

JUDICIAL INDEPENDENCE AND THE PROTECTION AND ENFORCEMENT OF HUMAN RIGHTS IN FEDERAL COURTS IN ETHIOPIA: THE NEED TO WALK THE CONSTITUTIONAL TALK

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Abstract

This article examines the role of the Ethiopian federal judiciary in the protection and enforcement of human rights from the perspective of judicial independence. Specifically, it examines the interplay between judicial independence and the protection of human rights and the implications of the manifestations of institutional and personal independence of the judiciary on the role of courts in the enforcement and protection of human rights. The article mainly uses the relevant literature, the relevant laws (domestic legislation, treaties, and international jurisprudence), concluding observations and recommendations of different human rights monitoring bodies, recommendations of the Ethiopian Human Rights Commission, internationally and regionally accepted legal principles, standards, and guidelines, different documents, and empirical data collected through interviews and focus group discussions as sources of data. The interviews and focus group discussions involved federal court judges, public prosecutors, and attorneys. A thorough examination of the law and the collected and analyzed data reveal that the institutional and personal independence of the federal judiciary is not protected in law and practice. As a result, federal courts cannot play a significant role in the adjudication and enforcement of human rights in Ethiopia.

Keywords: Ethiopia, Federal courts, Institutional Judicial Independence, Personal Judicial Independence, Protection of Human Rights.

INTRODUCTION

There is no doubt that having an independent and impartial judiciary is a prerequisite for the protection of human rights.¹ In particular, the right to a fair trial cannot be conceived in the

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¹ Letsebe Piet Lesirela, “Providing for the Independence of the Judiciary in Africa: A Quest for the Protection of Human Rights”, LLM Thesis (unpublished), The Catholic University of Central Africa, the Faculty of Social and Management Sciences, (2003), at 19.

absence of an independent and impartial judiciary. Moreover, a “fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.”²

Commonly, judicial independence is conceptualized as freedom from interference from the two contending branches of the government, the legislative and executive branches, both institutionally and personally.³ The independence of the judiciary and the protection of human rights are mutually reinforcing. An independent judiciary is a prerequisite for the protection of human rights. The UN HRC has underscored the role of an independent judiciary for the enforcement and protection of human rights. In its Resolution, the Council underlined that an independent and impartial judiciary, among other things, is a prerequisite for the protection of human rights and the application of the rule of law.⁴ Writers such as Javier Couso capitalize on the role of an independent judiciary in the enforcement of human rights and argue that judicial independence is essential and a *sine qua non-element* for the effective enforcement and protection of human rights.⁵

This article empirically examines the independence of the judiciary and its role in the protection of human rights in the federal courts of Ethiopia.⁶ In addition to the relevant laws, the article employs empirical data as a source of information. Empirical data were mainly collected from selected judges, public prosecutors, and attorneys through interviews and focus group discussions (FGDs) in federal courts in Addis Ababa and Dire Dawa. Empirical data were collected from a total of 17 interviewees, including judges, public prosecutors, attorneys, and a director from the Federal Judicial Administration. In addition, empirical data were collected from three FGDs, each composed of attorneys and public prosecutors, attorneys, and judges. Interviewees who hold positions such as a representative judge, the Deputy Director General at the Ministry of Justice, the Public Prosecutor and Coordinator of Economic Crimes, and the

² UN Human Rights Committee, “Right to Equality Before Courts and Tribunals and to a Fair Trial”, General Comment No. 32, Article 1423 August 2007, CCPR/C/GC/32

³ See Ishmael Gwunireama, The Executive and Independence of the Judiciary in Nigeria, Pinsi Journal of Art, Humanity and Social Studies, Vol. 2, No. 1, (2022).

⁴ UN Human Rights Council, “Independence and Impartiality of the Judiciary, Jurors and Assessors, and the Independence of Lawyers”, 16 June 2020 available at: file:///C:/Users/DELL/Downloads/A_HRC_RES_44_9-EN.pdf (accessed 25 July 2022).

⁵ Javier Couso, *Sine Qua Non: On the Role of Judicial Independence for the Protection of Human Rights in Latin America*, 33 *Neth. Q. Hum. Rts.* (2015), at 252.

⁶ Note that Ethiopia is a federal country, and state courts are not within the scope of this article.

Judgement Inspection Director at the Federal Judicial Administration Council were purposefully selected because of the position they had assumed. Other research participants in the interview and in the FGDs were selected because of their availability at the time of data collection and willingness to participate.⁷

The article discusses how judicial independence contributes to the judicial protection and enforcement of human rights in Ethiopia. The article examines the interplay between judicial independence and the protection of human rights. It scrutinizes the independence of the judiciary in the selection and appointment procedures of judges, budgetary issues, the infrastructure of courts, and the implications of these manifestations of institutional and personal independence of the judiciary on the role of courts in the enforcement and protection of human rights. The article ends with concluding remarks and corresponding recommendations.

1. THE MEANING OF JUDICIAL INDEPENDENCE

Judicial independence refers to the principle that courts should not be subject to improper influence from the executive and legislative branches of government.⁸ The goal of judicial independence is to enable judges to make decisions based solely on the law and the facts of the case, free from interference or influence from the two branches of government.⁹ In effect, this enables the judiciary to act as a check on the other branches of government, promoting the rule of law and safeguarding human rights and freedoms.¹⁰

Pragmatically, judicial independence can also be defined as a response and solution to concrete problems that the judiciary may naturally face. In this regard, John Bell identifies particular problems from the perspective of judicial independence.¹¹ These are the following: courts seen as politicized institutions; political influence on judicial decisions; political influence over the

⁷ This research partly uses some of the primary empirical data collected by members of the research team from Bahir Dar University, School of Law (in which the first author was a member), who were employed by the Federal Justice and Law Institute to conduct assessments on the causes of judicial misconduct at the Ethiopian federal courts.

⁸ See Gwunireama, *supra* note 3.

⁹ Basic Principles on the Independence of the Judiciary, Adopted by the 7th UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 Aug. to 6 Sept. 1985, and endorsed by General Assembly resolutions 40/32 of 29 Nov. 1985 and 40/146 of 13 Dec. 1985, Principle 2.

¹⁰ Gretchen Helmke & Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective", *Annual Review of Political Science*, No. 12, (2009), at 345–366.

¹¹ John Bell, "Judicial Cultures and Judicial Independence", 4 *Cambridge Y.B. Eur. Legal Stud.*, (2001-2002).

allocation of resources for justice; political involvement in the selection and career progression of judges; and the involvement of judges in extrajudicial activities.¹² According to Bell, the meaning given to judicial independence should reflect this, and its constitutive elements are expected to reflect this in such a way that the judiciary can naturally face and curtail these and other practical problems. It is possible to argue that, although the magnitude and severity might differ from jurisdiction to jurisdiction, the problems that are potentially posed by the executive and legislative branches of government and, to some extent, by the judiciary itself are the problems of every judicial system. In effect, “[b]y separating the adjudicatory function and placing it in a body independent of the political branches, we promote impartiality, fairness, and regularity in the interpretation and application of law-benefits that can be viewed together as a form of public or collective good.”¹³

Judicial independence, as a generic term, entails both personal and institutional independence. In the following sections, after discussing the nexus between judicial independence and the protection of human rights, we examine judicial independence from the perspective of these two components in general and in the context of the Ethiopian legal and judicial systems in particular.

2. THE NEXUS BETWEEN JUDICIAL INDEPENDENCE AND THE PROTECTION OF HUMAN RIGHTS

As “[t]he judicial system in a country is central to the protection of human rights and freedoms,”¹⁴ the independence of the judiciary forms the bedrock of a fair and just legal system in which human rights are protected and duly enforced. An independent judiciary serves as a shield, protecting human rights from potential violations by other branches of government, individuals, or powerful entities, including non-state actors. As Alemayehu G. Mariam argues, “[w]here there is a high degree of judicial independence, there is also likely to be a high degree of respect for human rights and civil liberties, political stability, and other effective democratic

¹² *Id.*, at 50-51.

¹³ John A. Ferejohn and Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, *New York University Law Review*, Vol. 77, (2002), at 967.

