JUDICIAL INDEPENDENCE OF THE FEDERAL JUDICIARY IN ETHIOPIA: ASSESSMENT OF THE POST-2018 PERIOD

Association for Human Rights in Ethiopia

Judicial independence of the Federal judiciary in Ethiopia: Assessment of the post 2018 period

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List of Acronyms

ACHPR	-	African Charter on Human and People's Rights
FDRE	-	Federal Democratic Republic of Ethiopia
FFIC	-	Federal First Instance Court
FHC	-	Federal High Court
FSC	-	Federal Supreme Court
GDP	-	Gross National Product
HPR	-	House of People's Representatives
JAC	-	Judicial Administration Council
UN	-	United Nations

About AHRE

Association for Human Rights in Ethiopia (AHRE) is a non-governmental, non-partisan, and not-for-profit organization dedicated to the advancement of human rights in Ethiopia. The organization was initially registered and based in Geneva, Switzerland in 2015. It was established through an initiative of an Ethiopian human rights activist that fled the country and other members of the Ethiopian diaspora, as an overseas human rights organization that carries out activities that are difficult to undertake by organizations based in Ethiopia due to financial and administrative restrictions.

Taking advantage of the opening up of the civic space as a result of the revision of the restrictive CSO proclamation (proclamation no. 621/2009) AHRE decided to base its office in Ethiopia, and got registered with the Agency as of November 12/2020. The organization is engaged in contributing for the improvement of the human rights situation in Ethiopia, mainly through its advocacy and research works. It is also engaged in training local actors, rehabilitation of torture victims, publishing press statements and an online magazine. All the above activities are the tools used to work on creating awareness, strengthening the capacity of local actors in Ethiopia and call upon concerned parties to give it due concern.

Recommendations

In order to enhance judicial independence in Ethiopia further legal reforms and changes in the practice of the justice system are required. The following recommendations are provided to that effect.

The law maker (House of People's Representatives (HPR)) should:

- Enact a law that provides objective criteria for appointment of presidents and vice-presidents, and ad hoc judges of the federal courts;
- Enact a law that provides the substantive and procedural conditions for impeachment and removal of presidents and vice-presidents of the federal courts;
- Amend the law that empowers the JAC to terminate the judge on the ground of gross incompetence or inefficiency and lift the judge's immunity without the approval of the HPR;
- Enact a law that designs an appeal procedure for disciplinary measures against the judges;
- Amend the law that empowers the JAC to decide on the leave of judges and restore it to the court itself;
- Enact a law that expressly recognises the judge's right to association; and
- Enact a law that prescribes determination of judges salary based on experience and a benefit delineating package.

The Executive should:

- Respect and enforce the courts' order and decisions;
- Take administrative measures against those who disregard and disobey the Courts' order and decisions; and
- Stop detaining judges from their bench and the indirect intimidation of judges and removing a judge from a case.

The JAC should:

- Stop treating judicial errors as judicial conduct in reviewing disciplinary complaints brought against judges.

Methodology

The study adopts a comparative qualitative legal research approach. As such it comparatively assesses the legal reform and practice of judicial independence in post-2018 Ethiopia against the international standards and the pre-2018 judicial administration law and practice. Accordingly primary and secondary sources of data are used. The primary sources are the Federal Democratic Republic of Ethiopia (FDRE) Constitution, international human rights instruments and other non-binding guidelines, the judicial administration proclamations, and interviews. As a secondary source literature collected through web and library searches were used.

A semi-structured interview was conducted with judges and leadership of the judiciary from the three levels of the federal courts Federal First Instance Court, Federal High Court and Federal Supreme Court at Addis Ababa. Four judges and one leadership of the judiciary were interviewed from each court. A total fifteen judges were interviewed. The following table unpacks and provides the summary of the interviewees.

Institutions	Participants		
	Male	Female	Total
FFIC Judges	2	2	4
FHC Judges	3	1	4
FSC Judges	2	2	4
FFIC Leadership	1	0	1
FHC Leadership	0	1	1
FSC Leadership	1	0	1
Total	9	6	15

The data collected is interpreted and analysed thematically.

