Plank, *supra* note 377, pp 22.

disciplinary matters is composed of members from house of peoples representatives, the executive (minister of justice), presidents of all levels of federal courts, one judge chosen by all courts, one practitioner lawyer, law academics and distinguished citizen.³⁸² This suggests that the judicial administration legal frame work is moderate enough in that it can fairly help the state to maintain the balance between independence and accountability of the judiciary. Courts can function independently to serve the society taking its recurring problems and public policies, the objectives of which are underpinned by laws, in to account. This moderate legal framework of judicial administration can thus be claimed as a moderate prospect for the judiciary in Ethiopian democratic developmental state to play the roles discussed under topic 5.4.

C. The Start of Structured Judicial Training

It is claimed that higher competence of judges is associated with their capacity to entertain disputes independently.³⁸³ This is because, judicial training of would be and working judges is believed improves their professional knowledge and practical skill with positive effect in autonomousecision making.³⁸⁴ Institutionalized judicial training also helps judges to understand the political, economic and social conditions in which they perform their duties.³⁸⁵ These ideas also suggest that structured and continuous training of candidates and those in judicial bench helps to build a judiciary which can function independently and sympathetic to social needs.

Studies on the quality and quantity of law professionals working as judges in Ethiopian courts in general and federal courts in particular in the last five to ten years have pointed out that the judiciary suffers from lack of man power with necessary legal expert and knowledge³⁸⁶ with negative effect on efficient and consistent judicial decision making. Absence of structured and continuous training of both judicial candidates and working judges is part of the reason to which studies have attributed the problem.³⁸⁷ Such a problem can rather have a negative impact on the proper role of the judiciary this research claims can play in Ethiopian democratic developmental state

³⁸² Article 5 of Proclamation Number 684/2010 Amended Federal Judicial Administration Council Establishment Proclamation.

³⁸³ The International Bank for Reconstruction and Development, Comprehensive Legal and Judicial Development: Towards an Agenda for Just and Equitable Society in the 21st Century, Washington, D.C, 2001, pp 278.

³⁸⁴ Ibid

³⁸⁵ Ibid

³⁸⁶ Federal Democratic Republic of Ethiopia, Ministry of Capacity Building, Justice Reform Program, Base Line Study Report, February 2005 and the World bank, Ethiopia. Legal and Judicial Sector Assessment, Washington DC, World Bank, 2004.

³⁸⁷ The Ministry of Capacity Building (Ibid), pp 159

A structured training of judicial candidates following their graduate and working judges has however, since recently started in Ethiopia.³⁸⁸ The continuity and institutional nature of the training can be taken as a prospect for the judiciary in Ethiopia to contribute its positive role towards achievement of goals of the democratic developmental state. This is because well structured trainings can equip candidates with necessary legal knowledge and practical skill which can help them develop their reasoning skill and consistent decision making. Organized judicial training centers can based on need assessment on manpower of courts produce required amount of law professionals and relatively qualified for judicial benches and this can in turn minimize possible gap between demand and supply in the practice of the profession. For this to be a reality, colleges of law in universities of the country should be capable of producing sufficient law degree graduates to training centers. Furthermore, the involvement of law academics and professors in the training can improve the prospect as it helps to expand the scholarly capacity of judges to understand international and domestic political and economic conditions in decision making.

South Korea and Japan developmental states also had legal research and training centers which trained students graduated with higher scores from law colleges.³⁸⁹ Public policies which underlined public interests of the then societies of the two states (economic development) and the context within which candidate judges were to apply laws constituted part of the training in Japan and South Korea training centers.³⁹⁰ South Africa has also since recently started the same trend in that it has established a legal research and training center as part of the judicial reform initiative.³⁹¹ Though it is early to measure the degree of its contribution to causes of the judicial reform initiatives, taking the transformative nature of the constitution of the state, the social problem prevailing in the country and the efforts of the ruling party to solve the problem with developmental state policies, it is claimed that the training center will create socially responsible judges.³⁹²

Seen from this, judicial training centers in Ethiopia can develop awareness of judicial candidates as to the political and economic conditions at international and domestic levels on one hand and

³⁸⁸ Id pp 49

³⁸⁹ Tom Ginsburg, *supra* note 13 ,pp,10

³⁹⁰ Neil Chisholm, internet source, *supra* note 285, pp 18

³⁹¹ Amy Gordon and David Bruce, *supra* note 297, pp 39

³⁹² Ibid

the implication of choice of democratic developmental states on the role of legal institutions in general and courts in particular on the other hand. This in turn can help judicial candidates or training judges understand the current social problems of majority of the population in Ethiopia in administration of justice and how law and its enforcement can solve at least part of the problems.

Consequently, organized judicial training of candidate judges can further improve the prospect for the judiciary to contribute the roles identified under topic 5.3., for Ethiopian democratic developmental state to achieve its goals. Involvement of law academician and professors in the training can further strengthen the prospect.

D. Constitutional and Policy Recognition of Legal Pluralism on Some Social Fields

As highlighted in Chapter Three, one limitation of the rule of law orthodoxy is of the fact that it gives little attention to the role of informal institutions and their machineries in economic development of states. But, recent studies on the issue at hand have established that informal or community institutions can promote development particularly at early periods of industrialization.³⁹³ It is also claimed that economic development of countries cause the development of modern democratic institution as much as legal institutions do³⁹⁴ to suggest that customary or local institutions can be useful to facilitate trade and investment in small economies. This suggests the need to recognize the importance of indigenous or community specific institutions of dispute settlement in states with deep social division like Ethiopia for their development particularly at early periods of their process of economic development. This in addition to advantage of informal institutions to empower local communities can improve efficiency of regular courts.

The experiences of Japan and South Korea as discussed in chapter four also suggest that informal institutions and their machineries of dispute resolution contributed positively to their development at early times of industrialization. They facilitated cooperation among citizens in the condition of limited capital in trade and investment and minimized the case load of courts

³⁹³ See my discussion in chapter three and part of chapter four which draws comparative lessons.

³⁹⁴ Ha-Joon Chang, Institutions and Economic Development: Theory, Policy and History, *Journal of Institutional Economics* V 7: No 4, 2010, pp 473–498

making the latter to be efficient in resolving cases submitted to them. Even if different factors such as limited access to courts and costly judicial proceeding accounted for choice of people in the two states and much reliance on informal institutions after expansion of their economies had their own dark sides as mentioned in Chapter Four, the importance of local institutions until economic development led to comprehensive legal development was paramount.

The theoretical argument and experiences of the East Asian developmental state thus suggest the need to have both the community specific and democratic state institutions in place so that one can promote the efficient utility of another in the process of development. As mentioned somewhere above in this chapter, however, the efficiency of informal mechanisms of dispute settlement in all types of cases depends on the efficiency and accessibility of courts and vice versa. This in turn demands formal recognition of social and legal pluralism in multicultural states such as Ethiopia and regulating the interactions between the different institutions of governance.

The FDRE constitution has recognized the right of people to arrange their interactions according to customary and religious rules and settle disputes in institutions other than ordinary courts in religious, family and personal matters.³⁹⁵ Even if constitutional recognition of customary institutions and modes of civil dispute settlement is limited to family and personal matters, this can still help courts to improve their efficiency as significant amount of civil matters may be settled without judicial litigation. This in turn strengthens the prospect that courts in Ethiopia can invest their limited resources and capacity on cases submitted to them particularly at this early process of economic development and democratic transition. However, sustainable development and democratization, as witnessed in successful developmental states in Japan and South Korea is going to increase demand of people for judicial litigation suggesting the need to gradually build the capacity of the judiciary in terms of material and human resource for efficient decision making. This will also make the institution ready to respond to new developments in the near future probably as the result of success of the developmental state

Moreover, policy wise, the criminal justice policy in Ethiopia since 2003 E.c has included mechanisms by which criminal cases may be settled without the need for courts to involve in

³⁹⁵ Article 34(4) and (5) ,and 78(5) of the FDRE constitution

dispute settlement and restoration of justice.³⁹⁶ The alternative modes of dispute resolution are made part of the criminal justice and to be used if the outcome of their utility benefits the society in general and victims in particular. Such a policy initiation can be seen as a prospect for the proper function of the judiciary in Ethiopian democratic developmental state. Firstly, in a society where developmental state is seen as a political economy that can better facilitate economic development and democratization, focus on restorative justice is important. Because, in society where informal institutions of social governance are dominant as discussed above in this chapter, the utility of their mechanisms of conflict resolution can be more important than the formal structure in terms of restoring peace and order in local communities.³⁹⁷ This (peace and security) being again an important ingredient for success of developmental states and collective action problem in developmental process being one reason for countries to pursue the developmental state model³⁹⁸, alternative criminal case resolution methods can help Ethiopia to maintain harmony among members of communities and mobilize them collectively along its developmental visions easily.

Secondly, the alternative modes of dispute resolution in criminal justice can reduce work load of courts to focus on cases resolution of which by the same is necessary for both the society and victim and hence improves the prospect for the efficient and procedurally fair judicial decision making in criminal justice.

Finally, the constitutional and policy recognition of legal pluralism and subsequent utility of alternative mechanisms of dispute settlement can do positively on public perception of the judiciary. A judicial decision which may not bring a lasting solution in the community is likely to lost public confidence on its significance and cast shadow on its legitimacy. Thus, the constitutional and policy recognition of alternative modes of dispute resolution and their integration with the formal structure can strengthen the prospects discussed above for the judiciary in Ethiopian democratic developmental state to play its own positive roles.