¹⁴ *International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors*, A Practitioners’ Guide Series No. 1, International Commission of Jurists, Geneva, 1 (2004).

institutions.”¹⁵ In particular, judicial independence guarantees fair trial rights, access to justice, and the application of the law without fear or favor. Without judicial independence, human rights can be easily undermined, leading to arbitrary and unjust decisions that erode the rule of law.¹⁶

Keith S. Rosenn depicts the role of an independent judiciary in society as follows: “Societies in which justice is rarely obtainable tend to be highly unstable. Furthermore, the personal and transactional insecurity arising from the type of justice delivered by a dependent judiciary is likely to retard socio-economic development by deterring productive economic activity.”¹⁷ This researcher shares Rosenn’s opinion, but would like to examine the impact of an independent judiciary further. The researcher believes that a non-independent judiciary not only retards socioeconomic development and the society in which it operates tends to be highly unstable, but also fails to create an environment conducive to the protection and enforcement of human rights. An independent judiciary plays a key role in safeguarding basic rights and freedoms. It is generally agreed that “[independent] judges play the crucial role of checking executive overreach, protecting against corruption, and upholding core human rights, including freedom of speech and assembly, physical integrity and due process, and the rights of marginalized communities.”¹⁸ Through impartial adjudication, judges ensure the protection of civil liberties, such as freedom of speech, assembly, religion, and the right to privacy. They act as guardians of fundamental rights, preventing the arbitrary restriction or violation of these rights, and thus reinforce democratic values in society. The ability of the judiciary to exercise its powers without interference is indispensable for upholding fundamental human rights.

Under international human rights law, judicial remedies are not the only means of ensuring effective remedies. In addition to judicial remedies, administrative and other remedies can be

¹⁵ Alemayehu G. Mariam, “Human Rights Matters in the New Millennium: The Critical Need for an Independent Judiciary in Ethiopia”, *International Journal of Ethiopian Studies*, 123 (2008).

¹⁶ See Ines Vargas, *The Independence of the Judiciary and the Protection of Human Rights*, 7 Mennesker og Rettigheter, (1989), at 3.

¹⁷ Keith S. Rosenn, “The Protection of Judicial Independence in Latin America”, 19 *U. Miami Inter-Am. L., Rev.* Vol. 19, No.1, 8 (1987).

¹⁸ Margaret Satterthwaite, UN Special Rapporteur on the Independence of Judges and Lawyers, Speech During the Opening Session of the Asia Pacific Justice Forum (December 8-9, 2022, available at <https://worldjusticeproject.org/news/role-independent-judiciary-protecting-rule-law> (accessed 27 July 2022).

used to redress human rights infringements.¹⁹ However, international human rights law imposes a duty on states to investigate, prosecute, and use judicial mechanisms to remedy violations in cases of gross human rights violations.²⁰ The obligation of states to investigate, prosecute, and punish gross violations is important to prevent such violations.²¹ The duty of states to investigate and prosecute serious human rights violations can be seen from the perspective of the rights to justice of victims of human rights violations, and it can be established from a close reading of the provisions of different international human rights instruments and principles.

Articles 4 and 5 of the Genocide Convention; Article 4 of the CAT; Articles 3, 7, 9, and 11 of the ICCPED; Article 6 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; and Principle 19 of the Updated Set Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity impose the duty on states to investigate and prosecute serious human rights violations. The ability of states to discharge this obligation very much depends on having an independent judicial mechanism, as the investigation and prosecution of serious human rights violations are inconceivable without an independent and impartial judiciary. The importance of having an independent judicial mechanism for the investigation and prosecution of serious human rights violations is subsumed under the Updated Set Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. According to these Principles, when national courts cannot offer satisfactory guarantees of independence and impartiality or are materially unable or unwilling to conduct effective investigations or prosecutions, international and internationalized criminal tribunals may exercise concurrent jurisdiction.²² To ensure accountability and combat impunity, an independent judiciary holds all individuals, including those in power, accountable for human rights violations. By doing so, an independent judiciary

¹⁹ For instance, the right to administrative remedy, in addition to judicial and other remedies, is recognized under Article 2(3)(b) of the ICCPR.

²⁰ Gross violations of human rights include torture and similar cruel, inhuman, or degrading treatment; extra-judicial, summary, or arbitrary executions; slavery; enforced disappearances; and rape and other forms of sexual violence of comparable gravity. *See* United Nations, Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice, (2010), at 4.

²¹ United Nations, Guidance Note of the Secretary General on Transitional Justice: A Strategic Tool for People, Prevention and Peace, (2023), at 16.

²² Commission of Human Rights, Updated Set Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, E/CN.4/2005/102/Add.1, (2005), Principle 20.

acts as a check on the executive and legislative bodies, ensuring that their actions adhere to constitutional provisions and international human rights obligations.²³ By ensuring that justice is served impartially and fairly, an independent judiciary discourages impunity. When the judiciary is free from external pressures or political interests, perpetrators of human rights abuses can be brought to justice, enhancing the protection of human rights.²⁴ Therefore, as Javier Couso convincingly argues, “notwithstanding how sophisticated and refined our understanding of rights is, without the structural support of a truly independent judiciary, human rights would continue to be systematically violated even under democratic regimes.”²⁵

The interplay between the independence of the judiciary and the protection of human rights is addressed in the resolutions of the General Assembly of the United Nations, human rights instruments, and the general comments of human rights monitoring bodies. In its resolutions, the UN General Assembly underlined the nexus between judicial independence and the protection and enforcement of human rights. In this regard, it acknowledges that an independent judiciary is essential to the full and non-discriminatory realization of human rights and indispensable to democratization processes and sustainable development.²⁶ In addition to the resolutions of the UN General Assembly, international and regional human rights instruments recognize the right to a fair trial by “an independent and impartial tribunal.”²⁷ The UDHR, the ICCPR, the Convention on the Rights of the Child, and human rights monitoring bodies, in their general comments and communications, underline the nexus between judicial independence and the judicial protection and enforcement of human rights. According to Article 10 of the UDHR, “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.” Similarly, Article 14 of the ICCPR states that “in the determination of any criminal charge

²³ See Linda Camp Keith, *Judicial Independence and Human Rights Protection around the World*, 85 *Judicature*, (2001).

²⁴ For a comprehensive review of academic works on the nexus between judicial independence and the protection of human rights, see Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, *Georgetown Journal of International Law*, Vol. 36, (2005).

²⁵ Couso, *supra* note 5, at 257.

²⁶ General Assembly, *Human Rights in the Administration of Justice*, G.A. res. 50/181, U.N. Doc. A/RES/50/181, (1995), Para. 2; General Assembly, *Human rights in the administration of justice*, G.A. res. 48/137, 48 U.N. GAOR Supp. (No. 49) at 256, U.N. Doc. A/48/49 (1993), Para. 4.

²⁷ *International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors*, *supra* note 14, at 15.

against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Rights and obligations in a suit at law should be determined by a judiciary that is independent of the executive and legislative branches of government.²⁸ The Human Rights Committee is of the view that the right to be tried by an independent and impartial tribunal is an absolute right that does not allow any limitation.²⁹ In addition, the Committee against Torture underscored the role of an independent judiciary in enforcing the principle of legality.³⁰ Moreover, in its general comment, the Committee underlined the obligation of state parties to take actions that will reinforce the prohibition against torture through judicial actions that must, in the end, be effective in preventing it and make available to detainees and persons at risk of torture and ill-treatment judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.³¹ The Convention on the Rights of the Child provides for the right of a child to have access to an independent judiciary to challenge the legality of the deprivation of his or her liberty.³²

By faithfully interpreting international treaties and conventions, judges can ensure consistency and adherence to global human rights norms, providing redress for victims of human rights violations. From this, one can understand that the right to be tried by an independent and impartial tribunal, as a human right obligation of a state, is a human right by itself, and it is also a means to enforce human rights. Hence, the independence of the judiciary can be considered “an essential requirement of the guarantee of human rights and freedoms.”³³

²⁸ Human Rights Committee, General Comment No. 32, *supra* note 2. Para. 18.

²⁹ Human Rights Committee, Communication No.263/1987, Case of *Miguel González del Río vs. Peru*, *op. cit.*, Para. 5.2, cited in International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 15.

³⁰ Committee against Torture, Concluding Observations: Nicaragua, CAT/C/NIC/CO/1, (2009), Para.12.

³¹ Committee against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, CAT/C/GC/2, (2008), Para. 2 and 13.

³² Convention on the Rights of the Child, Article 37(d). It should also be noted that the nexus between judicial independence and the judicial protection and enforcement of human rights is addressed under Articles 7 and 26 of the African Charter on Human and Peoples’ Rights.

³³ The Universal Charter of the Judge, approved by the International Association of Judges (IAJ), (1999).

3. JUDICIAL INDEPENDENCE IN ETHIOPIA: LEGAL AND INSTITUTIONAL FRAMEWORKS

In many jurisdictions, the legitimacy of the judiciary in general and the recognition of judicial independence in particular “stem from the constitution,”³⁴ the legal culture, and the political experience of the nation in question also matter. However, it is in the domain of common knowledge that the constitutions of Ethiopia are notoriously short-lived and often violated. In the constitutional history of Ethiopia, four constitutions were adopted in less than seven decades. In this regard, Rosenn’s description of the constitutions of Latin American countries also applies to the constitutional history and culture of Ethiopia: “Each *golpe* ruptures the preexisting constitutional order, leaving the judiciary in the unenviable position of trying to maintain a *de jure* institutional authority in a *de facto* regime.”³⁵ This constitutional instability, coupled with a long history of monarchy and authoritarian rule, limited the independence of the judiciary. In the following subsection, an overview of judicial independence under the 1995 FDRE Constitution is provided.