1. Background and Context of the Research

Judicial independence refers to being independent from any force and in performing its function, comprises the judge's personal independence and the independence of the judiciary as an institution.[1] It is the fundamental element of the self-standing right to access to justice and an essential means for the realization of the other human rights. Cognizant of this, international standards of judicial independence are developed.

The principles govern both personal and institutional independence and comprise the following subjects: (i) independence of the Judiciary; (ii) freedom of expression and association; (iii) qualifications, selection and training; (iv) conditions of service and tenure; (v) professional secrecy and immunity; and (vi) discipline, suspension and removal.[2] These principles are meant to ensure independence of the judiciary per se, as a branch of government, but also individual judges too in carrying out their professional duties.

In Ethiopia, before 2018 with the anti-terrorism proclamation[3] the courts were regarded as 'kangaroo courts' as they were used as instruments to suppress dissents and political oppositions.[4] The institutional and personal independence of the judiciary was highly compromised and at the brick. In recognition to this fact, Prime Minster Abiy Ahmed after assuming power in 2018 declared that there is 'state terrorism' and effected the release of political prisoners as part of the political reform.[5]

This was followed by the reform of the judicial institution with the appointment of new presidents and vice-presidents of the three tier courts Federal First Instance Court (FFIC),

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[1] Vicki C. Jackson. 'Judicial independence: structure, context, attitude' in Anja Seibert-Fohr (ed.). *Judicial Independence in Transition*. Heidelberg. Springer, 2012. 19–86, p 20.

[2] Democracy Reporting International. International standards for the independence of the judiciary. *Briefing Paper, 41*, 2013; International Bar Association. Minimum standards of judicial independence. *IBA Adopted 1982*. Principle; The International Association of Judicial Independence and World Peace. Mount Scopus international standards of judicial independence. *JIWP International Project of Judicial Independence. (Approved March 19, 2008, Consolidated 2015)*.

[3] The Ethiopian Anti-Terrorism Proclamation No.652/2009;

[4] ESAT, *Lawyer says Ethiopia's political prisoners are victims of kangaroo courts, unjust laws* (August 16, 2017) available at https://ethsat.com/2017/08/lawyer-says-ethiopias-political-prisoners-victims-kangaroo-courts-unjust-laws/ .

[5] Awol Allo, *Torture, state terrorism and Ethiopia's transformation* (Aljazeera, 23 June 2018) available at https://www.aljazeera.com/opinions/2018/6/23/torture-state-terrorism-and-ethiopias-transformation

Federal High Court (FHC) and Federal Supreme Court (FSC). This was complemented by the legal reform of the JAC proclamation.[6]

Nonetheless the changes and enhancements made alongside the international standards and principles require study. Consequently, this research has assessed the reforms brought forth following the post 2018 judicial reform and the extent to which it reflects the international standards and departed from the preceding judicial situation.

In doing so, the research is organized in to three main sections. The first section provides the general theoretical framework and the international standards of judicial independence. Section two makes a comparative analysis of the legal reform on the judicial administration against the theoretical framework and international standards and the pre-2018 judicial administration law. Section three, on the other hand, is devoted to assessing the practice and perception of the judges and the judiciary leadership about the implementation of the judicial independence in the federal courts of Ethiopia. This is followed by concluding remarks.

2. The Theoretical Framework and International Standards of Judicial Independence

The idea of judicial independence has its origin in the concept of separation of powers, whereby the Executive, Legislative and Judiciary form three separate branches of government, which, in particular, constitute a system of mutual checks and balances aimed at preventing abuses of power to the detriment of a free society.[7] This independence means that both the Judiciary as an institution and the individual judges deciding particular cases must be able to exercise their professional responsibilities without being influenced by the executive, the legislative or any other organ.[8] In general, it requires that the judiciary: (a) be impartial; (b) approach cases in an unbiased manner; (c) display no prejudice; (d) be politically independent; and (e) operate without fear.[9]

Especially when the state is party to the dispute the impartiality and independence of judicial review should not only exist in fact, but must also be seen to exist, in order to enhance public

[6] Amended Federal Judicial Administration Council Establishment Proclamation No. 684/2010 (herein after Proclamation 684/2010) was repealed and replaced by Federal Judicial Administration Proclamation No. 1233/2021 (herein after Proclamation No. 1233/2021).