³⁹⁶ Federal Democratic Republic of Ethiopia, Ministry of Justice: Criminal Justice Policy of Federal Democratic Republic of Ethiopia, February 25/2003, pp 36--41

³⁹⁷ Assefa Fiseha, Customary Dispute Resolution Mechanisms and the Rule of Law: Areas of Convergence, Divergence and Implications In: Elias N. Stebek and Muradu Abdo (Editors), Law and Development, and Legal Pluralism In Ethiopia , Addis Ababa , JLSRI Publications ,2013, pp 111-137

³⁹⁸ Ebrahim Shabbir Deen, *supra* note 42, pp 426

5.4.2. Challenges

A. Non-Judicial Constitutional Review

1. on the legal frame work

As discussed in chapter one and three, judicial power of courts in a given society includes review of constitutionality and legality of all governmental actions. And in fact, scope of judicial independence in modern democracies is currently measured, as considered in chapter three, among other things by the extent to which courts can review constitutional validity of legislative and administrative actions.

The assessment of experience of foreign developmental states under chapter four also demonstrates that judicial power of regular court involve review of the constitutionality of all governmental actions though amendment of constitution in South Korea in 1972 limited power of courts to reviewing constitutionality of only administrative actions. Even if the judiciaries of the Japan and South Korea rarely invalidated legislations, likelier of judicial review as the result of formal power of the judicial systems still contributed towards achievement of objectives of their developmental states in ways discussed under chapter four. It also forced political leaders in Japan to negotiate with and co-opt influential opponents for coalition in at least some cases.³⁹⁹ The exclusion of judicial constitutional review since 1972 as the result of amendment of the constitution by the authoritarian regime of the time also led the public to perceive the judiciary in political disputes as the instrument of the government against which social movements increased for, among different things, its undemocratic character.⁴⁰⁰

In Ethiopia, the FDRE constitution has vested the power to review constitutionality of laws to the house of federation.⁴⁰¹ Even if there have been different arguments whether the same constitution empowers Ethiopian courts to review administrative actions of their constitutionality, the Ethiopian parliament came up with proclamations 250/2001 and 251/2001 which clearly have settled the issue since the same year. These two proclamations have further

³⁹⁹ John O. Haley, *The Paradox of Weak Power and Strong Authority in the Japanese State* in: Richard Boyd and Tak-Wing Ngo (Eds), *Asian States: Beyond The Developmental Perspective*, London and New York, Routledge Curzon, 2005 Pp 67-83 At Pp 67.

⁴⁰⁰ Huck-Ju Kwon, Supra Note 245, pp 76

⁴⁰¹ Article 62(1) and 82(1) of the FDRE constitution

empowered the HOF to review constitutionality of administrative actions.⁴⁰² So, the fact that the judiciary in Ethiopia is totally sidestepped from reviewing all governmental actions of their constitutionality is, the author of this work argues, one challenge that can affect the proper roles of the organ in the democratic developmental context.

Different reasons for the exclusion of judicial review of constitutionality of laws under the current Ethiopian constitution are submitted;⁴⁰³ the political dynamic that caused the coming in to being of the current Ethiopian constitution, public perception on the judiciary and fear of judicial activism. The political settlement between nations, nationalities and peoples of Ethiopia derived by the nationality question is considered to be cause of the constitution and its contents.⁴⁰⁴ This combined with the perceived perception that the public had on the judiciary of the preceding regimes, it is held, led the constitutional framers to give the power of constitutional interpretation to the house of federation. The latter being considered a political institution where the owners of the constitutions are represented is thus with the power to review constitutionality of laws and administrative actions since 1995 and 2001 respectively. Concern of drafters of the constitution with possibility of ideological preferences of individual judges to causes of the constitution is also mentioned as explaining factor to empower the house of federation.⁴⁰⁵ The third reason appears to be the concern of the ruling party in South Africa where, the judiciary filled with liberal rule of law minded judges as discussed in chapter four, is denying it policy space.

The explanations submitted to justify the institutional configuration with regard to constitutional review in Ethiopia are in fact interrelated. The first two reasons combined leads to the conclusion that the owners or champions of the constitution rather than an organ filled by individuals with possible personal ideological preferences should clarify and interpret values of the constitution. Considering the nature and purpose of the house of federation or like organs; representation of interests and values of local communities, an emphasis on group values and interests(nations and nationalities in Ethiopian case), one can legitimately held thus appears to be the driving force behind the institutional set up. The third reason, public (whole society which constitute the

⁴⁰² See Article 2(2) and Article 9 of Proclamation Number 251/2001, And Article 2(5) Proclamation Number 250/2001

⁴⁰³ Assefa Fiseha, *supra* note 144, pp 10-12.

⁴⁰⁴ *Ibid*

⁴⁰⁵ *Ibid*

federation) confidence on the judiciary is also linked to the conclusion premised from the first two reasons. Champions of the constitution could not expect the judiciary, which was considered to be instrument of the preceding repressive regimes,⁴⁰⁶ would be sympathetic to the values and interests entrenched in the constitution. All revolve around the question of who owns the constitution to lead in to the conclusion that the owner should interpret it.

In relation to these reasons and the conclusion derived from the same, the author of this work wants to submit the following argument. Every democratic constitution is assumed to be made by public so that the people are owners of the constitution. But, it is not common for people or their representatives to interpret constitutions and apply them in to concrete cases. Representatives of the people or people may, however, involve in the appointment or elections and control of judges whose role is to interpret constitutions and other subsequent laws.⁴⁰⁷ Democracy also demands institutional opportunity by which causes for and owners of the constitution are represented in law making body and/ or participate directly in law making process.⁴⁰⁸ The logical derivation will thus be that though the owners of the constitution in Ethiopia are multicultural people, the nature of society cannot strongly justify the argument that owners of the constitution should interpret it in all transactions.

But, it can fairly be held that the nature of control of judges and involvement of representatives of nation's nationalities and people in judicial appointment should be different. This may include the involvement of the second chamber in the appointment and administration of judges, and/ or determination of structure of special courts with power to interpret the constitution. The following statement of a certain justice minister is worth quoting here. Adolf Leonhard, justice minister of German empire (1871-1918) noted that;

“I have nothing against the independence of judges as long as I promote them.”⁴⁰⁹

Independence of judges here can be linked to the scope of transactions over which courts can rule independently as can be inferred from the discussion under Chapter Three. The point of this note is that any political organ in constitutional democracy with different interests (such as the

⁴⁰⁶ Ibid

⁴⁰⁷ United States Institute of Peace; Judicial Appointment and Judicial Independence, 2009 available at www.USIP.org last visited September 25/2014.

⁴⁰⁸ Ibid

⁴⁰⁹ Cited in: Neil Chisholm, Internet Source, supra note 285 at pp 10

HOF which represents interests of nations, nationalities and people in our case) can institutionally control and hold judges accountable for their function, the aim being giving institutional support to ones' interest no matter how broad the interest is.

Another less investigated reason which may led the driving force of the time to come up with the current institutional configuration is rather worth examining here. It is claimed that most states whose political philosophies are inspired by the dependency /Marxist theory vest the power of constitutional review to political organs such as second chambers, parliaments or the executive.⁴¹⁰ Literatures on the law and development as mentioned in introductory part of Chapter Two also hold that powerful bureaucracies played significant role in policy, rules and decision making with little judicial supervision in classical statist developmental states. Seen in light of these claims and the experience of foreign capitalist developmental states(Japan and south Korea), the institutional configuration with regard to scope of judicial power in Ethiopia currently makes it somehow similar with classical statist developmental states.

It is, however, worth emphasizing here that East Asian states (for instance Japan and South Korea) succeeded under the capitalist developmental state model. Japan and South Korean developmental states did, as discussed in chapter two, not regulate all their economies. They gave space for market forces. Equally important, it is their institutional characters which new developmental state are being advised to creatively emulate. These ideas combined with the constitutional democracy context with in which Ethiopia is to construct developmental state demands it to have a judiciary the power of which scope should even beyond that of South Korea (characterized by having authoritarian regimes).

There are arguments in favor of judicial constitutional review forwarded by Ethiopian scholars.⁴¹¹ A certain author for instance contends that the nature of composition and magnitude of constitutional roles of the HOF makes it both inefficient and incapable of adjudicating constitutional disputes and interpreting the constitution independently.⁴¹² In fact, considering the dual mandate of members of the organ and extensive powers of the organ itself, it appears to be

⁴¹⁰ Philip d. Reed, *Silencing the Ethiopian Courts: Non Judicial Constitutional Review and Its Implication on Human Rights*, *Fordham International Law Journal* V. 32, No 1, 2008 pp 259-297 at pp 280.

⁴¹¹ Assefa fiseha argues that the judiciary can best serve in disputes which do not involve political questions; see Assefa Fiseha, *supra* note 144. See Also Yonatan Tesfaye, *Judicial Review and Democracy: a Normative Discourse on the Novel Ethiopian Approach to Constitutional Review*, 14 *Afr. J. Int'l & Comp. L.* 53 2006, pp 54-82

⁴¹² Yonatan , *Id* p 71-72

challenging for the same to efficiently handle particularly private disputes the resolution of which may demand frequent interpretation of the constitution. The organ is inaccessible for individual citizens whose rights and interests may be frequently at stake because of interventionist bureaucracy of the developmental state. The low level of independence of the house of federation from the ruling party because of the way its members have been appointed so far⁴¹³ even goes to contradict the third reason (low public confidence on the judiciary) which explains the constitutional review power of the organ. These theoretical arguments, experiences of foreign developmental states and issues legitimize the need to consider other alternatives

The author of this research is of the belief that the judiciary with constitutional review power can serve the democratic developmental Ethiopian state better. To empower regular courts or special court with the same power without any limitation or controlling mechanisms (checking accountability of the judiciary) may in fact be counterintuitive to imperatives of the democratic developmental state as is demonstrated in the experience of South Africa considered in chapter four. The house of federation should be still with some power to control operation of courts which involve in interpretation of the constitution. Furthermore, the scope of transactions over which the judiciary should have constitutional review power can be limited to some transactions.