3.1 Judicial Independence under the FDRE Constitutional Framework

The FDRE Constitution explicitly acknowledges and establishes an independent judiciary. Articles 78 and 79 outline the constitutional mandate of the judiciary. Article 78(1) of the Constitution establishes an independent judiciary. In particular, the Constitution prohibits the establishment of “special or ad hoc courts which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial function and which do not follow legally prescribed procedures.”³⁶

In addition to the explicit constitutional recognition of the establishment of an independent judiciary under Articles 78 and 79 of the Constitution, other constitutional provisions reinforce the constitutional recognition of an independent judiciary. One such constitutional recognition is the separation of powers. The Constitution provides for the separation of powers, a fundamental

³⁴ Rosenn, *supra* note 17, at 33.

³⁵ *Id.*

³⁶ Constitution of the Federal Democratic Republic of Ethiopia, Proclamation No. 1/1995, Federal Negarit Gazette, 1st Year No.1, Article 78 (4).

principle that reinforces judicial independence.³⁷ In this regard, the most important avenue that helps secure judicial independence is the power of judicial review. As John A. Ferejohn and Larry D. Kramer convincingly argue, “[f]or many, the question of judicial review and the question of judicial independence are one and the same [...]”.³⁸ Conferring constitutional decision-making power upon the House of Federation instead of the judiciary has been identified as one of the “practical and structural impediments to judicial independence that remain to be addressed and overcome.”³⁹ Even if the power of judicial review is not vested in courts, by dividing powers among the executive, legislative, and judicial branches, the Constitution promotes checks and balances, preventing any branch from overpowering the others. In principle, this separation of powers allows the judiciary to act impartially, free from the influence of other branches of government.

With regard to the personal independence of the judiciary, the Constitution provides that judges shall be independent and directed only by the law.⁴⁰ Legally, these constitutional provisions protect the judiciary from undue interference, ensuring its independence in decision-making processes. In addition to the constitutional guarantee, Ethiopia has enacted different laws to strengthen judicial independence. The Federal Judicial Administration Proclamation is one of such laws.⁴¹ This Proclamation established the Judicial Administration Council, a separate body responsible for the administration and appointment of judges. This body is composed of members from various branches of the government, the judiciary, the Ethiopian Bar Association, a legal academician, and others,⁴² ensuring a multi-stakeholder approach to judicial administration and reducing the possibility of executive control over the judiciary. According to the Federal Judicial Administration Proclamation, in the administration of justice, it is important to ensure that courts exercise their judicial functions free of all internal and external influences and in the spirit of complete independence; establish a legal framework and procedures that ensure transparency, impartiality, and public confidence in the process by which judges are appointed, as well as by ensuring that members of the judiciary conduct their judicial functions

³⁷ *Id.*, Articles 50 (2), 55, and 72-79.

³⁸ Ferejohn and Kramer, *supra* note 13, at 1033.

³⁹ Ethiopia, Legal and Judicial Sector Assessment, The International Bank for Reconstruction and Development/the World Bank, (Washington Dc, First Publication), 24 (2004).

⁴⁰ Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Article 79 (3), (4), and (5).

⁴¹ Federal Judicial Administration Proclamation, Proclamation No. 1233/2021.

⁴² *Id.*, Article 6.

with complete independence; and enable the judiciary to exercise its judicial function free from any and all internal and external influences.⁴³

The other relevant law in which the concept of judicial independence is enshrined is the Federal Courts Proclamation.⁴⁴ The Federal Courts Proclamation provides a legal framework to safeguard the independence of the judiciary in Ethiopia. This Proclamation can be taken as a tool that helps establish an independent and autonomous federal court system that is separate from the executive and legislative branches of government. Like the Federal Judicial Administration Proclamation, the Preamble, Articles 23, 39, 43, 52, and 53 of the Federal Courts Proclamation are provisions that have been provided to give effect to constitutionally recognized judicial independence. In addition to the Constitution and these subsidiary laws, it has to be noted that Ethiopia has adopted international and regional human rights instruments, including the ICCPR and the African Charter on Human and Peoples' Rights, which stress the importance of an independent judiciary.

Despite these constitutional and legal provisions, arguments claiming challenges to judicial independence and the existence of a subservient judiciary in Ethiopia persist.⁴⁵ A thorough examination of institutional and individual judicial independence will be made in the following sections, in light of the previously described legal and constitutional frameworks, accepted norms, guidelines, and standards, and the collected empirical evidence.

3.2 Institutional and Personal Independence of the Judiciary and Protection and Enforcement of Human Rights in Ethiopia

As examined previously, courts in general and an independent judiciary in particular are important avenues and prerequisites for protecting and enforcing human rights, respectively. This section examines the two components of judicial independence—institutional and personal independence—in the Ethiopian legal framework and examines the practice in federal courts.

⁴³ *Id.*, Preamble, and Article 3.

⁴⁴ Federal Courts Proclamation, Proclamation No.1234/2021.

⁴⁵ See Simeneh Kiros Assefa, Conspicuous Absence of Independent Judiciary and 'Apolitical' Courts in Modern Ethiopia, *Mizan Law Review*, Vol. 15, No. 2, (2021).

3.2.1 Institutional Independence of the Judiciary and Protection and Enforcement of Human Rights in Ethiopia

The institutional or collective independence of the judiciary refers to the importance of the judiciary functioning without interference or pressure from the two branches of the government, mainly the executive. In effect, this scheme helps the judiciary function independently of the executive and legislative branches of government. This duty is clearly provided under the United Nations Basic Principles on the Independence of the Judiciary. According to the Basic Principles, “It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”⁴⁶

In the FDRE Constitution, the core principles of judicial independence in general and institutional independence in particular are enshrined under Article 79(2). According to this constitutional provision, “courts of any level shall be free from any interference or influence of any governmental body, government official, or any other source.” In addition, the financial autonomy of federal courts is recognized under Article 79(6) of the Constitution. According to this constitutional provision, “the Federal Supreme Court shall draw up and submit to the House of Peoples’ Representatives for approval the budget of the Federal courts, and upon approval, administer the budget.” As will be discussed in detail in the section to follow, the institutional independence of federal courts is also secured by giving the judiciary a significant role in the appointment of judges.⁴⁷

The abovementioned constitutional principles of the independence of the judiciary are further elaborated in the Federal Judicial Administration Proclamation. The Preamble, Articles 3, 8, 9, 20–23, and 42 of the Proclamation are the most important provisions on judicial independence; courts exercise their judicial functions free of all internal and external influences and in the spirit of complete independence. The important aspects of institutional independence are decision-making independence, judicial jurisdiction over all issues of a judicial nature, financial autonomy, and the availability of sufficient resources. The following subsection examines the

⁴⁶ Basic Principles on the Independence of the Judiciary, *supra* note 9, Principle 1.

⁴⁷ Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Article 80.

significance of institutional judicial independence and its implications for judicial human rights protection and enforcement, using relevant laws and empirical data.

3.2.1.1 Decision-making Independence

The institutional independence of courts, to be free from the interference of the executive, includes noninterference in judicial proceedings. The duty of noninterference in judicial proceedings, among other things, protects and ensures the decision-making power of the judiciary. In its concluding observations on Slovakia, the Human Rights Committee stated that “states should take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making.”⁴⁸ The decision-making institutional independence of the judiciary is enshrined in the UN Basic Principles. Principle 4 states that “there shall not be any inappropriate or unwarranted interference with the judicial process [...]” In general, the decision-making independence of the judiciary aims “at safeguarding judges’ ability to carry out their functions fully without incursions from other state actors.”⁴⁹

As mentioned in the preceding section, the Ethiopian constitutional and legal frameworks clearly recognize the decision-making institutional independence of the judiciary. However, the data collected in assessing the practice in federal courts reveal that there are problems with respecting the decision-making independence of the judiciary and noninterference in judicial proceedings. In this regard, an attorney said, “If the defendant in possessory action is the government, there are pressures on the judges. If the interest of the government is at stake, interventions come from different directions.”⁵⁰ A discussant in a focus group discussion, composed of judges, and an interviewed public prosecutor are of the same opinion as this attorney. In connection with this, a judge in a FGD said, “With regard to intervention, no one may directly call or order to do this and decide that. But they come through the court administration. Court administrators are often in trouble, I hear. In connection with injunctions, they are ordered behind the curtain to do something about matters that are considered to be in the government’s interest. This goes to the extent of removing a judge from handling the case and replacing him or her with a judge who is

⁴⁸ Concluding observations, Slovakia, CCPR/C/79/Add.79 (1997), Para. 18.