[7] Christopher M. Larkins, Judicial Independence and Democratization: A Theoretical and Conceptual Analysis, *The American Journal of Comparative Law*, Vol. 44, No. 4 (Autumn, 1996), 605-626.

[8] Roger Masterman, *The separation of powers in the contemporary constitution: judicial competence and independence in the United Kingdom*, Cambridge University Press, 2011.

[9] Democracy Reporting International (n 2 above).

trust and confidence in the judiciary, and "to maintain state submission to law."[10] This is so because achieving impartial justice and checking government wrong-doing or abuse of power, can be rendered or be seen to be rendered when the judiciary is independent *from* any forces and in *performing* its function.[11]

The idea of judicial independence is expressly recognized under all international and regional human Rights instruments. This is with the belief that human rights and fundamental freedoms are "better safeguarded to the extent that the judiciary and the legal professions are protected from interference and pressure."[12] For the sake of illustration, it is worthy to mention two instruments that Ethiopia has ratified. The first one is the International Covenant on Civil and Political Rights that states in its article 14(1) that:

> *"All persons shall be equal before the courts and tribunals" and further, that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".*[13]

The Human Rights Committee has unambiguously held that "the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception".[14] It is thus a right that is applicable in all circumstances and to all courts, whether ordinary or special.

The second is article 7(1) of the African Charter on Human and Peoples' Rights which provides that "every individual shall have the right to have his cause heard", a right that comprises, in particular, "(b) the right to be presumed innocent until proven guilty by a competent court or tribunal", as well as "(d) the right to be tried within a reasonable time by an impartial court or tribunal" (emphasis added).[15] Furthermore, according to article 26 of the ACHPR, states parties "shall have the duty to guarantee the independence of the Courts". It is

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[10] Larkins (n 7 above) p 606.
[11] Jackson (n 1 above) p 20.
[12] UN Office of the High Comm'r for Human Rights. *Human rights in the administration of justice: a manual on human rights for judges, prosecutors and lawyers*. New York. United Nations, 2003, *p 115.*
[13] UN. International covenant on civil and political rights. Adopted 16 Dec. 1966, G.A. res 2200(XXI), UN GAOR, 21st Sess., Supp. No. 16, UN doc A/6316, (1966), 993 U.N.T.S. 3. (herein after ICCPR).
[14] Communication No. 263/1987, *M. Gonzalez del Río v. Peru* (Views adopted on 28 October 1992), in UN doc. *GAOR*, A/48/40 (vol. II), p. 20, para. 5.2; UNITED NATIONS HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 32.
[15] The African Charter on Human and Peoples' Rights, adopted 01 June 1981(herein after ACHPR).

the view of the African Commission on Human and Peoples' Rights that article 7 "should be considered non-derogable" since it provides "minimum protection to citizens".[16]

Apart from the above two instruments, the idea of judicial independence has also been formed by customary rules of international law as well as general principles of law. Moreover, the UN General Assembly in its resolutions 40/32 adopted the fundamental principles of independence of judiciary.[17] The principles provided there establish the benchmark to assess the judicial independence of a given country. The principles govern both personal and institutional independence and comprise the following subjects: (i) independence of the Judiciary; (ii) freedom of expression and association; (iii) qualifications, selection and training; (iv) conditions of service and tenure; (v) professional secrecy and immunity; and (vi) discipline, suspension and removal.[18] These principles are meant to ensure independence of the judiciary per se, as a branch of government, but also of individual judges in carrying out their professional duties. In order to operationalize these principles, the discussion below is made about the constituting elements of personal and institutional independence separately.