A certain Ethiopian scholar⁴¹⁴ also contended that the judiciary; regular or special should have at least power to concrete review supporting the legitimacy of the house of federation to deal with abstract meaning of constitutional provisions against which validity of governmental actions may be challenged. Aseffa fiseha⁴¹⁵ even argues that the HOF is the proper political institution not only for abstract review in matters which purely are of individual right and interest but, also factual review in disputes which involve political questions; disputes among organs of government, disputes among/ between regional governments and the federal government. The point is that constitutional interpretations which involve questions political in nature can be better settled by a political process or organ. Consequently, disputes between political parties of both the opposition and the ruling can also be included to the list. The list can even be extended to include any dispute between non political groups or any social group and government so that

⁴¹³ It is said that members of the HOF have so far been appointed from members of regional state or local councils and at times from members of the executive bodies of local governments. Id pp 78

⁴¹⁴ Takele Soboka, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory*, *African Journal of International and Comparative Law*, 19(1), 2011, pp 99-123.

⁴¹⁵ Assefa Fiseha, *supra* note 144

the house of federation can have the opportunity to deal with social or political groups which are electorally meaning full.

Thus, the writer of this research holds that the judiciary; regular or special court to which citizens can have relatively easy access should at least have the power to review constitutionality of governmental acts over transactions which involve interests and rights individual in nature. Representative of champions of the constitution need, however to have some mechanisms by which it can supervise the operation of courts engaged in constitutional review. Much, the author believes that the HOF of federation should still settle constitutional disputes, the resolution of which may have significant effect on the political interest of those it represents.

Exclusive power of the HOF to settle conflicts among groups of the kind mentioned here and political organs by considering constitutional provisions can have the following advantages. First and foremost, it may allow political actors who lost elections little opportunity to capture the state or challenge pro poor development policies through a judiciary whose officials can be more sensitive and technically capable on concrete cases than general social conditions compared to the HOF. The latter can be more sympathetic and responsive to current political, social and economic conditions of the society owing to nature of its composition.⁴¹⁶ This can in turn address the fear of framers of the constitution on judicial activism. Secondly, the political organ because of its nature of composition can resolve conflicts among these mentioned above amicably: such as by negotiations and conciliations. This option if viewed against the developmental path the state declares to pursue and the ongoing project of nation building can even be of greater importance. This is because of the need for developmental states to solve collective action problem at state level for better development success as mentioned above. The possible resolution of conflicts among different groups of people or institutions by a political process in the period of transition to advanced economy and democracy can promote win-win solution and hence inter-group cooperation. Thirdly, gradual or sequential reform is necessary so that empowering courts with constitutional review power over only politically less sensitive matters can help the state to learn for more or big bang reform in the future. Much, the gradual reform approach may be helpful for the state to avoid possible conflict between sovereign/ strong state

⁴¹⁶ Each nation and nationality is represented by one member with more for every one million additional number of populations; see article 61(2) of the FDRE constitution.

and judicial activism. The political question doctrine which judiciaries of advanced western democracies had pursued until recently for judicial self restraint in policy sensitive constitutional issues⁴¹⁷ is also worth noting here. The doctrine had until recently resulted in a trend of judicial deference in matters courts believe would better be settled by the political process.⁴¹⁸

These advantages of this option, however, the author believes depends on factors such as the public perception on independence of the HOF and the extent to which potential parties see it as legitimate representative of diverse interests. Reforms with regard to the mode by which the organ is claimed to have been composed can improve its legitimacy. This includes such as recruitment of members of the HOF through direct elections that promote effective representation of different group interests in the same and efficient decision making.

The judicial power to interpret the constitution in disputes which involve interests or rights of individuals can be better alternative for the success of the democratic developmental state in Ethiopia. Firstly, the fact that market forces need to be protected and at times supported by the developmental state means that productive private sector must be primarily provided with efficient and independent judiciary that can protect its economic interests against arbitrary action of the government or its agencies. This can be a reality if the judiciary is empowered to supervise the constitutional validity of private property and contract related legislations and other administrative actions. Judicial check whether governmental laws and actions have something to serve constitutional values and development objectives or otherwise can also improve the quality of development policies.

Secondly, one inevitable result of the increasing size and function of the bureaucracy in developmental Ethiopian state is an increasing interaction between public administration and citizens. This condition in the context where rent seeking behavior is being regarded as a major challenge to the developmental state is likely to increase individual grievances against arbitrary administrative actions demanding in turn an easily accessible institution that can arbitrate state-citizen conflicts independently. The judiciary can do that better for its relative accessibility to average citizens compared to the HOF. This can result in the ability of the state to balance the need for constructing a strong bureaucracy necessary for democratic developmental without

⁴¹⁷ Assefa Fiseha, *supra* note 144, pp 18-20

⁴¹⁸ *Ibid*

undermining market forces and individual rights of any kind unduly. It further strengthens legitimacy of development oriented leadership and hence extended time horizon for implementation of development policies.

Empowerment of the judiciary or special court to review constitutionality of governmental actions in case of individual complaints can also socialize constitutional rules and other subsequent development underpinning laws with the effect of creating a stability and smooth transition to a state envisioned in the preamble of the constitution. This is because access of people to an organ (courts) for its relatively better efficiency and easy accessibility to the poor will make practice of constitutionalism daily activity. A judiciary blessed development policies can also be easily socialized and hence effective implementation.

This option; judicial constitutional review in some transactions if taken demands revisiting or amending constitutional provisions regarding the enterprise of constitutional review. This in turn may demand the possibility of political resettlement among political elites regarding constitutional provisions over the issue at hand and even other parts of the constitution.

Different concerns over whether the judiciary with review power can properly serve the democratic developmental state may be raised and demand caution. The inefficient performance that the judiciary has experienced in the last decades can in fact be important concern. Easy access to independent judiciary in constitutional matters may give rise to increasing judicial litigation to impact quality decision making. Further strengthening of the prospect discussed with regard to the start of structured judicial training, here above can respond to this concern. This is to say that reforming the legal education curriculum in consideration of the current political and economic conditions and consolidation of the judicial training centers in terms of producing sufficient and socially responsible law experts can improve the efficiency of the judiciary.

The fear that the judiciary with vast power may be used by elites with the effect of structural exclusion of the poor is also worthy of caution. The lesson drawn from South Africa in chapter four shows that limited accessibility of the poor to the constitutional court and legal service, and filling of courts with judges oriented along the neoliberal rule of law resulted in structural exclusion of majority of society up on which the legitimacy of the ruling party is based. Though the ruling party declared to pursue developmental state to solve the recurring social problem as

discussed in the same chapter, the judiciary has limited the opportunity by which development policies derived from voices of the society can be institutionalized and implemented. What this suggests is the need to strengthen accountability of courts so that society will be served of their independence and constitutional review power.

The concern with accountability and creation of a judiciary capable of understanding the major problems of the society in Ethiopia can be dealt with different institutional measures. Reform of legal education curriculum in a way help full to increase scholarly knowledge of law students about law and development, and improve their understanding of political and economic conditions of Ethiopian society can be one solution.

In addition to this, different alternatives with regard to accountability issues can be considered. The first alternative is to let courts to determine meaning of constitutional provisions or values in light of concrete cases. While likelier judicial application of constitutional principles in to concrete cases can serve as a pressure for governmental bodies to remain consistent and act in procedurally fair manner in decision making, abstract review by the house of federation can also minimize judicial arbitrariness. This kind of institutional setup can promote development commitment of the bureaucracy and force the judiciary to check the former only against the development objectives of the constitution.

Another alternative by which the representative of the nationals, nationalities and people of Ethiopia can insure accountability of the judiciary to the general society is through involving in the appointment, administration and removal of judges of courts engaged in constitutional interpretation. The lessons drawn from experiences of Japan and South Korea in chapter four and the judicial reform initiatives in South Africa support this idea. The national assembly and the executive body as mentioned in chapter four involved in appointment of judges in developmental Japan and South Korean states. The national assembly in Japan also had power to entertain impeachments made by citizens against judges for their unlawful acts.⁴¹⁹

Should the HOF be empowered only to control or involve in appointment of judges and administration of courts with constitutional review power, it necessarily involves amendment of the constitutional provisions regarding powers of the organ and the judiciary. It may also demand

⁴¹⁹ Article 64 of the 1947 constitution of Japan

the empowerment of the same to involve in law making process regarding transactions over which the judiciary will have power to interpret the constitution.

2. Overview of Judicial Practice on the Issue

With regard to practical experience of regular courts to interpret and apply the Constitution in Ethiopia, there are varying arguments. Some claim courts can cite and apply constitutional provisions in cases which do not involve dispute as to meaning of relevant provisions and no need of interpretation.⁴²⁰ It is also argued that judicial referral to the house of federation is not mandatory and should be only in relation to question of law and not of fact.⁴²¹ Consequently critics are forwarded against particularly regular courts for willingly relinquishing of their power to see any dispute which they suspect may involve constitutional interpretation.

Some reviewed decisions of the Supreme Court cassation bench, however, reveal that regular courts not only cite and apply constitutional provisions, but discuss them extensively even if it is not a routine practice. In case between seventh day Adventist church and members of board of Awasa branch church, file number 66597 for instance, the cassation bench discussed article 11 and 37 of the FDRE constitution to review decisions of lower courts arguing that religion and state are constitutionally separated and the dispute between parties is not justiciable⁴²². While lower courts reversed decision of the church (the applicant in Cassation Bench) to dissolve the branch church holding that decision of the church is in violation of relevant provisions of the Civil Code and directives of the church itself, the Federal Supreme Court Cassation Division held that the church has a constitutional power and right to decide on its internal affairs independently and regular courts as part of state institutions do not have power to review its decisions. The discussion and decision of the Cassation Bench, which reviewed decisions of lower courts derived partly from provision of the Civil Code (Article 448) also, indicate that lower courts' decision is in violation of constitutional principles. It indirectly (not expressly) suggests the incompatibility of the provision of the Civil Code which partly served as basis of decision of lower courts.