⁴⁹ Keith, *supra* note 23, at 196.

⁵⁰ Interview with an Attorney (Anonymous), Federal First Instance Court, Bole Bench, (Addis Ababa, June 2022).

believed to act according to the given order. I consider this an intervention in itself.”⁵¹ An interviewed public prosecutor describes the interventions from different interest groups, including the executive, in criminal judicial proceedings as follows:

Serious cases of partiality in judgment due to political influence, lobbyist influence, and mob influence appear. It can be said that these things actually exist. In particular, in view of political and security problems, we investigated criminal cases and opened files. We saw many gaps in this process. In terms of influence and independent decision-making, we have seen mob-based decisions. From this point of view, there is a gap.⁵²

These opinions demonstrate direct interventions in the decision-making independence of the federal courts. In addition, as decision-making is naturally extended to the power to enforce a given decision and order, the decision-making independence of the judiciary can be explained in terms of the reciprocal duty of the other branches of the government, mainly the executive, to enforce and execute. As Rosenn truly argues, the “[r]efusal of the executive to enforce judicial decisions that it does not agree with seriously undermines the independence of the judiciary.”⁵³ In effect, the refusal of the executive or lack of cooperation from it to execute and enforce decisions and orders of the court can be taken as the usurpation of the principle of separation of powers. The implementation and enforcement of judicial decisions as an extension of the notion of judicial independence and the nexus of these two with human rights protection are summarized by Lovemore Chiduza as follows:

Respect for the independence of the judiciary should also be extended to implementing its judgments irrespective of whether those decisions are against state policy. Such measures will no doubt enhance accountability, respect for the rule of law and separation of powers, and the independence of the judiciary. Human rights protection thrives where there is respect for the rule of law and respect for the independence of the judiciary.⁵⁴

⁵¹ FGD with Judges, Federal First Instance Court, Dire Dawa Bench, (Dire Dawa, May 2022).

⁵² Interview with a Public Prosecutor (Anonymous), Dire Dawa Branch Office, Ministry of Justice, (Dire Dawa, June 2022).

⁵³ Rosenn, *supra* note 17, at 30.

⁵⁴ Lovemore Chiduza, *The Significance of Judicial Independence in Human Rights Protection: A Critical Analysis of the Constitutional Reforms in Zimbabwe*, PhD Dissertation, the Faculty of Law of the University of the Western Cape, South Africa (unpublished), (2013), at 328 .

In the collected empirical data, the research participants mentioned instances of the refusal of the executive (the police) to execute and enforce judicial decisions and orders as follows: “The executive does not enforce and execute orders, and when measures are taken, it reacts inappropriately. The police say that it is beyond their control. This makes the decision of the courts meaningless.”⁵⁵ An attorney and criminal suspect described the interference of the police and its lack of cooperation as follows: “The influence of the police is evident in the courts. There is a possibility that the police will detain an accused to whom the courts grant bail, open a new criminal charge, or even detain the accused incommunicado. Courts have the power to enforce their orders even by ordering police officers to bring them before them.”⁵⁶ Because courts are subservient to the executive, they are reluctant to take appropriate measures against police officers and others who fail to comply with the decisions and orders of courts.⁵⁷ For instance, a criminal suspect who had been granted bail had to give birth at the police station because of the refusal of the police to release the woman according to the order of the court.⁵⁸ Even if some judges are courageous enough to question police officers who detain criminal suspects who are granted bail, it is common to see them removed from benches following the measures they had taken.⁵⁹ A Federal High Court judge also shares these opinions.⁶⁰ The refusal of the police to execute the decision of the courts is common not only in criminal cases but also in high-profile political cases.⁶¹ In practice, in the Ethiopian criminal justice system, it is common to categorize criminal cases into two categories: “high-profile political criminal cases,” in which the interest of the government is the top priority,⁶² and other criminal cases, in which the government is not very interested. The refusal of the police to execute the decision and order of the courts is common in high-profile political cases.

⁵⁵ FGD with Attorneys, Federal First Instance Court, Guelele Bench, (Addis Ababa, May 2022).

⁵⁶ Interview with an Attorney (Anonymous), (Addis Ababa, June 2022); Interview with Mr. Alelegn Mihretu, a criminal suspect and an attorney, (Addis Ababa, October 2023).

⁵⁷ *Id.*, Interview with Mr. Alelegn Mihretu.

⁵⁸ Interview with a Judge (Anonymous), Federal High Court, Ledeta Bench, (Addis Ababa, October 2022).

⁵⁹ Interview with Mr. Alelegn Mihretu, *supra* note 56.

⁶⁰ Interview with a Judge (Anonymous), *supra* note 58.

⁶¹ *Id.*

⁶² Terrorism and related crimes under the Prevention and Suppression of Terrorism Crimes Proclamation No.1176/2020, and crimes against the constitutional order and internal security of the state under Articles 238 ff. of the Criminal Code fall in this category.

In addition to the aforementioned empirical data collected from the research participants, there are various known cases in which the police refuse to enforce the court order. In particular, the police refuse to release criminal suspects who have been granted bail. A number of criminal suspects whom the police have refused to release according to the court order have reported their grievances to the Ethiopian Human Rights Commission. To mention some illustrative cases, the following grievances were reported to the Commission against the refusal of the police:⁶³ Kirkos Sub-City Police Department, Addis Ketema Sub-City Police Department, Federal Police Criminal Investigation, Akaki Kality Sub-City Police Department, Bole Sub-City Police Department, Lemi Kura Sub-City Police Department, and Nefassilk Lafto Sub-City Police Department.⁶⁴ These police departments detained a total of more than 80 criminal suspects by ignoring court orders.⁶⁵ In addition, in *Chief Seregnat Metiku Teshome v. Federal Public Prosecutor*,⁶⁶ the court ordered the release of the criminal suspect. However, irrespective of the court's order, the police detained the person in a different place, which was not under police custody or in a prison. Similarly, in *Colonel Gemechu Ayana et al. v. Federal Public Prosecutor*,⁶⁷ the first applicant in the petition stated that after he was released from detention by the verdict of the Federal High Court, he had been detained by the Oromiya Region Special Forces and the Federal Police in different places.

The executive's interference in judicial proceedings and the refusal of the police to enforce judicial decisions violate the constitutionally guaranteed institutional independence of the judiciary. These acts of interference and refusal by the executive directly violate the rights of arrested persons to be released on bail and their right to liberty, as guaranteed in international human rights treaties and the FDRE Constitution. They also compromise the judiciary's institutional independence and impair its ability to protect and enforce human rights.⁶⁸ In effect,

⁶³ To protect the wellbeing of criminal suspects and because most of the cases are pending before the Commission, the researcher will mention only the police department that refused to release criminal suspects, irrespective of a court order.

⁶⁴ Statistical Data from the Ethiopian Human Rights Commission, (February 2022).

⁶⁵ *Id.*

⁶⁶ *Chief Seregnat Metiku Teshome v. Federal Public Prosecutor*, Federal High Court, File No. 253309.

⁶⁷ *Colonel Gemechu Ayana et al. v. Federal Public Prosecutor*, Federal Supreme Court Cassation Division, File No. 222914.

⁶⁸ Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Articles, 19 (1) (6) and 17.

this would, as I. Mahomed cautions, “implode the power of the judiciary into nothingness, and much, much worse, human rights could irreversibly be impaired.”⁶⁹

3.2.1.2 *Jurisdictional Monopoly: Exclusive Jurisdiction over Judicial Issues*

One of the most important aspects of judicial independence is the exclusive jurisdiction of courts over all judicial issues.⁷⁰ The independence of the judiciary also requires courts to have the power “to decide whether an issue submitted for its decision is within its competence as defined by law.”⁷¹ In this sense, exclusive judicial power extends beyond the adjudication of cases brought before courts by contending individual parties. In addition to resolving “ordinary cases according to the law,” enabling judicial review is at the core of judicial independence.⁷² As Christopher Larkins argues, judicial independence “is not meaningful if the courts cannot exercise it to check the arbitrary or unjust exercise of power by political and social actors.”⁷³ As the guardian of human rights and fundamental freedoms, the judiciary, among other things, protects individuals from unjust and partial laws adopted by the legislature and enforced by the executive. However, the judiciary can discharge this important function only if it has the power of judicial review. In Ethiopia, judicial power is vested in the courts.⁷⁴ The FDRE Constitution provides that “[e]veryone has the right to bring a justiciable matter to and to obtain a decision or judgment by a court of law or any other competent body with judicial power.”⁷⁵ In addition, the Constitution gives exclusive judicial power to courts and bans the establishment of special or *ad hoc* courts, which take judicial powers away from the regular courts or institutions legally empowered to exercise judicial functions.⁷⁶

However, the constitutionally bestowed judicial power excludes the right to challenge unconstitutional laws and acts of the government before a court of law. As repeatedly pointed out, the judiciary in Ethiopia does not have the power to strike down legislation and acts of the

⁶⁹ I. Mahomed, *The Independence of the Judiciary*, 115 S. AFRICAN L.J. 658, 661 (1998).