2.1. Personal Independence

The personal independence and impartiality of the judiciary is the capability of a judge to decide on a case based on the law without interference of any force or any fear and influence from anyone.[19] There are different ways of securing the independence of individual judges. The fundamental ones are: attitude, immunity, financial security, standards for and the process of their appointment, removal and withdrawal.[20] As independence and impartiality are a matter of power relations with the other branches of government – legislative and executive – both about an individual judge and the judiciary as an institution, the appointment, promotion, withdrawal and removal of judges is required to be in accordance with objective standards and without undue influence from other state organs, typically the executive. Accordingly, to realize the personal independence and impartiality of the judiciary, substantive conditions (standards for appointment, withdrawal, promotion, removal, determination of financial benefits of judges) and procedural conditions (making of the

[16] Ibid.
[17] UN Office of the High Comm'r for Human Rights (n 12 above) p 119; UN Basic Principles in the Independence of the Judiciary, 1985.
[18] Ibid.
[19] Democracy Reporting International (n 2 above) p- 1; International Bar Association (n 2 above) Principle A(1); The International Association of Judicial Independence and World Peace (n 2 above) Principle 2.2.
[20] Jackson (n 1 above); see UN Office of the High Comm'r for Human Rights (n 12 above) Pp 128–129.

decision of appointment, withdrawal, promotion, removal and financial benefits of judges) must be free from political interference.

As provided under Principle 10 of the UN Basic Principles the appointment to the judicial office must be based only on the professional qualifications and personal integrity of the candidates. It prohibits making discrimination during the selection of judges based on race, sex, political or other opinion, social origin, birth status, or property. It also prohibits appointment of judges on ill-motives. Furthermore, the UN Special Rapporteur on the Independence of Judges and Lawyers' Annual Report 2009 notes that appointment procedures dominated by either the legislative or the executive carry risks to judicial independence. Opportunities for legislative and executive domination arise more easily in the legislative super/majority model and the multi-constituency model of judicial appointment.[21] It, then recommends the judicial council model be followed, since an independent, corporatist and deliberative body offers the greatest prospect of an independent appointment process. The Special Rapporteur's Annual Report 2009 further recommends that the head of specific courts must be elected by judges of that court.[22]

The second protection to ensure the personal independence of a judge is security of tenure. It is a guarantee that ensures that judges cannot be dismissed, except in specific circumstances, until the expiry of their term of office.[23] In the absence of security of tenure, there is a serious risk that their independence will be compromised, as they may be more vulnerable to inappropriate influence in their decision-making. As short terms of office weaken judicial independence, it is prohibited to make judicial appointment under fixed-term contracts.[24]

The third requirement to guarantee personal independence of a judge is financial security and other terms of service. Although international and regional human rights instruments don't expressly provide it, the UN Basic Principle under Principle 11 requires that judges shall have adequate remuneration and pension. This protection is important in two respects. The first one is that it has the potential to attract qualified individuals to the bench. Second, it reduces judges' temptation to corruption and the possible influence of judges' decisions on the threats of reduction in pay or less favourable terms of service.

[21] Report of the Special Rapporteur on the Independence of Judges and Lawyers, 2009, A/HRC/11/41, 24 March 2009, paras 25-28.
[22] Ibid.
[23] UN Basic Principles (n 17 above) principle 11 and 12; DRI and The Carter Center, Strengthening International Law to Support Democratic Government and Genuine Elections, 2012, p 17.
[24] (n 14 above).

The UN Basic Principles also stipulate measures in relation to accountability of judges to ensure their personal independence. It provides that judges should not be removed or suspended from office except for reasons of incapacity, inability to discharge their duties, or a lack of fitness for the position.[25] Further, all disciplinary proceedings must adhere to standards of procedural fairness, with judges subject to discipline, removal or sanction only for violation or non-fulfilment of established standards of judicial conduct and should only be removed in cases of serious misconduct or incompetence.[26] The Special Rapporteur's Annual Report 2009 states that an independent body should be tasked with the discipline of the judiciary, including questions of dismissal, rather than the legislative or executive branches. In addition, the requirements of "natural justice" or procedural fairness must be observed in any proceeding that may lead to the dismissal or suspension of a judge, and any decision of such a body must be susceptible to judicial review.[27]

The other important measure to ensure the personal independence of the judge is about promotion and transfer of judges. The UN Basic Principles require that whenever there exists promotion it should be based on objective factors such as ability, integrity and experience and it should be decided by an independent body composed of at least a majority of judges.[28] Otherwise, promotion can be used as an incentive to reward judicial behaviour that is favourable to political elites and transfer to less favourable postings can be used as a threat to influence judicial behaviour.