⁴²⁰ Takele Soboka, *supra* note 414

⁴²¹ *Ibid*

⁴²² The federal democratic republic of Ethiopia Supreme Court research and legal aid directorate, federal supreme court cassation bench decisions, volume 13, 2005, pp 603-606

In other cases reviewed, the Cassation Bench cited, discussed and applied different constitutional provisions to support its analysis and decisions. Case file numbers, 58119, 72420,, 69291, 76909 and 64014 of volume 13 of decisions of the cassation bench are other illustrations which demonstrate the trend of judicial practice in relation to interpretation and application of constitutional provisions.

Despite the trend of regular courts to interpret and apply constitutional provisions, it can be noted that courts do not engage in constitutional interpretation to invalidate laws and other governmental action. This (expressly) suggests that courts discuss and apply constitutional values only in cases the resolution of which do not involve contradiction between the Constitution and other subsequent laws, and which involve the interest of government. They engage in discussion of constitutional values to strengthen the soundness of their decisions which means to show the compatibility of legislations relevant to disputes with the Constitution. In addition to this, even if the Cassation Bench demonstrated the same practice in criminal cases in that it interprets and applies constitutional provisions to validate constitutionality of relevant laws, the bench did not demonstrate much the same in other disputes between the government and citizens.

In a case File Number 43511, Weizero Weletsadik and others Vs. Ethiopian State Housing Agency in which applicants requested the Cassation Bench to reverse the decision of Board of the Agency, the Bench rejected the case arguing that it does not have the power to rule over decisions of the governmental agency.⁴²³ The Bench did not mention any constitutional provision or legislative provisions to show exclusive adjudicating power of the board. The HOF and the Constitutional Inquiry Council to which applicants submit their case claiming that the case involves constitutional interpretation ordered the Cassation Bench to resolve the case.

Despite its reluctance to adjudicate the case earlier, however, the Bench in the second application framed the issue of whether the decision of the board was in compliance with the procedures which should be followed by administrative agencies in decision making. The relevant Proclamation No. 87/1986 EC did not embrace guidelines which should be observed by the Board. Nor was a directive issued to this end. The Cassation Bench thus cited and discussed constitutional values such as the right to justice, right to be heard and right to produce evidence. The Cassation Bench finally ruled that there is error of law on the part of the Board and reversed the decision.

⁴²³ The Ethiopian Federal Supreme Court Cassation Bench decisions, Ethiopian Federal Supreme Court Research and Legal Aid Directorate, *Meskerem* 2006 EC (September 2013), volume 14 pp 211-215

of the latter. Even if the Bench did not expressly say the administrative decision is unconstitutional, the final outcome was due to the unconstitutional action of the Board.

The decision of the House of Federation and then the Cassation Bench imply that regular courts can apply constitutional provisions not only to confirm validity of laws and other governmental actions, but also to invalidate particularly administrative action in case of apparent contradiction between governmental actions and the Constitution, and absence of clear legislative provisions which embrace constitutional values. So, ordinary courts should be courageous to demonstrate this trend so that citizens' right to access to justice can be respected. It is also in line of the argument that the regular judiciary should engage in constitutional review in concrete cases (concrete review).

B.Developmental Political Settlement Related Problems

The discussion of additional elements of democratic developmental under chapter two identifies that political settlement among political elites, administrative elites and the society in large with regard to the direction of development and relevant policies is crucial ingredient for success of new developmental states in the context of constitutional democracy. Political settlement particularly among political elites as to the choice of developmental policies can in turn lead to political coalitions of different parties and channeling different classes of society towards attainment of developmental visions and goals of the state. Grand coalitions in effect results, as discussed in chapter two, in power sharing and fragmentation leading to the need for independent judiciary which enforces the rules of the game in developmental governance. Much, institutional linkage of different parties to the state representing different social classes can also make the public in general and political elites in particular to perceive legal institutions including the judiciary as agents of society. This can have finally the effect of taking disputes of any kind by parties to courts because of the positive public perception and hence legitimacy the judiciary enjoys.

In Ethiopia, a political settlement among particularly elites with regard to issues of priority and development policies appears to be far from being a prevalent trend. The discussion in chapter two revealed some issues over which political elites have retained polarized positions. The fact that more than 70 parties are officially registered in the electoral board currently in Ethiopia

⁴²⁴can be taken as clear additional evidence on this point. Different reasons may account to the condition of limited political development agreement and formation of grand coalitions among parties. Lack of democratic political culture of political elites to discuss national issues among themselves is mentioned as one strong explaining factor.⁴²⁵ Recent studies also claim that multicultural countries which have introduced multiparty system since the third wave of democratization (1990s) following an end of civil wars are characterized by ethnic based formation of political parties with little emphasis on substantive ideological orientation.⁴²⁶ This second reason can also fairly explain the current number of parties in Ethiopia characterized by multicultural society. Owing to these and other reasons, it may thus be difficult to see viable party coalitions formed along extensively deliberated and clearly defined development policies (state power-shared)

Whatever reasons may account to polarized stands of political parties, one possible effect is dominance of a certain political coalition in governance or determination and implementation of development policies and design of legal institutions including courts. This is not in fact only a matter of possibility as EPRDF have dominated the national assembly so far since the new constitutional system. What is the institutional implication on the proper roles of the judiciary, this research claims, can contribute towards the realization of goals of democratic developmental Ethiopian state is the issue to be discussed here.

Firstly, the absence of political settlement among elites can lead party in control of power to perceive the judiciary as a suspect forum where the opposition may plot to challenge its power and policies. This in turn is likely to force the government to delay initiatives of judicial reform or even limiting existing scope and level of judicial independence in to transactions which do not involve interest of the government with the purpose to deny the opposition institutional space using the one party dominated legislature. Narrowing scope of functions of courts and limiting

⁴²⁴ De Birhan media, available at www.debirhan.com/%3fp%3D156, last visited September 25/2014.

⁴²⁵ Assefa fiseha (2012), Ethiopia's Experiment in Accommodating Diversity: 20 Years' Balance Sheet, Regional & Federal Studies, 22(4), pp 435-473 at pp 460

⁴²⁶ Krishna Kumar and Jeroen De Zeeuw, International Support for Political Party Development in War-Torn Societies In: Benjamin Reilly and Per Nordlund (Eds), Political Parties in Conflict-Prone Societies: Regulation, Engineering and Democratic Development, Tokyo, New York and Paris, United Nations University Press (2008), pp 261-285. Concerned with the dominance of ethnicity in Ethiopia in political discourse and its effect in democratic development, Abbink also noted that over politicization of ethnicity is a constraining factor on political, economic and social progress of Ethiopia under its new federal arrangement. See Jon Abbink (2011), Ethnic-based federalism and ethnicity in Ethiopia: reassessing the experiment after 20 years, Journal of Eastern African Studies, 5(4), pp 596-618

level of judicial independence can be institutionalized in different ways ranging from constitutional non-judicial review over some transactions to legislation of laws excluding judicial power using one party dominated national assembly. The experience of Japan and South Korea discussed under chapter four also demonstrates same implication. In addition to the constitutional rules which empower the HOF to review constitutionality of laws, the Ethiopian parliament is also known for enactment of a large number of laws stripping judicial power.⁴²⁷ Proclamations 250 and 251/ 2001 which have denied the judiciary to review administrative actions can be good illustrations in this regard

Secondly, even if developmental state and its policies are desirable choices and pro poor parties can hold power following extensive and democratic discussion with the public, an expanded judicial power (it can be established constitutionally or legislative reforms) to include constitutional review can still be used by opposition parties to challenge developmental policies in courts. This can have the effect of denying the public institutional voice for its choice in general and institutional space for the leadership to implement its development policies derived from the public through deliberative democracy in particular. This is to say that even if court are given a constitutional power the scope of which includes reviewing constitutionality of laws, they can be turned in to elitist institutions and be passive in terms of responding to social needs as is being demonstrated in south Africa. This may also lead the development oriented ruling regime to come with legislations that undermine the independence of the judiciary or exclude transactions that involve governmental interest from jurisdiction of the judiciary; a desire to shift from independence to more accountability as efforts of the ruling party of south Africa whose experience is discussed in chapter four demonstrates. Even if judicial litigation trend in Ethiopia in the last ten years shows that the judiciary is not merely a forum for elites when compared with most African countries⁴²⁸, it is still difficult to avoid the possibility if judicial power is extended to policy matters given the polarized positions of political parties.

⁴²⁷ Laws regarding mortgage and pledge of property, ethics and anti corruption commission, lease, income tax are examples, Cited in: Tilahun Teshome, Rule of Law and Development in Ethiopia: Now and Twenty-Five Years from Now (Translated by Yonas Admassu), Economic Focus, Vol. 6 No 4., 2004, pp 1-18 at pp 10-13. See also proclamation No. 455/2005, a proclamation to provide for the expropriation of land holding for public purpose and payment of compensation

⁴²⁸ World Bank (2010) *Uses and users of justice in Africa : the case of Ethiopia's federal courts*. Washington, DC: World Bank available at <http://documents.worldbank.org/curated/en/2010/07/13145799/uses-users-justice-africa-case-ethiopias-federal-courts> last visited June 5/2015.

The effect of all these possible problems and related confusions stemmed from limited political developmental settlement in Ethiopia may ultimately pose a challenge on the judiciary to contribute the roles discussed under topic 5.3. This is to say that the different segments of the state may not see the judiciary as a legitimate/impartial institutional forum of contest between different interests with the possibility of forcing potential parties to seek other alternative means including violent actions. The fact that little possibility of contest in impartial courts between opposing interests and government policies in South Korea since 1972 later led to contest or conflict between the same in streets⁴²⁹ is in support of this point.