⁷⁰ Basic Principles on the Independence of the Judiciary, *supra* note 9, Principle 3.

⁷¹ *Id.*

⁷² Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev., 336 (1999).

⁷³ Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, *American Journal of Comparative Law* 44, 611 (1996).

⁷⁴ Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Article 79(1).

⁷⁵ *Id.*, Article 37(1).

⁷⁶ *Id.*, Articles 78(4) and 71(1).

government that are deemed to be in violation of human rights and fundamental freedoms; this power is given to the HoF according to Article 83 of the FDRE Constitution. This dwindles the role of the judiciary in the protection and enforcement of human rights; “[i]t is, of course, a misconception to expect a judiciary without any power to police the actions of the other branches of the government to deliver in ensuring rule of law and protection of human rights.”⁷⁷

There are also major pieces of legislation, such as the Defense Forces Proclamation, that oust the jurisdictional monopoly of courts and bring civilians under military courts.⁷⁸ According to Article 38 of this Proclamation, the jurisdiction of military courts extends beyond members of the defense force and includes offenses committed by civilians. The Article cross refers to offenses listed under Articles 284-332 of the Criminal Code. Therefore, from the listed provisions of the Criminal Code, it can be understood that there are offenses that can be committed by civilians. For instance, offenses such as refusal to perform military service, failure to comply with a calling-up order, and intentionally contracted unfitness listed under Articles 284-86 of the Criminal Code are offenses to be committed by civilians, not members of the armed forces. Therefore, Article 38 of the Defense Forces Proclamation, similar to Article 9(5) of the State of Emergency Proclamation, violates the right of civilians to be tried by an independent and impartial tribunal enshrined in Articles 14 and 15 of the ICCPR, the stated international principles and standards.

3.2.1.3 *Financial Autonomy and the Availability of Adequate Budgetary Resources*

The other important aspect of institutional independence is the financial or fiscal autonomy of the judiciary and the availability of adequate budgetary resources. As is commonly said, the financial power of the government, or purse, is not held by the judiciary but rather by the legislative branch. Therefore, it is clear that the judiciary gets its financial budget and other resources mainly from the legislative branch. It is clear that the judiciary, as one of the three branches of the government, should be allocated adequate resources, and the power to administer the resources should be given to it.

⁷⁷ Diagnostic Study of the Ethiopian Criminal Justice System, The Legal and Justice Affairs Advisory Council of the Federal Democratic Republic of Ethiopia, Attorney General, 201 (2021).

⁷⁸ Defense Forces Proclamation, Proclamation No. 1100/2019.

The importance of allocating adequate financial resources and the financial autonomy of the judiciary are recognized under different international legal instruments. One such instrument is the United Nations Basic Principles on the Independence of the Judiciary. According to Principle 7, member states of the United Nations have the duty “to provide adequate resources to enable the judiciary to properly perform its functions.”⁷⁹ The Guidelines on a Right to a Fair Trial in Africa has a provision with similar content. It states that it is the duty of states to “endow judicial bodies with adequate resources for the performance of their functions.”⁸⁰ In addition, it is also the duty of states to consult the judiciary “regarding the preparation of budgets and their implementation.”⁸⁰ The Human Rights Committee underlines the importance of allocating supplementary budgetary resources for the administration of justice where there are delays in judicial proceedings caused by a lack of resources and chronic underfunding.⁸¹ To enhance the financial autonomy of the judiciary, it is also common for constitutions in different jurisdictions to provide that “a fixed percentage of the country’s total budget be allocated to the judiciary.”⁸² In these jurisdictions, it is common to allocate up to 3% of the total national budget to the judiciary.⁸³ M. Dakolias and K. Thachuk suggested that this constitutional measure helps to limit the budgetary influence of the other branches of government on the judiciary.⁸⁴

According to the Ethiopian constitutional and legal frameworks, as mentioned before, the budget of federal courts is prepared and submitted to the House of Peoples’ Representatives for approval, and upon approval, the judiciary administers the budget. In addition to the budget of the judiciary, the House of Peoples’ Representatives allocates funds to the Federal Judicial

⁷⁹ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, adopted by the African Commission on Human and Peoples Rights, (2003), Principle A, Para. 4 (h); see also the European Charter on the Statute for Judges, DAJ/DOC (98), Para. A, 4 (v).

⁸⁰ *Id.*

⁸¹ Human Rights Committee, Concluding observations: *Democratic Republic of Congo*, CCPR/C/COD/CO/3 (2006), Para. 21, *Central African Republic*, CCPR/C/CAF/CO/2 (2006), Para. 16, cited by the Human Rights Committee in its General Comment No. 32, Para. 27.

⁸² Rosenn, *supra* note 17, at 16.

⁸³ *Addis Zemen*, Amharic Daily, Interview with Mr. Solomon Arede, Vice President, the Federal Supreme Court of Ethiopia (hereinafter *Addis Zemen*, Interview with Mr. Solomon Arede), January 2020, available at <https://www.press.et/Ama/?p=25768>.

⁸⁴ See M. Dakolias and K. Thachuk, “Attacking Corruption in the Judiciary: A Critical Process in Judicial Reform”, *Wisconsin International Law Journal*, Vol.18, No. 2, (2000).

Administration Council, an important body that supports institutional judicial independence.⁸⁵ The budgetary administration and autonomy of federal courts are also reinforced by the Federal Courts Proclamation.⁸⁶ Despite this clear constitutional stipulation, the budget of the judiciary had not been approved by the House of Peoples' Representatives for 25 years. Before the 2019/2020 fiscal year, the budget of the judiciary was submitted to the Ministry of Finance. Then, the Ministry of Finance submitted it to the House of Peoples' Representatives as part of the overall budget of the federal government. The budget of the judiciary for the fiscal year 2019/2020 was approved by the House for the first time; since then, the budget of federal courts has been approved by the House of Peoples' Representatives. Even after 25 years, it was not easy to break the *status quo* and get the budget of the judiciary approved by the House for the first time. The former vice president of the Federal Supreme Court, Mr. Solomon Areda, stated this challenge as follows: "We insisted and put pressure to go to the Parliament to get our budget approved by it."⁸⁷

The approval of the budget of the judiciary by Parliament can be taken as a breakthrough and an important step forward to secure the financial autonomy of the judiciary. However, the financial autonomy of the judiciary is not an end by itself in guaranteeing institutional judicial independence; it is equally important to ensure that adequate funding and resources are allocated to the judiciary. The government allocates about 0.3% of the total national budget,⁸⁸ which is much lower than the internationally accepted standard of 3%. In connection with the allocation of adequate funding to the judiciary, the FDRE Constitution and the stated relevant laws are silent. The possible justification that can be raised by the government for allocating the stated percentage of funding is the inability of the country's economy to afford more. Even if it is not binding and applicable in Ethiopia, we can draw a lesson on the issue from the jurisprudence of the Beijing Principles.⁸⁹ In this regard, the Beijing Principle states that:

⁸⁵ Federal Judicial Administration Proclamation, *supra* note 41, Article 40.

⁸⁶ See the Preamble, Articles 17(2) (c) (e) (i), 19 (2) (4), 36, 37, and 40, Federal Courts Proclamation.

⁸⁷ *Addis Zemen*, *supra* note 83.

⁸⁸ *Id.*

⁸⁹ Beijing Statement of Principles of the Independence of the Judiciary, the LAWASIA Region, adopted by the LAWASIA Council, (2001).

Where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources.⁹⁰

If we import and inject this logically sound principle into the Ethiopian legal framework, the government should prioritize the judiciary in the allocation of funding and resources for the nation. If we examine the current allocation of budget and resources to the judiciary, it is not only inadequate and insufficient, but also unfair. In this regard, Mr. Solomon said, “We are not claiming the amount of budget and resources allocated in other jurisdictions, like the US judiciary; the nation cannot afford that. What we are claiming is the fair and equal distribution of the resources generated by the nation’s economy.”⁹¹

Without adequate funds and resources, the judiciary cannot effectively and properly perform its functions, and its independence, both institutional and personal, would be jeopardized. Lack of an adequate budget, courtrooms and buildings, an environment conducive to work, and infrastructure are the main problems that the judiciary is facing.⁹² As Ferejohn and Kramer correctly put it, “an underfunded court is a distinctly unpleasant place to work.”⁹³ Specifically, a lack of adequate funding and resources affects the administration of justice in general and the judicial protection of human rights in particular, such as the right to a fair trial. In this regard, as Mr. Solomon argues, “without allocating adequate resources and budget [to the judiciary], it is not possible to think about the rule of law, constitutionalism, and justice.”⁹⁴

In other jurisdictions, in addition to allocating a consolidated judicial fund, courts retain their internal revenue, which is a portion of their budget and is collected from court fees and other services, rather than having it transferred to the national treasury.⁹⁵ In Ethiopia too, the Federal Supreme Court suggested that the internal revenue of courts be made part of the budget of the

⁹⁰ *Id.*, Para. 42.