Last but not least we have protection related to freedom of expression and association. Judges like other citizens are entitled freedom of expression, belief, association and assembly.[29] They are entitled to oppose the merits of the case or cases decided by the judge in question. Being free to form associations they are able to defend their independence and other professional interests.

2.2. Institutional Independence

Institutional independence, on the other hand, demands non-interference of others in the functioning of the judiciary. The judiciary as an institution is supposed to discharge justice and its internal function without influence and interference from other state organs. This

[25] UN Basic Principles (n 17 above) principle 17 to 20.
[26] Ibid.
[27] (n 14 above).
[28] General Comment No. 32 (n 14 above), para 19.
[29] UN Basic Principles (n 16 above) principle 8.

includes non-transfer of judicial function to other organs, autonomy in its administrative and financial matters, and respect and observance of its decisions by other organs.[30] Such matters should preferably be guaranteed in the constitution or any higher normative instruments as they are aspects of separation of power.

The non-transfer of judicial functions to other organs is about the jurisdictional competence of the courts. In fact, this principle doesn't deny the existence of and competency of alternative forums of resolution of legal disputes. Rather, what this principle requires is that the judiciary assume "jurisdiction over all issues of judicial nature and ... exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law."[31] Furthermore, it demands that the alternative forums should (a) not close off routes of access to courts, especially to protect rights, and (b) operate with similar safeguards for independence and impartiality as ordinary courts.[32]

Administrative autonomy, on the other hand, is the freedom and ability of the judiciary to handle its own administration and matters that concern its operation in general without the interference of any other branch of the government or any authority. As Principle 14 of the UN Basic Principles provides the judiciary should be free and independent to handle internal matters of the judicial administration. Such administrative functions include recommendations about appointment and withdrawal of judges; placement, promotion, allowance, medical benefits, transfer and suspension of judges; and allocation of cases to judges in a particular court.[33] As noted above some of these internal administrative matters of the judiciary also have an impact on the personal independence of judges. With respect to case assignment the Special Rapporteur's Annual Report 2009 recommends an objective mechanism for allocating cases that safeguard judges from interference from within the judiciary itself.[34] It suggests either randomized allocation or allocation of cases based on objective criteria.

Judicial autonomy on financial matters is another element of institutional independence of the judiciary. The proper functioning and impartiality of the judiciary further depends upon availability of sufficient financial resources and in administering the same independently. In

[30] John Ferejohn. Independent judges, dependent judiciary: explaining judicial independence. (1999) 72 *S. Cal. L. Rev.* 353–384; The High Comm'r for Human Rights (n 12 above) pp 120–121.
[31] UN Basic Principles (n 17 above) principle 3.
[32] Ibid.
[33] Id principle 1, 4 and 14;
[34] (n 14 above).

the absence of adequate funds and where the administration of funds is left to other organs, the judiciary may be unable to perform its functions effectively and efficiently, and may be susceptible to undue influence from outsiders.[35] This would happen when the judiciary has no say in proposing and preparing, and administration of its budgets. Consequently, Principle 7 of the UN Basic Principles requires the judiciary to be granted sufficient fund to properly preform its functions. The Special Rapporteur's Annual Report 2009 recommends that a fixed percentage of national budget be allocated to the judiciary, and the Special Rapporteur has recommended that a baseline of two to six percent of the GDP be devoted to the judiciary. [36]