The author is not claiming to establish that democratic developmental state in Ethiopia lacks political consensus or settlement among elements mentioned here. But, the signs of the problem at least suggest policy makers and other stake holders such as political parties the need to investigate the degree of the problem and provide institutional solution. This may demand them to deliberate their policies of governance and development democratically around a table among them and with the people, and reconsider rules of contest collectively. It may also include discussions among all parties over the need to develop regulatory frame work about the general activities, criteria of organization and behavior of parties. In addition, political elites need to develop the culture of respecting rules of the game and institutions of enforcement of the rules until they get their visions and policies in to state institutions.\

Furthermore, Even if the executive body and its agents need to enjoy policy and a flexible decision making space given the developmental statehood, it is necessary for the parliament to identify matters over which judicial deference is important and when judicial supervision is necessary before delegating its power to the administration. The fact that public institutions of the state have been identified as corrupt⁴³⁰ is worth worrying here. It should consider the effect of enactment of laws which take judicial power and empower the executive body absolutely over individual rights recognized under the constitution. It is also necessary for the same body to consider the implication of respect and protection of individual rights or otherwise for the success of democratic developmental state. This demands the need to understand when efficiency should be given priority over individual interests and vice versa in governance, and consultation

⁴²⁹ See the discussion in chapter four under topic 4.1.2.

⁴³⁰ Transparency international corruption index(2013), available at [http://www.ei.com/Publication/vwLUAssets/EY-Transparency-International-Corruption-Perceptions-Index-2013/\\$FILE](http://www.ei.com/Publication/vwLUAssets/EY-Transparency-International-Corruption-Perceptions-Index-2013/$FILE) last visited 04 June/ 2015.

with stake holders aimed at soliciting their consent to sacrifice their individual interests for the collective goal if necessary.

C. Absence of Comprehensive Administrative Procedural Law

The development of administrative law across the world is associated with the increase in size and functions of governments to intervene and regulate economies of states.⁴³¹ The practical reason that necessitated interventionist governments in economies of states is at least partly the limitations of markets to address problems of social inequality.⁴³² Even if the reasons for most developmental states including of Ethiopia is beyond regulating markets and addressing social inequalities, as can be understood from discussions in chapter two, one important point of intersection between the regulatory state and democratic developmental state is their reluctance to totally rely on markets to solve locally specific social problems. Despite variety in degree, both rely on interventionist bureaucracy or governmental agencies.

The concern of administrative procedure law is not how much the executive body of government and its agencies should be empowered, but with whether governmental agencies exercise their powers properly within the bound of authorizing laws.⁴³³ On the other hand, current literatures on the third law and development moment have held that law can serve as accelerator of development and as a brake on government and its agencies to curtail corrupt practices.⁴³⁴ The purpose of the latter is to make sure that administrative actions are within the boundary of their legal power and procedural rules and whether their acts promote development objectives defined in general norms or are arbitrary and predatory. This function is indeed part of the reason for the development of administrative law as mentioned here above.

Whether administrative actions are consistent with general objectives or public interests defined in general norms; of the constitution or legislations and procedurally fair can also be supervised by courts or higher hierarchy within the internal structure of the public administration.⁴³⁵ The

⁴³¹ Charles H. Koch, Jr, confining judicial authority over administrative action, *Missouri law review*, V. 49, No 2., 1984, pp 186-249

⁴³² Tom Ginsburg, internet source, *supra* note 368, pp 2

⁴³³ Charles H. Koch, Jr, *supra* note 431

⁴³⁴ David M. Trubek, *supra* note 5

⁴³⁵ Internal/hierarchical control of the bureaucracy together with judicial control was also utilized in Japan and South Korea developmental states. The demarcation between the two systems of control and their integration was made by their respective administrative procedure acts. See the discussion on experiences of Japan and South Korea in chapter four.

specific roles of courts and other institutions and the relationship between them are commonly provided by administrative laws as mentioned above.

While rules that deliver the function of administrative procedure law may be found in different legislations and constitutions in a scattered manner, they can also be provided in comprehensively organized code or legislations. Relevant here is the fact that even Japan and South Korea, early developmental states had codified administrative procedural acts though they were formalist in nature.⁴³⁶ The separately codified procedural acts helped their courts to easily identify when they are mandated to review administrative actions and when they are required to defer.⁴³⁷ This in turn provided courts with the opportunity to contribute to the nature of the bureaucracy in Japan and South Korean developmental states as discussed in Chapter Four. Incomprehensiveness and formalist approach of administrative procedure acts of these states owing to the nature of their regimes and their primary focus on economic growth yet resulted in bureaucracy-business elites' conspiracy for corruptive practices as mentioned in chapter four

Ethiopia does not have a comprehensive procedure act so far though one can find rules of the same nature scattered in different enabling acts. The author of this work claims that the absence of the same instrument may cause another challenge on the proper function of courts in Ethiopian democratic developmental state. It is possible that courts may closely examine whether enabling acts exclude judicial review or not and in time of absence of any say in the relevant law, one can hold they should review actions of administrative agencies because of the principles of separation of power and rule of law. It is also, however, possible that courts in the absence of clear ousting clauses may refuse cases involving administrative agencies holding that they are not expressly authorized to do so by enabling acts. In support of this view, Assefa Fiseha provided the observation that courts in Ethiopia did not show much interest in entertaining disputes to which governmental bodies are parties in the last years.⁴³⁸

Overview of experiences of courts on the issue at hand reveals inconsistency. Even if the Cassation Bench at one time held the view that courts do not have inherent power to review

⁴³⁶ Tom Ginsburg, internet source, supra note 368, pp 2

⁴³⁷ Ibid

⁴³⁸ Assefa Fiseha, supra note 144, pp 13.

legality of administrative actions⁴³⁹, the judiciary in general and the Federal Supreme Court in particular have shown a different practice. In one case submitted to the Federal Supreme Court Cassation Bench (Ethiopian privatization and public enterprises supervising agency Vs. heirs of Ato Nur Beza, Cassation File Number 23608 date Hidar 3-2000 E.C.) it was held that the source of judicial power in Ethiopia is statutory. It thus held that courts do not have inherent judicial power and there is no legal framework governing the judicial review of administrative actions.

Despite the strong words of the Cassation Bench in this case and absence of clear clause empowering courts to review the legality of administrative actions, the Bench also deferred a practice of some lower courts which invalidated a certain directive (for reasons other than adjudicative power). In a case between (Ethiopian National Bank Vs. 1. Hibret Insurance Company 2. Ato Eyesuswork Zafu 3. Ato Workeshet Bekele Demisie, Cassation File Number 44226 Date Tahesas 15-2003 E.C.), the Federal First Instance Court invalidated some provisions of the directive regarding functions and powers of the Ethiopian National Bank (Directive Number 39/2006)⁴⁴⁰ and its decision was affirmed by the appellate Federal High Court. Even if the cassation bench overturned the decisions of lower courts holding that the National Bank of Ethiopia acted within the scope of its power (which is substantive in nature), it did not challenge the procedure of the courts as it did in the first case.

The inconsistency observed in the judicial practice regarding judicial review of administrative actions demonstrates that the absence of comprehensive administrative procedure law in Ethiopia makes it difficult to determine when courts are empowered and the scope of their power, which the writer of this research argues is another challenge for the efficient function of the judiciary.

This problem combined with the exclusion of courts from reviewing constitutionality of any governmental actions and increasing trend of legislations which strip judicial power can only worsen the problem. The researcher also observes that the Cassation Bench in some cases

⁴³⁹ The analysis and decision of the cassation bench in a case between Ethiopian privatization and public enterprises supervising agency Vs. heirs of Ato Nur Beza, Cassation File Number 23608, date Hidar 3-2000 E.C indicates that courts do not have power to see cases over which another organ(including governmental agency) has jurisdiction to give binding decision. It cited article 37 of the FDRE constitution to support its argument that courts do not have inherent power to review administrative actions. See the federal supreme court cassation bench decisions, Ethiopian federal supreme court , Addis Ababa, 2003, volume 6, pp 179-184.

⁴⁴⁰ The federal democratic republic of Ethiopia Supreme Court research and legal aid directorate, federal supreme court cassation bench decisions, volume 11, 2003EC, pp 478-481.

rejected legal actions submitted to it to review the legality of administrative actions claiming that it does not have the power to do so.⁴⁴¹ In the case between Weizero Weletsadik and others Vs. Ethiopian State Housing Agency, File No. 43511 for instance, the Bench rejected the case holding that the Board of the agency has a power to give final decision. Even if the parties took their case to the House of Federation believing that the case involves constitutional interpretation, the later rejected the case holding that the Cassation Bench has judicial power.⁴⁴² Surprisingly, the Bench then entertained the case arguing that it has constitutional power and settled the dispute based on provisions of Proclamation 87/1986EC in favor of appellants. The case which was initiated in 1988 Ethiopian calendar finally resolved in 2005 EC, and this shows the effect of absence of comprehensive administrativeprocedural law to facilitate the efficient performance of the judiciary. Part of the problem or reluctance of the Bench to see the case earlier can be linked to the formal power of the HOF to interpret the Constitution even if the issue was in relation to legality of the decision of the Board of State Housing Agency, and not a constitutional dispute.

This compromises the roles which courts are expected to contribute towards building a bureaucracy characterized by efficiency, transparency and accountability and constitute part of the different challenges in democratic developmental Ethiopian state.

An enactment of administrative procedure act which properly considers the need to construct strong bureaucracy and promote transparency and accountability in decision making can help to deal with the challenge. Consideration of characteristics of the public administration in democratic developmental state thus demands law makers to institutionalize the relationship between the interventionist bureaucracy, private sector and the judiciary. It should also embrace democratic procedures that enable participation of citizens in public decision making and insure accountability of state-private partnerships.