⁹¹ *Addis Zemen*, *supra* note 83.

⁹² *Id.*

⁹³ Ferejohn and Kramer, *supra* note 13, at 985.

⁹⁴ *Addis Zemen*, *supra* note 83.

⁹⁵ *Addis Zemen*, *supra* note 83.

judiciary and be regulated in the two would-be adopted proclamations, the repeatedly cited Federal Courts Proclamation and the Federal Judiciary Administration Proclamation.⁹⁶ Regretfully, the parliament rejected this recommendation and excluded it from the stated proclamations. This shows the unwillingness of the legislative branch to allocate an adequate and sufficient budget and resources to the judiciary, even by letting the latter retain its internal revenues.

3.2.2 Personal Independence, and the Protection and Enforcement of Human Rights in Ethiopia

One mechanism for guaranteeing judicial independence is securing the personal independence of individual judges. Personal judicial independence refers to the autonomy and impartiality of judges in the judicial process and administration of justice. Therefore, it can be argued that “individual judicial independence exists primarily for the benefit of institutional independence” of the judiciary.⁹⁷ In other words, as Lord Phillips convincingly argues, “[personal] independence is inseparable from institutional independence, as the latter contributes enormously to the former.”⁹⁸ To guarantee the judiciary that protection, judges should be independent and protected from interference and pressure from the two branches of the government and the people.

Personal judicial independence can be manifested in different ways. One manifestation of personal independence is the freedom of judges to decide cases. To maintain personal judicial independence, judges must have the freedom to decide cases solely on the basis of the law and the evidence presented before them. External influences, whether through public opinion, public protests, or pressure from interest groups, should not interfere with the judge’s impartiality. Judges must evaluate cases without compromising objectivity and resist the temptation to align their decisions with external factors. Judges must be able to approach each case with an open mind and free from any bias or predetermined outcome. The other related protection is protection

⁹⁶ *Addis Zemen*, *supra* note 83.

⁹⁷ Stephen B. Burbank, “Judicial Independence, Judicial Accountability, and Interbranch Relations”, 95 *Geo. L.J.*, (2007), at 912.

⁹⁸ Lord Phillips, “Judicial Independence and Accountability: A View from the Supreme Court, UCL Constitution Unit”, launch of research project on “The Politics of Judicial Independence,” London, (2011), cited in Laura-Stella Eposi Enonchong, *Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship*, 5 *Afr. J. Legal Stud.*, (2012), at 331.

from political interference. Protecting judges from political interference is vital for ensuring personal judicial independence. Judicial immunity shields them from arbitrary removal, disciplinary actions, or intimidation arising from their judgments or opinions. All would help judges ensure impartiality. In turn, impartiality assures judges that they can make decisions solely on the basis of the law and the facts presented before them, guarding against any personal or external influence.

Second, the appointment procedure is a vital aspect of personal judicial independence. The manner in which judges are appointed is a key factor in ensuring personal judicial independence. Judicial recruitment processes that prioritize merit-based appointments over political or patronage-based selections further contribute to personal judicial independence. Personal judicial independence also requires safeguards against external interference. This entails protection from political, economic, or other pressures that may seek to compromise the independence of judges and influence their decisions.

The concept of personal judicial independence recognizes the need for judges to be free from any undue influence that may cloud their judgment or impede their ability to uphold the rule of law and protect human rights. In the following subsection, these different manifestations and components of personal judicial independence will be discussed and examined in light of the United Nations Basic Principles on the Independence of the Judiciary, the Ethiopian constitutional and legal frameworks, different principles and guidelines, the established conceptual frameworks, the collected empirical data, and other relevant sources of information.

3.2.2.1 Impartiality

The literature distinguishes “two interrelated aspects of judicial independence: impartiality and insularity.”⁹⁹ In the context of judicial independence, insularity, generally, refers to the importance of shielding the judiciary from the interference and pressure of the executive and the personal independence of judges. However, impartiality “refers to the state of mind of a judge or

⁹⁹ Menberetshai Tadesse, “Judicial Reform in Ethiopia”, PhD Dissertation (unpublished), University of Birmingham, School of Law, 251 (2010).

tribunal towards a case and the parties to it.”¹⁰⁰ The notion of impartiality, as enshrined under Article 14 of the ICCPR, is clarified by the Human Rights Committee as follows: “Impartiality of the court implies that judges must not harbor preconceptions about the matter put before them and that they must not act in ways that promote the interests of one of the parties.”¹⁰¹ Therefore, since impartiality refers to the duty of judges to be transparent, neutral, and free, it cannot be taken as the independence of judges. However, the impartiality of judges can be taken as an invaluable input to safeguard and ensure judicial independence. Therefore, it is plausible to argue that the notion of judicial independence, especially personal independence, cannot be fully conceived unless it is coupled with one of its components, namely the impartiality of judges.

Impartiality, like an independent judiciary, is “at the heart of a judicial system that guarantees human rights in full conformity with international human rights law.”¹⁰² As a component of judicial independence, the notion of impartiality is enshrined in different legal instruments, principles, and guidelines. One such instrument is the UN Basic Principles. According to Principle 2, “the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason.” The importance of the impartiality of judges is also recognized under the Ethiopian constitutional and legal frameworks. According to Article 79(3) of the FDRE Constitution, “judges shall exercise their functions in full independence and shall be directed solely by the law.” This general constitutional stipulation is addressed in detail under the Federal Judicial Administration Proclamation; the preamble and Articles 3, 35-38, and 43 are the relevant provisions. In addition, Articles 26, 29 (4), 32, 33-34 of the Federal Courts Proclamation are the relevant provisions provided to ensure impartiality in one way or another.

Lack of impartiality “in the administration of justice may take different forms: economic, social, or political interests of judges in the outcome of a particular case resulted from judicial corruption, lack of integrity on the part of the judges, political affiliation of judges, and grounds

¹⁰⁰ International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 20.

¹⁰¹ Human Rights Committee, Communication 387/1989, *Arvo. O Karttunen v. Finland*, UN Document CCPR/C/46/D/387/1989 (Jurisprudence), Para. 7.2.

¹⁰² International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 2.

of such sort inducing the judges to develop bias or prejudice towards one of the parties.”¹⁰³ The collected data on the impartiality of federal court judges show that there are instances in which federal court judges are not impartial. According to the research participants, a lack of impartiality is witnessed in putting convicts on probation, granting bail, and cases in which the interest of the government is at stake. The research participants mentioned that the causes of the lack of impartiality are ethnic-based relations, personal relations, judicial corruption, political interests in the outcome of the case, and indirect pressure from court administrators.

With regard to putting convicts on probation and releasing criminal suspects on bail, among the stated instances of lack of impartiality, a number of research participants mentioned that judges are inconsistent in releasing convicts on probation. In this regard, an attorney said, “The rich and the poor are not treated equally; the one who can pay is released on bail and can be placed on probation. It makes you lose faith in judicial institutions.”¹⁰⁴ This opinion is shared by an interviewed public prosecutor, who mentioned his opinion on the lack of impartiality in releasing convicts on probation as follows: “Someone may believe that criminals who commit serious economic crimes are placed under probation, while others who commit a minor crime are sentenced to prison. This is because he can’t pay money as a bribe.”¹⁰⁵ Interviewed public prosecutors at the Ministry of Justice are of the same opinion. The first one said, “It’s a problem when you decide different things for different people in similar cases. In particular, some convicts are placed on probation, while others are sent to prison. Even if it is difficult to take it for granted and conclude, the rumor is that a convicted person who can pay money as a bribe is placed on probation, and someone who cannot afford it will be sent to prison.”¹⁰⁶ A public prosecutor, who is also a Deputy Director General for Corruption Crimes Prosecution at the Ministry of Justice, is also of the same opinion and said, “For example, when there is an option between incarceration and fine, the judge will be bribed to impose a fine instead of incarceration. It is common to hear that convicts who cannot pay bribes are not released on probation.”¹⁰⁷

¹⁰³ Diagnostic Study, *supra* note 77, at 216.

¹⁰⁴ Interview with an Attorney at Law at Federal Courts (Anonymous), (Dire Dawa, June 2022).

¹⁰⁵ Interview with a Public Prosecutor and Coordinator of Economic Crimes (Anonymous), Dire Dawa Branch Office, Ministry of Justice, (Dire Dawa, June 2022).