Finally, the level of respect and observation of judicial decisions by other organs of the government is also an essential condition of institutional independence of the judiciary. Principle 1 of the UN Basic Principles states that other branches of government including other institutions have the duty to respect and observe the independence of the judiciary. It means that the executive, legislative and any other authority and individual must respect and abide by the judgements and decisions of the judiciary, even if they do not agree with them. Judicial independence of decision-making is further supported by Principle 4 of the UN Basic Principles. It specifically demands that there should not be any inappropriate or unwarranted interference with the judicial process and revision of decisions outside the appeal procedures as prescribed in the law. Furthermore, it is also prohibited to take any decision which invalidates judicial decisions retroactively.

Generally, the realization of judicial independence depends upon the extent to which the above discussed elements of personal and institutional independence are legally guaranteed and practically implemented. Consequently, the next section assesses the legal as well the implementation reforms Ethiopia conducted in the post-2018 judicial reform against these constructs.

3. Legal Framework of Judicial Independence in Ethiopia

3.1. The Constitutional Framework of Judicial Independence in Ethiopia

To ensure the personal independence and impartiality of the judiciary in the post-1991 Ethiopia the Federal Democratic Republic of Ethiopia Constitution[37] contains measures in

[35] The High Commissioner for Human Rights (n 12 above) p 121.
[36] (n 14 above) para 17.
[37] See Federal Democratic Republic of Ethiopia (FDRE) Constitution, Proclamation No. 1/1995, (hereinafter FDRE Constitution).

relation to the appointment and removal of judges. The FDRE Constitution after securing the non-interference of any body and that a judge should solely be guided by the law in carrying out judicial functions under article 79(3), stipulates principles on appointment and removal of judges. Regarding appointment, the FDRE Constitution has more procedural rather than substantive conditions to ensure personal judicial independence. The substantive conditions applicable to judges other than the president and vice-president of the supreme courts are stipulated in the laws enacted by the law-making organ of the federal government.[38] The procedural conditions vary depending on the position an appointee-judge assumes.[39]

The appointment of the president and vice-president of the federal Supreme Court is done by the law-making organs (House of People Representatives (HPR)) upon the nomination and recommendation of the head of government.[40] Nevertheless, neither the FDRE Constitution nor any other federal law provides for other procedural conditions and any substantive conditions the nominees are required to satisfy. Thus, it makes their nomination very subjective and totally reliant on the whim of the highest executive organ of both the federal government and the Prime Minister.[41] In such a situation it is difficult to think the nomination is done solely on the basis of the nominees' capability and personal integrity. Their political loyalty will also be taken into account, which in effect undermines the personal independence and impartiality of these judges and the institutional independence of the judiciary as these appointees are governing it.

On the other hand, the remaining judges of the supreme courts and any judge of the high and first instance courts are appointed by the HPR upon the nomination and selection by the Judicial Administration Council.[42] In the federal courts the judges appointment process opens room for involvement of the head of the government. The FDRE Constitution implies that the appointment of federal court judges by the HPR is made upon submission by the Prime Minister.[43] The power of submission of candidates may not simply imply the procedural requirement of presentment to the HPR. It may open space for the chief executive to screen

[38] For instance, about the federal courts' appointee-judges see the previous Proclamation No. 684/2010 (n 6 above), Article 11 which is repealed and replaced by Proclamation No. 1233/2021 (n 6 above), Article 6. The details on how far the law is reformed is discussed in the next section.
[39] See FDRE Constitution (n 37 above) Article 81.
[40] Id Article 81(1) and (3).
[41] Ibid.
[42] Id Article 81(2) and (4).
[43] Id Article 81(2).

out the nominees he/she is not interested in. That way the appointment of the federal courts' judges exposed to the influence of the executive again.