Worth noting here is thus the need for law and policy makers to be cautious if administrative procedure act should be enacted in the near future. Experts who involve in the drafting of the act may assess experiences of countries whose administrative law are developed after their

⁴⁴¹ The Ethiopian Federal Supreme Court Cassation Bench, *supra* note 423

⁴⁴² Ibid

industrialization such as in Germany and United States of America⁴⁴³ with little significance to Ethiopia in the context of democratic developmental state. Possible drafting process should consider the basic characteristics of public administrations of developmental states and how principles and procedures of the act should be constructed in a way to balance effective and good governance.

If one considers the nature and objective of developmental state; a model that helps facilitate the all round transition of states including Ethiopia to advanced economy and democracy, not a stable system on its own right, the concern with administrative procedure act before the completion of the process may appear less relevant. The experiences of north East Asian states explored in chapter four however demonstrate that their development success under the developmental state resulted among other things in only more comprehensive and right oriented administrative law than they had at early period of industrialization. This suggests new developmental states the need to craft administrative procedure laws that consider their current political, economic and social conditions, and subject to gradual reforms on the basis of new developments. The experience of South Africa, an example of democratic developmental state which has comprehensive administrative law which embraces principles of procedural democracy and standards of reviewability⁴⁴⁴ is also worth consulting in possible enactment of the same procedure in Ethiopia.

Moreover, administrative procedural law which defines administrative agencies and their functions, their relationship with regular courts and when the latter should intervene in administrative decision making may not be enacted in the near future for different reasons. However, the house of peoples' representatives in recognition of this fact and challenges associated with the nature of the bureaucracy should carefully design administrative establishment acts. It has to consider the role of the private sector and respect of individual rights for the success of the democratic developmental state. it is necessary for the same organ to identify when efficiency in decision making should be given priority after consultation with stakeholders and how judicial deference can serve the collective purpose.

⁴⁴³ It is said that while administrative laws of Japan and South Korea developed in time of their state industrialization, the need to regulate industrial elites after industrial growth necessitated the development of administrative procedure acts in Germany and United States. See John Ohnesorge, *supra* note 178, pp 5

⁴⁴⁴ Section 6 of the republic of south African, promotion of administrative justice act 3/2000

D. Poor Working Conditions of Judges

Literatures on judicial independence agree that sufficient funding of courts helps them to operate their functions smoothly and independently.⁴⁴⁵ It is claimed that trained, knowledgeable and skilful judges who are not overworked are in a better position to resist undue influence from the other branches of government and private parties of commercial disputes and to be efficient in decision making.⁴⁴⁶ This is to say that sufficient funding allow courts to build their capacity in terms of necessary facilities, and quality and enough law professionals. At the heart of this is thus improving the working condition of judges so that judicial profession will attract individuals with higher knowledge of laws. This in turn promotes efficient and independent decision making in courts with positive implication on public perception for the predictability and consistency in functions of courts.

Relevant and more important in relation to the working conditions of judges is the extent to which judges are satisfied with their salaries and economic security they feel in their life. It is held that judges who are not satisfied with their job payments and do not feel economic security in the long run are less likely to decide cases autonomously.⁴⁴⁷ It is of course clear that economically unsecure judges are likely to resort to external means of income particularly from parties in dispute or potential litigants. This leads them compromise the principle of impartiality, which they are expected to comply with in decision making. Furthermore, economic insecurity of courts officials can force them to leave judicial job for seeking better payments in the market.

As noted in Chapter Four, attractive working conditions of particularly salaries of court officials had partly attributed for judiciaries in Japan and South Korean developmental states to be filled by talented legal experts with the effect of objective, consistent and moderately efficient decision making especially in commercial and civil disputes. Salaries and economic security of judges are also said better in South Africa compared to other African countries and it is also praised for having independent judiciary in the continent of Africa as mentioned in chapter four.

⁴⁴⁵ The International Bank for Reconstruction and Development, *supra* note 383, pp 161,

⁴⁴⁶ *Ibid*

⁴⁴⁷ Thomas E. Plank, *supra* note 377, pp 1-72 at pp 9

In Ethiopia, the working condition under which judges perform their duties is said generally poor.⁴⁴⁸ In spite of efforts of judicial reform to improve institutional facilities of courts, it is claimed that many judges particularly of lower courts still work in decaying offices with minimal equipment.⁴⁴⁹ Salaries of judges in Ethiopia are also generally said insufficient to help court officials cover costs of their living and poor economic security is a challenge for them to stay in the judicial job.⁴⁵⁰

The poor working conditions of judges in Ethiopia as noted here above is thus another challenge facing the judiciary to play its own roles discussed under topic 5.3, for the democratic developmental. First and foremost, poor working condition in general and economic insecurity in particular can increase the turnover of court officials for seeking better payments in the market. A report in June 2014 by the president of the federal Supreme Court to the parliament indeed showed that there is high turnover of judges of federal courts partly for poor salary and economic insecurity.⁴⁵¹ This will have the effect of making courts training centers where individual judges equip themselves with the necessary experience and skill to compete in the private sector. Such a trend in the judiciary will result in institutional inefficiency and instability in that higher turnover either increases overwork of those in duty and/ or the judiciary only serves as transition of lawyers from the world of legal theory to practice of the profession in the private sector.

The poor working condition can also lead to increasing judicial corruption or rent seeking should judges prefer to stay in the profession. Even if this research does not conduct empirical assessment on the issue at hand, it is conventionally accepted that poor payments or economic insecurity is one factor that explains higher degree of judicial corruption.⁴⁵² The report of the transparency international on judicial corruption in Ethiopia indicated that courts in Ethiopia are among most corrupted public institutions.⁴⁵³ For example, in thereport of the Federal Supreme Court to the parliament it wasstated that the Judicial Administration Council hadreceived 50 complaints lodged against federal judges in the last months and the Council decided to remove

⁴⁴⁸ Assefa Fiseha, *supra* note 144, pp 13

⁴⁴⁹ Ibid

⁴⁵⁰ The Ministry of Capacity Building of Ethiopia, *supra* note 386, pp 178

⁴⁵¹ The Ethiopian reporter, private news paper (English edition), june 21, 2014, headlines; federal court calls for housing allowance for judges, available at <http://www.thereporterethiopia.com/index.php/news-headlines/item/2159-federal-court-calls-for-housing-allowance-for-judges>, last visited june 5/2015.

⁴⁵² The Ministry of Capacity Building of Ethiopia, *supra* note 386, pp 178

⁴⁵³ Transparency international, 2012, available at [http://www.ev.com/Publication/vwLUAssets/2012_TI_CPI/\\$FILE/2012%20TI%20CPI.pdf](http://www.ev.com/Publication/vwLUAssets/2012_TI_CPI/$FILE/2012%20TI%20CPI.pdf) pp 19.

two federal high court judges found guilty of corruption charges⁴⁵⁴. This also means that the judiciary in Ethiopia instead of helping development oriented leaders and the society in controlling predation in developmental governance would likely conspire with predatory public officials or rent seeking private interests.

Even if the legal framework in relation to determination and administration of funds of courts, as discussed here above, empowers the supreme court to plan its institutional budgets and administer up on approval by the lower house in Ethiopia, the determination of economic benefits, including salaries of judges seems not to be free of influence of the executive body.⁴⁵⁵ This is to say that the fact that practical determination of rates of salaries of judges are made together with those in the public service gives one the impression that the executive body is with all the power to decide on the economic condition of judges.

The author of this paper is of the argument that the judicial administration council and the supreme court should be with real power to determine the economic benefits of judges and their general working conditions taking in to account the budget capacity of the state and the specific importance of roles of an independent judiciary for the success of the democratic developmental Ethiopian state. This is important particularly if one considers possibility of increasing complexity of the economy as the result of rapid growth in the coming years and its implication on the extent of importance of effective and independent judiciary. The fact that judicial litigation rate and the scope of judicial role gradually increased in Japan and South Korea developmental states as the result of economic development from time to time ⁴⁵⁶ also supports this view. The increase of the judicial litigation from time to time in the last ten years in Ethiopia⁴⁵⁷ also suggests that demand for court settlement of disputes may increase implying the need to strengthen capacity of the judiciary.

E. The Problem of Accessibility to Judicial Proceedings and Remedies.

Having an independent judiciary both institutionally and functionally is an important step for courts to contribute their role to the development of society. Further step is however necessary

⁴⁵⁴ The reporter news paper (English edition), [Headlines](http://www.thereporterethiopia.com/index.php/news-headlines/item/3308); Supreme Court says obstinate public institutions impeding court decisions, march 17/2015 available at <http://www.thereporterethiopia.com/index.php/news-headlines/item/3308> last visited June 06/2015

⁴⁵⁵ The Ministry of Capacity Building of Ethiopia, supra note 386, pp 57

⁴⁵⁶ See my discussion in chapter four; 4.1.1.A., and 4.1.2. A.

⁴⁵⁷ World bank, internet source, supra note 428

for independent and accountable courts to deliver functions expected of them in process of development of any kind. Currently, it is also held that legal empowerment of particularly the poor segment of society is crucial for developing countries including those attempting to construct new developmental states to successfully develop their societies.⁴⁵⁸ While legal empowerment of society includes number of things ranging from empowering society in law making, to decision making at different levels of state institutions, this topic is concerned with opportunity of people to access to judicial resolutions and subsequent remedies.