¹⁰⁶ Interview with a Public Prosecutor (Anonymous), Ministry of Justice, (Addis Ababa, June 2022).

¹⁰⁷ Interview with the Deputy Director General (Anonymous), Corruption Crimes Prosecution Directorate General, Ministry of Justice, (Addis Ababa, May 2022).

Concerning the lack of impartiality in releasing suspects of crime on bail, the research participants mentioned the inconsistency and disparity with the law as follows: “Regarding bail, there is an issue that bothers us as public prosecutors. Sometimes a serious crime is committed and bail is granted, and sometimes bail is granted on serious conditions for a simple crime.”¹⁰⁸ Moreover, “the lower court denies the release on bail of persons suspected of committing economic crimes. However, the appellate court reverses the decision and grants bail. I think the problem is based on ethnic ties or economic connections. These suspects released on bail have never been brought back to court. As a result, 80%–90% of the sentences are not executed.”¹⁰⁹

An interviewed attorney is of the opinion that courts lack impartiality regarding cases in which the interests of the government are at stake. In this regard, the attorney said, “There is something called government interest, especially one that is related to politics. Everyone is equal before the law, but when the executive is a litigant, there are judges who conclude that the government is right, and they side with the government. Some judges are even more concerned than the police; they are biased.”¹¹⁰ Especially in high-profile cases, court administrators reshuffle judges, remove judges from handling cases, and assign “favorable” judges to cases by “anticipating the outcome of the case.”¹¹¹ Judges of the Federal High Court are heard complaining about internal interventions from court administrators concerning the assignment of judges to benches and the stepping down of judges from cases.¹¹² This internal pressure from court administrators, “notably from the officials assuming higher positions in the hierarchy of courts,” has also been reported as a threat to judicial independence.¹¹³ The Director of Judgment Inspection and Judge’s Discipline Committee at the Federal Judicial Administration Council is also of the opinion that there is a practice of lack of impartiality mainly based on personal relations and financial bribes.¹¹⁴

¹⁰⁸ Interview with a Public Prosecutor and Coordinator of Economic Crimes (Anonymous), *supra* note 105.

¹⁰⁹ *Id.*

¹¹⁰ Interview with an Attorney (Anonymous), at the Federal First Instance Court, Bole Bench, (Addis Ababa, June 2022).

¹¹¹ Interview with Mr. Alelegn Mihretu, *supra* note 56.

¹¹² Interview with a Judge (Anonymous), Federal Supreme Court Cassation Division, (Addis Ababa, October 2023).

¹¹³ Diagnostic Study, *supra* note 77 at 208.

¹¹⁴ Interview with the Director (Anonymous), Judgment Inspection and Judge’s Discipline, Federal Judicial Administration Council, (Addis Ababa, June 2022).

From the analysis of the data collected from different participants, including judges, it can be inferred and understood that a lack of impartiality is manifested in federal courts. The political implications of cases, administrative pressures, judicial corruption, and ethnic and interpersonal ties are the main causes of judges' partiality. Specifically, there is abuse of judicial discretion and partiality in putting convicts on probation, granting bail, and in possessory action cases. There is also pressure and interference from the executive in possessory action cases, which in effect results in the lack of impartiality of the judge handling the case.

3.2.2.2 *Recruitment and Appointment Procedure*

One of the procedural measures that help ensure the independence of the judiciary is the recruitment and appointment of judges. Generally, what is important in the recruitment and appointment procedure of judges is to ensure that it is conducted without the interference and manipulation of the two branches of the government, specifically the executive branch. This is because “[u]nless judges are appointed and promoted on the basis of their legal skills, the judiciary runs the risk of not complying with its core function: imparting justice independently and impartially.”¹¹⁵

The Human Rights Committee has examined the impact of judge appointment criteria on judicial independence. As the Committee mentioned in its general comment, “[t]he requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges [...]”¹¹⁶ States are also required to “take specific measures guaranteeing the independence of the judiciary through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment of the members of the judiciary.”¹¹⁷ In its concluding observation on Slovakia, the Committee underlined the importance of taking “specific measures guaranteeing the independence of the judiciary [and] protecting judges from any form of political influence through the adoption of laws regulating [their] appointment.”¹¹⁸

¹¹⁵ International Principles on the Independence and Accountability of Judges, Lawyers, and Prosecutors, *supra* note 14, at 38.

¹¹⁶ Human Rights Committee, General Comment No. 32, *supra* note 2.

¹¹⁷ *Id.*

¹¹⁸ Concluding Observations of the Human Rights Committee on Slovakia, UN Document CCPR/C/79/Add.79, Para. 18.

The generally agreed-upon selection criteria of judges, among other things, should be based on the candidate's merit, integrity, and qualification; it should not be based on the political loyalty or affiliation of the candidate to the government. The United Nations Guiding Principles on the Independence of the Judiciary provide for the selection and appointment criteria of judges as follows:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status [...].¹¹⁹

Similar appointment criteria are provided under the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa: "The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability."¹²⁰ Setting the appointment criteria of judges does not by itself guarantee judicial independence; there has to be an appointment procedure to be followed in the process of appointment that ensures the observance of the appointment criteria. In this regard, the accepted requirement is the selection of judges, and the appointment procedure should be conducted by an organ independent of the two branches of the government. For instance, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa underline the importance of establishing an independent body that will ensure transparency and accountability in the appointment of judges.¹²¹

In the Ethiopian legal and constitutional framework, the legislative organ, the Prime Minister, and the Judicial Administration Council participate in the selection and appointment of federal judges.¹²² Here, it is important to distinguish between the appointment procedures of the president and the vice president of the Federal Supreme Court, the presidents and the vice presidents of lower courts, and federal judges. The president and the vice president of the Federal Supreme Court are appointed by the House of Peoples' Representatives upon recommendation

¹¹⁹ Basic Principles on the Independence of the Judiciary, *supra* note 9, Principle 10.

¹²⁰ Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, *supra* note 79, Principle A, Para. 4 (i).

¹²¹ *Id.*, Principle A, Para. 4 (h). See also the European Charter on the Statute for Judges, *supra* note 79, Para. 1.3.

¹²² Constitution of the Federal Democratic Republic of Ethiopia, *supra* note 36, Article 81.

by the Prime Minister.¹²³ Therefore, as far as the appointment of the leadership of federal courts in general and the Federal Supreme Court in particular is concerned, the power of the executive is limited to recommending candidates to the stated offices, and the Judicial Administration Council does not play any role. However, it can be perceived that, in recommending the president and the vice president for appointment, the Prime Minister cannot be free of political considerations and the interests of the executive. Given the considerable power that the president and the vice president of the Federal Supreme Court have over the Supreme Court and lower federal courts, it “would induce judges to anticipate that ‘wrong’ decisions in particular cases could have career consequences, thus negatively impacting their independence.”¹²⁴

Unlike the appointment of the president and the vice president of the Supreme Court, the nomination and appointment of the federal judges, presidents, and vice presidents of the Federal High Court and the Federal First Instance Court is the same; candidates are nominated for appointment by the Judicial Administration Council and submitted to the Prime Minister, and their appointment is approved by the House of Peoples’ Representatives.¹²⁵ Regarding the role of the Prime Minister in the appointment of federal judges and the presidents and the vice presidents of the two lower courts, one question worth further inquiry is whether the role of the Prime Minister is limited to submitting candidates to the House, or does he have the power and discretion to reject nominations made by the Council before submitting them for approval? Neither the Constitution nor the Judicial Administration Proclamation is clear on this issue. It can be argued that as the Prime Minister is the bridge between the Council and the House in the nomination procedure, he can avail himself of the silence of the Constitution and the Proclamation and reject the nomination. The Council does not have legal grounds to challenge the rejection of the Prime Minister, bypass it, and submit candidates for the approval of the House. Therefore, it can be concluded that the Prime Minister or the executive plays an important role in the appointment of presidents and vice presidents of all levels of courts and federal judges. In the latter case, his role goes beyond submitting judges for appointment, and he has the power and discretion to reject nominations made by the Council. The possibility of this

¹²³ *Id.*, Article 81(1).

¹²⁴ Diagnostic Study, *supra* note 77, at 209.

¹²⁵ See Articles 8 (1) (2) and 9 (3) of the Federal Judicial Administration Proclamation and Article 81(2) of the Constitution of the Federal Democratic Republic of Ethiopia.

intricacy and legal uncertainty would undermine the role of the Judicial Administration Council and pave the way for the interference of the executive in the appointment procedure of federal judges.