As discussed in detail, in the subsequent section, the involvement and interference of the non-judicial body in the nomination process of judges in Ethiopia is inferred by letting the executive authority and others become members of the council in the period before the reform or at least before 2021.[44] Perhaps, as per the international standards, the involvement of the other bodies in the selection and promotion of judges may not necessarily compromise the personal independence of judges and be inconsistent with the principle of judicial independence, as long as the selection and promotion is done by a judicial selection board or commission in which a majority of members are from the judiciary or are legal professionals.[45] The numerical majority in representation, however, is not enough to ensure the independence of judiciary. In a transitional democracy like Ethiopia, since the executive assumes strong power, the bargaining power and the power-relation among the members should also be taken into account. Consequently, in Ethiopia, as discussed in the subsequent section, the dominance of the executive both in terms of numerical representation and bargaining power is prevalent in the councils in the pre-reform period.[46]

In relation to the withdrawal of judges and termination of tenure the FDRE Constitution contains substantive and procedural measures to ensure the tenure of judges so that their personal independence and impartiality is enhanced. Substantively, the FDRE Constitution in

[44] In this juncture, the influence of the executive in the appointment of judges can be explored by looking into how the Federal JAC formed and the members thereof in the previous law. The JAC is established by the law enacted by the HPR. With the objective of enabling the judiciary to administer itself in a way free from interference among other things the JAC establishment proclamation has specified the members of the Council. (See Proclamation. No. 684/2010 (n 6 above) the preamble). It comprises twelve members majority of which are judges take at face value. The president and vice-president of the federal supreme court, three members of HPR, the attorney general (formerly the minister of ministry of justice), the presidents of the federal high and first instance courts, a judge selected by all federal judges, a practicing lawyer, a law academic and a distinguished citizen appointed by the council itself are the members of the council. (*Id* Article 5). Moreover, the involvement of the executive may be widened as the members of HPR can serve also in the executive. Therefore, three of the HPR members may be at the same time serve in the executive which in turn makes the number of members from the executive four. For instance, the government whip minister, who is member of the HPR, is also a member of the council. Furthermore, the selection of a practicing lawyer, a distinguished legal scholar and citizen may also be exposed to the influence of the executive given the power dominance they assume. Thus, the judiciary de facto does not assume a majority in the council. How far this problem is rectified by proclamation no. 1233/2021 of the Judicial Administration Council Proclamation No. 1233/2021 is discussed in the subsequent section.

[45] IBA (n 2 above) Principle A(3); JIWP (n 2 above Principle 4.2.

[46] The selection of judges by the JAC mostly causes grievance. To mention the 2018 compliant submitted to the Prime Minister and HPR is an indication of prejudice and biasness in the process. (See Tamiru Tsegie. T*he federal judges' selection has instigated grievance*. (The Report Amharic, 25 April 2018).

principle ensures that no judge is removed from his/her duties before the age of retirement.[47] Moreover, in conformity with international standards they also strictly limit and list out the exceptional grounds for which judges may be removed from their post before the age of retirement.[48] The grounds are violation of disciplinary rules, gross incompetence or inefficiency, and inability to carry out responsibilities on account of illness.[49] The reasons for these grounds are associated with preventing the occurrence of miscarriage of justice resulting from a judge's personal problems. The FDRE Constitution has assigned the ultimate power of decision on the termination of tenure of judges on the highest federal government body the HPR. Hence, except for these grounds, withdrawal of judges even on the account of legislatively incorporated grounds not only impedes the personal independence of judges, but also goes against the constitutional rule, because the issue of withdrawal of judges is a constitutional matter and the grounds for withdrawal are listed exhaustively in the constitution.

With respect to institutional independence, the FDRE Constitution enshrines certain important rules. Under article 78(1), it begins by declaring the establishment of independent judiciary and assigning the judicial power to court of law in principle. It takes a firm stand to ensure institutional independence of the judiciary. The FDRE Constitution, first, totally prohibits the establishment of special or ad hoc courts which take away judicial power from the regular courts or institutions legally empowered to exercise judicial functions; and exclusively reserves judicial power to courts with the recognition of the judicial power of religious and customary courts on private and family matters.[50] Second, when establishment of another judicial organ is required it has to be done with the blessing of the relevant legislative organ and the organ so created should follow legally prescribed procedures in carrying out the judicial function.[51]

[47] FDRE Constitution (n 37 above) Article 79(4).
[48] IBA (n 2 above) Principle D (29 and 30); JIWP (n 2 above) Principle 5.5.
[49] FDRE Constitution (n 37 above) Article 79(4).
[50] Id Article 78. The phrase "institutions legally empowered" creates certain absurdity whether it refers the religious and customary courts only or about the establishment of other judicial organs as well, like administrative tribunals by law. In practice, it is understood in the later way and that is why additional court structure – social courts and different administrative tribunals are established by law in the country.
[51] Ibid.