Problems that impede access to court proceedings and remedies of particularly the poor can make the presence of an independent judiciary practically meaningless or less relevant to society. Such problems may emanate from costly rules of judicial proceeding and enforcement of judicial remedies, limited access of people to legal service and representation and absence of public knowledge on laws which define rights and obligations of individuals in social interaction.⁴⁵⁹ As noted under chapter four in the topic which discusses the experience of Japan, costly judicial proceeding and small number of lawyers in the market limited access of people to courts. The implication was as discussed in the same chapter that people, whether they like it or not, were being forced to rely much on informal institutions with subsequent negative effects that limit the generalizability of experience of Japan on the issue at hand. The discussion on the experience of South Africa in the same chapter also highlights that despite the constitutional power of the judiciary to entertain socio economic rights and respond to the social need in the country, inaccessibility of the poor to the same institution makes it passive on addressing the problem of social inequality

In Ethiopia, it is claimed that despite some improvements since recently, small number of private lawyers, costly legal representation and outdated procedures of judicial proceeding and delayed enforcement of remedies have yet limited access of the poor to the judiciary and its remedies.⁴⁶⁰ Backlog of cases partly because of poor quality and small quantity of judges to handle files

⁴⁵⁸ Costantinos BT Costantinos, Legal Empowerment of the Poor to Access Justice in: Elias N. Stebek and Muradu Abdo (Editors), Law and Development, And Legal Pluralism in Ethiopia , Addis Ababa , JLSRI Publications ,2013, pp 35-55

⁴⁵⁹ Ibid

⁴⁶⁰ Alemayehu Geda, the Road to Private Sector Led Economic Growth, Strategy Document for the Third Annual National PSD-Hub Conference Held on June 30/2009, Addis Ababa, Chamber of Commerce and Sectoral Association, 2009,pp 55-57.

within reasonable period of time is also mentioned as factor which renders judicial resolution of disputes inefficient or time taking in Ethiopia.⁴⁶¹ The recent report of the Federal Supreme Court to the House of Peoples' Representative regarding the challenges it is facing also suggests the inadequate compliance from different public institutions including police to cooperate in the execution of judicial decisions thereby constituting one of the hurdles that limit access to the justice system. The highest judicial organ in the country in its seven months performance report stated that the judicial system is facing challenges in judgment executions due to lack of cooperation by some public institutions such as the Federal Urban Land Development and Management Bureau as well as the police and kebele administrations⁴⁶²

Despite the start of structured judicial training of judges and candidates, the problem with regard to sufficient number and quality of judges as mentioned here above may be attributed partly to the turnover of senior judges because of poor working condition and partly to the quality of general education in colleges of law. Even if some positive signs of legal education reform have also been observed in the last years, it is claimed that the problem of quality legal education is still enduring.⁴⁶³

Problems of such kind which limit access to courts and their solutions can be solved through moderately large number of citizens taught in colleges of law and training in judicial training centers. Policies which encourage extensive and quality legal education and training should, however, consider the social need for lawyers and judges and the proportion of professionals to the society in need of legal service. More important here is training of potential private lawyers with candidate judges and public prosecutors in judicial training centers can help produce socially responsible legal practitioners as their awareness of the political, economical and social conditions of the state may help them understand their roles for the good of the public in the period of transition of the state.

Delay and hence inefficient enforcement of judicial decisions can also be addressed through training of officials other than judges in justice institutions such as police and public prosecutor and through creating an atmosphere of coordination between courts and other institutions that

⁴⁶¹ Ibid

⁴⁶² The reporter news paper , internet source, supra note 454

⁴⁶³ Costantinos BT Costantinos, supra note 458, pp 43

assist it in administering justice. There are in fact initiations aimed at improving professional quality of personnel of other justice institutions than the judiciary since recently.⁴⁶⁴ Such trainings should be strengthened and have continuity so that other justice institutions can support judicial administration of justice meaningfully and sustainably.

Publication of laws and creation of public awareness on legal developments related with social and economic organizations in the developmental state context can also help a lot. Extensive consultation and discussion on the nature and purpose of laws with stake holders can also keep the public aware of developments in the justice sector and individuals of their rights and obligations.

F. Low Public Perception on Independence of the Judiciary

Low or negative public perception on judicial independence and role in modern societies is also one factor that limits the extent of judicial role to settle disputes or handle transactions.⁴⁶⁵ Different factors may attribute to the low public perception; perceived or real executive interference in or control of courts in their function, the absence of willingness of courts to assert their independence within the bound of law and judicial behavior in decision making.⁴⁶⁶ The discussion in chapter four also suggest that people in Japan and South Korea perceived modern western type institutions including courts as imposed and instruments of political elites particularly in matters of politics with the effect of rare occasions of judicial litigation of political cases between government and citizens.

The effect of low public perception on the judiciary as can be generalized from the experiences of Japan and South Korea is little willingness of members of society to take their grievances to courts. The fact that large numbers of cases had been handled out of courts in these early developmental states to the extent of affecting the inefficiency of informal institutions is partly, as discussed in chapter four, attributed to this factor.

In Ethiopia, studies conducted in the last years reveal that the public in general have low perception on the independence of the judiciary. The recent report of Transparency International corruption perception also implies that the judiciary still suffers from low public

⁴⁶⁴ Id pp 44

⁴⁶⁵ The International Bank for Reconstruction and Development, *supra* note 383, pp 284-286

⁴⁶⁶ Ibid

perception.⁴⁶⁷ Another additional accounts can be mentioned for such public perception;⁴⁶⁸ the relationship of the judiciary with the executive in the preceding regimes, executive interference and even lack of courage of judges to assert their independence and role when particularly disputes involve governmental interest.

The author of this research is also interested to add that the challenges discussed in above particularly; the general trend of exclusion of judicial review of constitutionality and legality of governmental actions and problems related with developmental political settlement can lower the public perception on the independence and role of the judiciary in Ethiopia. This is to say that, the fact that the HOF is with the power to interpret the constitution against laws and administrative actions and the issues associated with it as discussed above can lead people to perceive the judiciary less independent. In fact, some authors even mentioned this issue to argue that the judiciary in Ethiopia is less independent of the two branches of government⁴⁶⁹. Even if such arguments are inconclusive, they at least suggest that the general trend with regard to judicial review in Ethiopia is likely to affect the public perception negatively. The problems associated with lack of necessary level of developmental political settlement, the author of this research believes can only worsen the challenge on public perception of the judiciary. It is very likely that in the condition of political polarization, opposition parties and other dissent opinions can using Medias criticize the general structure of governance including the independence of the judiciary and undermine the legitimacy of courts and their decisions in eyes of the public.

The general effect, what so ever the factors could be, as mentioned here above, is people will have little incentive to take their cases and complains against governmental bodies to courts. As a result, in the private economic transactions people may resort much to the informal institutions with effect of letting them to be inefficient or to the public official which they believe can secure them favorable judicial decisions. Low public perception on independency of the judiciary is also likely to undermine the legitimacy of judicial decisions over cases which involve interest of government leading in turn to the possibility of contest between governments and opposing views in other places or converted to conflicts.

⁴⁶⁷ Transparency international, internet source, supra note 453

⁴⁶⁸ Assefa Fiseha, supra note 144, pp 13

⁴⁶⁹ Assefa holds that the judiciary in Ethiopia has been weakened even long before proclamations 250/2001 and 251/2001 came to consolidate the power of the HOF, Id pp 15. See also Philip d. Reed, cited at 410.

Parts of possible solutions with regard to the public perception are related with these discussed in topics above. With regard to the perceived or real executive interference in the judicial enterprise, the author of this work is of the suggestion that court officials need to have courage and be objective in decision making though some attempts of interference may be made from the executive body. Much, transparent and open procedures based on which the judicial administration commission handles disciplinary matters and removal of judges can build confidence and certainty on their tenure despite their decisions against interest of government. Building of public awareness on the developments related with level of independence of the judiciary and their importance to protection and respect of individual rights and security can also improve the degree of confidence of people on the judiciary and legitimacy of its functions. Such public awareness building can be facilitated and promoted by the Supreme Court and ministry of justice. These organs may in turn collaborate with mass media of both state-owned and the private, and law colleges. Furthermore, judicial reforms including of extension or other wise of the scope of functions of the judiciary should involve public participation or at least those who are stake holders of the reform so that public awareness on the role of courts and legitimacy of their function can be improved.

Access of ordinary citizens to judicial proceedings and enforcement of its remedies can also lead the public to perceive the judiciary as agent of people. This demands availability of sufficient and quality lawyers with affordable cost in the market and judges. Access of people to judicial proceeding also includes empowerment of the judiciary to adjudicate individual constitutional complaints. Improving the quality of performance and coordination of other justice institutions with the judiciary can also help in heightening public perception on the justice system in general and the judiciary in particular

CHAPTER SIX

Conclusions and Recommendations

6.1. Conclusion

Developmental states construct and allow strong bureaucracies to intervene in the social and economic transformation of their society. To this end, interventionist policies of development oriented political leaders need to be designed and implemented without undermining market forces and principles. Democratic developmental states in addition to the institutional features of East Asian successful developmental states are characterized by transparency and accountability in public decision making, and human rights protection.

This research shows that the judiciary can independently play some important roles in even developmental states characterized by authoritarian regimes; maintain security and order, securing predictable business environment, enhancing efficiency of bureaucracy (a necessary element of developmental states) and as a means of social control for political leaders which all are necessary ingredients of successful developmental state. The nature of regimes in South Korea and Japan, however, limited the level of independence of courts to transactions which did not involve political/policy interest of their governments.

As the research shows, courts characterized by the independence and accountability can help Ethiopia in its commitment to pursue democratic developmental state in different ways; securing order and stability in democratization and development, creating conducive business environment, helpful to construct an effective bureaucracy, promoting good governance, protection of human rights and ultimately consolidating political capacity of development oriented and pro poor political leadership.

It is found that effective judicial enforcement of criminal laws and human rights in the current context of Ethiopia can strengthen security and order which is necessary precondition for all kinds of resources to focus on productive investment and democratic nation building.

The research further finds that the judiciary can contribute towards the construction of bureaucracy characterized by coherent and consistent decision making, and being embedded in to society. Analogous to judicial review of administrative actions for their legality and

constitutionality, the research finds it important to control the powerful bureaucracy towards consistency in decision making. It is also found that judicial review can force the bureaucracy to consult and negotiate with stakeholders so that the latter can be persuaded to defer their individual interest in the interest of public good in developmental governance.