With regard to the criteria for the selection and appointment of judges, the Constitution is silent. However, it should be noted that “[o]ne of the foundations for a capable and legitimate judiciary is the professional competence of individual judges.”¹²⁶ In addition, “[a]ccess to professionally competent adjudication is considered a human right of court service users.”¹²⁷ In this regard, the Judicial Administration Proclamation provides for the general requirements for the appointment of federal judges and additional requirements for the appointment of the Federal First Instance Court, Federal High Court, and Federal Supreme Court.¹²⁸ As general requirements, according to Article 20 of the Proclamation, a person is required to fulfill the following requirements to be appointed as a federal judge: be an Ethiopian national; have a proven reputation for probity, integrity, honesty, and be free from morally repugnant conduct; be of good health and display a sense of duty, responsibility, and diligence of the highest standard fitting the position by virtue of his competence to assume the responsibility of being a judge; have a sense of justice and is committed to respecting the rule of law; be willing to serve as a judge; be free from criminal conviction except for minor contraventions; be not less than the age of 30; and hold at least an LLB degree from a recognized institution of higher learning. From the reading of these general requirements, it can be concluded that the selection criteria are objective and based on the merit, competence, integrity, and qualification of the candidate as enshrined under different instruments and recommended by the Human Rights Committee. This will, in turn, help ensure a competent, independent, and impartial judiciary.

This researcher empirically assessed the practice of the recruitment and appointment of judges in light of the stated general requirements, and the research participants questioned the observance of some of the legally stipulated recruitment and appointment requirements. The opinion of the research participants is that the recruitment and appointment of judges is not based on merit,

¹²⁶ The Comprehensive Justice System Reform Program Baseline Study Report, Ministry of Capacity Building, Justice System Reform Program Office, 161 (2005).

¹²⁷ *Id.*

¹²⁸ Federal Judicial Administration Proclamation, *supra* note 41, Articles 20-23.

competence, integrity, or qualification. Specifically, they mentioned that the recruitment and appointment of judges is mainly based on the political inclination and ethnic origin of the candidates. In this regard, the interviewed attorney opined:

One of the reasons for judicial misconduct is that there is an ethnic-based appointment rather than a merit-based one. The appointment is based on an ethnic-based quota, not merit. It is not a problem that underrepresented ethnic groups in the judiciary are given some quotas. A meritorious competition should be held, and the best of those underrepresented should be selected. Competition should be held among the Somalis, Amharas, and Oromos, and the one who is capable and fit should be selected and appointed. The problem is that politics impact appointments and selections based on ethnicity.¹²⁹

Other interviewed research participants and discussants in the focus group discussions shared the opinion of the quoted informant.¹³⁰ These research participants are of the opinion that the recruitment and appointment of judges is mainly based on the political inclination, ethnic origin, network, and personal relations of the candidates, not on their merit, competence, integrity, or qualification. Specifically, the research participants pointed out that recruitment and appointment are mainly based on the quota given to ethnic groups.¹³¹ An interviewed public prosecutor said, “Judgeship is a profession; the judiciary should never be staffed by judges based on the quota given to ethnic groups as it is not a political organ like the House of Federation.”¹³² The practices mentioned by the research participants, even if they might have been used to a limited extent, are not in tandem with the recruitment and appointment criteria accepted by international instruments and the requirements under the Judicial Administration Proclamation. This will, in turn, hamper the right to trial by independent and impartial courts in general and the role the judiciary can play in the protection and enforcement of human rights in particular.

¹²⁹ Interview with an Attorney at Law at Federal Courts (Anonymous), *supra* note 104.

¹³⁰ Interview with a Judge (Anonymous), Federal Supreme Court Cassation Division, (Addis Ababa, May 2022); FGD with Attorneys and Public Prosecutors, Federal First Instance Court, Bole Bench, (Addis Ababa, May 2022); FGD with Attorneys, Federal First Instance Court, Guelele Bench, *supra* note 55; Interview with a Representative Judge (Anonymous), Federal High Court, Dire Dawa Assigned Division, (Dire Dawa, June 2022); Interview with an Attorney at Law (Anonymous), (Addis Ababa, May 2022).

¹³¹ *Id.*; Interview with a Judge (Anonymous), Federal Supreme Court Cassation Division, *Id.*; FGD with Attorneys and Public Prosecutors, Federal First Instance Court, *Id.*; FGD with Attorneys, Federal First Instance Court, Guelele Bench, *Id.*.

¹³² Interview with a Public Prosecutor (Anonymous), Guelele Branch Office, Ministry of Justice, (Addis Ababa, May 2022).

CONCLUSION AND RECOMMENDATIONS

The institutional independence of federal courts in Ethiopia is compromised by the executive branch meddling and police reluctance to enforce court decisions and orders. This diminishes the courts' inherent power to protect human rights. The jurisdictional monopoly of the judiciary has also been eroded by Article 38 of the Defense Forces Proclamation and Article 9(5) of the recently adopted State of Emergency Proclamation. Even if the judiciary's budget is approved by parliament, the allocated resources are insufficient for effective justice administration and safeguarding human rights. Adequate funding is crucial for upholding the rule of law and constitutionalism.

Concerning the individual independence of judges and their impartiality, the analyzed empirical data reveal a lack of impartiality in federal courts, with abuse of discretion, partiality in putting convicts on probation, granting bail, executive interference, and pressures in possessory action cases. The recruitment and appointment criteria of judges align with international guidelines and the jurisprudence of the Human Rights Committee. However, some of the legally stipulated recruitment and appointment requirements are not always observed, and the recruitment and appointment of judges mainly consider the political inclination and ethnic origin of the candidates. This practice is not in tandem with the legally recognized importance of the "de-politicization of the process by which judicial personnel are appointed and removed."¹³³ Specifically, the Prime Minister plays an important role in the appointment of presidents and vice presidents of all levels of courts and federal judges. His role goes beyond submitting judges for appointment, and he has the power and discretion to reject nominations made by the Council. As far as the president and the vice president of the Federal Supreme Court are concerned, the Judicial Administration Council does not play a role in their selection and appointment; the executive and the parliament control the entire process.

In general, it can be concluded that most of the constitutional provisions and subsidiary laws on judicial independence in Ethiopia are inspired by internationally recognized guidelines,

¹³³ Bruce M. Wilson et al, "The Best Laid Schemes" (2004); Gang Aft A-Gley, "Judicial Reform in Latin America: Evidence from Costa Rica", *Journal of Latin American Studies*, Vol. 36, No. 3, 514 (2004), cited in Elias N. Stebek, *Judicial Reform Pursuits in Ethiopia, 2002-2015: Steady Concrete Achievements - versus - Promise Fatigue*, *Mizan Law Review*, Vol. 9, No. 2, (2015), at 221.

standards, and the jurisprudence of human rights monitoring bodies. However, these constitutional provisions and subsidiary laws have not been fully implemented and practiced. As J. Mark Ramseyer rightly asserts, “Judicial independence is not primarily a matter of constitutional text.”¹³⁴ Therefore, a “constitutional provision stating that the judiciary shall be independent merely indicates a commitment but does not suffice.”¹³⁵ Most importantly, “judicial independence waxes and wanes with changes in the political composition.”¹³⁶ Similarly, this researcher believes that constitutional and legal recognition can be taken as one of the instruments to guarantee judicial independence in Ethiopia. However, it is not an end in itself. Judicial independence develops and is guaranteed in a legal system and political culture where the rule of law and real separation of governmental power prevail. Four constitutions have been adopted in the constitutional history of Ethiopia. Unfortunately, these constitutions, including the apparently democratic ones, have not significantly impacted changes in the judicial administration of justice, the protection and enforcement of human rights in general, and judicial independence in particular.

In sum, the Ethiopian government should go beyond the mere declamation of its constitutional commitment to judicial independence and start to “walk the constitutional talk” by fully and properly enforcing the constitutionally entrenched principles of judicial independence so that the judiciary can play its inherent role in the protection and enforcement of human rights. If not, as Mahomed rightly concludes and cautions, subverting judicial independence and attacking the independence of the judiciary is “[attacking] and [subverting] the very foundations of the freedoms articulated by the constitution to protect humankind from injustice, tyranny, and brutality.”¹³⁷ The judiciary, in general, and the Federal Judicial Administration Council, in particular, should strive to fully exercise their constitutionally guaranteed judicial independence and power to play a significant role in the protection and enforcement of human rights, safeguarding them from undue interference and pressure from the executive.

¹³⁴ J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. (1994), cited in Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. Cal. L. Rev., (1999), at 332.

¹³⁵ Laura-Stella Eposi Enonchong, *Judicial Independence and Accountability in Cameroon: Balancing a Tenuous Relationship*, 5 Afr. J. Legal Stud., (2012), at 334.

¹³⁶ McNollagast, “Positive Political Theory and the Law: Conditions of Judicial Independence”, *Journal of Contemporary Legal Issues* 15, (2006), at 108.

¹³⁷ Mahomed, *supra* note 69, at 666.