The judicial constraint of developmental bureaucracy in areas of private property is also helpful to protect productive private firms from misappropriation of their property rights so that certainty in the business environment can be promoted. This in turn allows productive private investment to expand the economy.

The independent function of the judiciary in Ethiopia can improve conditions of governance to be good and protect human rights against arbitrary administrative actions in the name of public interest such as economic growth. This, the research manages to find, can in turn promote shared development and design of quality development policies.

The combination of these roles of the judiciary in Ethiopia is ultimately capable of consolidating the political capacity of developmental state oriented leadership to further design and implement policies of sustainable development for relatively longer period of time.

The specific roles of courts in general and for the success of democratic developmental state in Ethiopia in particular depend on the ability of the state to have a judiciary that operates independently and characterized by accountability. The ability of the state to maintain a balance between these two features of the judiciary is necessary for the institution to contribute roles mentioned in above. The research finds that there are prospects that enable the judiciary in Ethiopia to contribute the roles mentioned here above for the success of democratic developmental state.

The fact that the independence of the judiciary is constitutionally entrenched is, at least normatively speaking, one enabling institutional configuration for Ethiopian courts to contribute the roles the research claims for the success of democratic developmental state.

The legal framework following the constitution also provides a moderate institutional opportunity by which judicial independence and accountability can be balanced. It can help the

Ethiopian society to secure the proper function of the judiciary in the context of democratic developmental state.

Another opportunity for the judiciary to contribute positively to the democratic developmental state in Ethiopia is the start of judicial training of would be and working judges. The establishment of judicial training centers at both federal and regional levels is helpful to produce skill full and scholarly judges which in turn promotes independent, efficient and quality judicial decision making. Subject to the nature of trainings and professional experiences of trainees, training centers can also help trainees understand the political, social and economic condition of the society they are about to serve.

The fact that customary institutions and their machineries of dispute settlement have got constitutional recognition and policy recognition of the same in some social fields is also another prospect the research finds can promote the efficiency of the judiciary in Ethiopia.

Despite these prospects which enable the judiciary to play its roles towards realization of the commitment of Ethiopia to construct effective democratic developmental state, there are also some challenges the research finds can hinder it from contributing the roles properly.

The fact that the judiciary is totally sidestepped from the enterprise of constitutional review is one major challenge. Even if extensive power of the judiciary in south Africa including constitutional review has done little in terms of responding to the social problem in the country(social inequality), the research finds that it still is important in some transactions; in case of individual complaints against governmental actions/laws.

Political settlement among particularly elites related problems is one major challenge in possible further empowerment of the judiciary to intervene in more transactions. This is because of the fact lack of political consensus among elites either is likely leads to one party dominance in state power which in turn can use state institutions against other elites or political elites not linked to state power undermines the legitimacy of institutions of the state including the judiciary. It is also possible that in the condition of limited political settlement and judicial constitutional review, opposing elites may use courts as a forum to limit institutional space of development policies derived from needs of the society.

The other challenge is in one or another way related to the second challenge. The fact that the Ethiopian legislature in the last years came with many laws excluding judicial power shows the increasing trend of further stripping the judiciary from its functions. The effect is limiting the scope of transactions over which courts govern independently and this research finds it as one challenge compromising the roles the judicial system can play towards constructing a success full democratic developmental state in Ethiopia.

The research also reaches on the conclusion that the absence of administrative procedure act designed based on the new development is one challenge the judiciary in Ethiopia has to face while trying to contribute positively to the success of the democratic developmental state.

Poor working conditions, problems of accessibility to judicial accessibility and remedies, and low public perception on the independence and legitimacy of the judiciary are also other challenges that the research finds can limit the extent of the roles it is claimed can contribute towards the construction of success full democratic developmental state and achievement of goals it pledges.

6.2. Recommendations

The research has indicated that there are some prospects which enable the judiciary to contribute to Ethiopia's pursuits in the path of a democratic developmental state. It also however finds some potential major challenges that face the judiciary for its positive roles. The author of this research recommends the following possible solutions to deal with the potential challenges identified so that the judiciary can contribute the roles, the research have identified, towards the success of the democratic developmental state in Ethiopia.

1. On the issue of constitutional review and power of courts, it is recommended that the judiciary needs to have a power to review constitutionality of governmental actions in case of disputes which involve individual interests and rights. While the HOF is relatively in a better position to settle or adjudicate constitutional disputes the resolution of which demands political consideration, the judiciary is in a better position to protect market forces and individual rights against arbitrary governmental actions with its power of constitutional review over transactions mentioned here above.

- ✓ Concerns with and issues of performance of the judiciary should be addressed by consolidating the judicial training centers and containing reform of the legal education curriculum taking in to account new political, economic and social developments at the state and international levels. Such an institutional consolidation is also helpful to produce socially responsible court officials and insure judicial accountability to needs of the Ethiopian society
 - ✓ Further alternative mechanisms by which judicial accountability to owners of the constitution can be secured may also be devised. One alternative is the power of the HOF federation to interpret abstract meaning of the constitution to test the constitutional validity of laws from which politically less sensitive disputes arise. This institutional configuration which empowers the judiciary to review the constitutionality of governmental actions in concrete cases is likely to force both the government and the judiciary to remain committed to public interest. This alternative also appears to be less demanding in terms of reform or constitutional amendment as reforms of laws which consolidate the power of the HOF may suffice for it to be implemented
 - ✓ The second alternative is about empowering the HOF to involve in or control the appointment of judges and administration of courts engaged in constitutional review. This demands constitutional amendment with regard to judicial power in the stream of constitutional review and HOF regarding its controlling power and possibly its involvement in the law making process.
2. Regular courts should also show willingness and be courageous to apply constitutional provisions in case of apparent contradiction between legislations and the constitution, and in case of gap on part of legislations to embrace fundamental constitutional values.
 3. Reforms regarding the mode of composition of the HOF should be introduced in a way to strengthen its independence and reflect diverse interests so that the public will consider it as a legitimate body to adjudicate constitutional disputes which involve political differences and administer the appointment and removal of judges who are engaged in constitutional review.
 4. It is recommended that consensual developmental political settlement between and among political elites and society should be promoted so that a national culture on the respect of rules of the game and mechanisms of their enforcement can be developed. Ruling development oriented parties should either expand their horizon of support through

consultation and negotiation or creating political coalition with parties having broad support. This can promote sense of respect of rules of the game and the procedures of their change on part of society which in turn can result in a positive public perception on legal institutions in general and courts in particular. It can also result in a condition wherein courts will not be used as instruments of some political elite against others. Possible judicial reform should also be preceded by open discussion between political elites, stake holders and society at large so that expanded scope of judicial power will not result in structural exclusion of poor segment of the society.

5. It is recommended that comprehensive administrative procedural law which considers both on how bureaucracy of the developmental state can be effective in directing economic development and when restraining the same is necessary to insure democratic procedural values should be enacted so that a strong or efficient bureaucracy can be constructed without undermining market principles and individual human rights unnecessarily. Cautious consideration of characteristics of the bureaucracy necessary for the success of democratic developmental state and channeling such institutional features to rules and principles of administrative procedure act can help to determine the proper relationship between the judiciary and developmental bureaucracy in efforts of the state to facilitate development and democratization.
6. It is also important to respond to problems associated with the nature of the bureaucracy in Ethiopia; prevailing rent seeking and corrupt practices, through careful and thoughtful crafting of administrative establishment legislative acts in the short run. It may take time for law and policy makers to design and enact administrative procedure act with its own negative effect on capacity of the state to control mal administrative actions. So, it is necessary for the Ethiopian parliament to identify matters over which judicial deference is important and when judicial supervision is necessary before delegating its power to the administration. Even if administrative procedure act may not be enacted in the near future, the law making organ should include rules and principles of administrative law in enabling acts. The rules and principles may include manner of power exercise by the bureaucracy, when judicial review can be sought and grounds, and remedies of judicial review taking the policy and decision making space the public administration has to enjoy in to account.

7. It is recommended that the federal judicial administration council and Supreme Court should be practically empowered to determine and administer funds of the judiciary including salary of judges to generally improve performance capacity and secure both institutional independence of the judiciary and personal autonomy of judges. The same organs should conduct studies on the general working environment and economic conditions of judges in new developments and determine institutional budgets of courts and economic benefits of judges taking budget capacity of the state and problems that undermine institutional efficiency and independent judicial decision making in to consideration
8. Effective and extensive consultation with stake holders in rule making and publications of laws should also be promoted so that the public can be kept aware of new legal developments in the context of democratic developmental Ethiopian state which in turn can improve knowledge of individuals of their rights and obligations and hence access to justice in general and judicial process in particular. Continuous, but periodical reform of curriculum of legal education with regard to quantity and quality of law graduate students taking in to account social need for lawyers and judges and strengthening judicial centers can also improve access to the judiciary. Expanding the capacity of judicial training centers to train potential private lawyers and reconsideration of regulation of cost of legal service can also do positively in terms of improving access of the poor to legal service and thus justice. Strengthening the institutionalized training of professionals of other justice institutions and institutional coordination between the judiciary and other institutions which assist it in administration of justice is also paramount to improve access to judicial process and remedies.
9. On public perception, it is suggested that in addition to the possible solutions recommended here above, efforts of the Supreme Court and ministry of justice in building public awareness on achievements with regard to independent judicial decision making should be promoted. Access of function of the judiciary to the public and mass media or institutionalized collaboration between mass media and law colleges on creation of public awareness over judicial developments can also help a lot in terms of improving public perception. Furthermore, judicial reforms including of extension of the scope of functions of the judiciary, judicial institutional capacity and working conditions of judges should involve public participation or at least those who have stake in the reforms so that public perception on the role of courts and legitimacy of their function can be improved.

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