Nonetheless, in Ethiopia the legislative practice of transferring judicial power to the executive is becoming very common.[52] This is done basically by two different strategies. One is making the administrative decisions final and non-reviewable by the judiciary. The other is empowering the executive or other organ to exercise judicial functions, supposed to belong to the judiciary.

The other important measure the FDRE Constitution took to ensure institutional independence of the judiciary is financial independence. The proper functioning and impartiality of the judiciary further depends upon availability of sufficient financial resources and administering the same independently. In the absence of adequate funds and where the administration of funds is left to other organs, the judiciary may be unable to perform its functions effectively and efficiently, and may be susceptible to undue influence from outsiders.[53] This would happen when the judiciary has no say in proposing and preparing, and administration of its budgets. The federal judiciary is constitutionally empowered to prepare and submit its budget for approval to the HPR; and upon approval it is empowered to administer the budget autonomously.[54]

Moreover, institutional independence demands administrative autonomy for the judiciary in formulating and discharging internal administrative matters. Such administrative functions include recommendations about appointment and withdrawal of judges; placement, promotion, allowance, medical benefits, transfer and suspension of judges;[55] and allocation of cases to judges in a particular court.[56] With regard to these elements, the FDRE Constitution has left it to be determined by subsidiary laws and the judicial administration council, which the constitution impliedly recognised as the judicial administrative body.

In general, the FDRE Constitutions' stipulation about establishment of an independent judiciary; judges' freedom from any influence and guarantee to be guided solely by law; restrictive stipulations on grounds of withdrawal; the need of law-makers' approval in appointment and withdrawal of judges; prohibition on the establishment of special or *ad hoc*

[52] Assefa Fiseha. Separation of powers and its implications for the judiciary in Ethiopia. (2011) 5 *Journal of Eastern African Studies.* 702–715; Yemane Kassa. Dealing with justiciability: in defense of judicial power in Ethiopia. (2015) 3 *Mekelle University Law Journal.* 42–87.
[53] The High Comm'r for Human Rights (n 12 above) p 121.
[54] FDRE Constitution (n 37 above) Article 79(6).
[55] As I note above in a system whereby such things are required to be performed by a commission as the case in Ethiopia, the majority of the judiciary in number and power of decision-making is required. In pre-2018 Ethiopia both are missing.
[56] The High Comm'r for Human Rights (n 12 above) p 120.

courts; and empowering of the judiciary in preparing its budget are positive steps to ensure the independence and impartiality of the judiciary. Nonetheless, how far these measures are translated into the subsidiary laws and implemented in practice are imperative to assess. Consequently, the next section assesses the subsidiary legislative framework of judicial independence in Ethiopia taking a comparative perspective of pre-and-post-reform dynamics.

3.2. Subsidiary Laws Protection of Judicial Independence

In Ethiopia, besides the FDRE Constitution, the judicial administration proclamation is an important subsidiary law that provides the details of judicial independence. As an aspect of the post-2018 legal reform, one of the milestones praised was the appointment of the first women chief of justice of the FSC and the revision of the Judicial Administration Proclamation. How far this law has departed in terms of ensuring judicial independence from its predecessor is assessed in detail below.

3.2.1. Rationale for the Promulgation of the JAC Law

The first departure is reflected in the preamble in justifying the enactment of the proclamation. Proclamation No 684/2010 adopted two main but contradictory objectives. First, as ensured in the preamble, it is aimed at protecting institutional and judicial independence with a view to enable the judiciary to administer itself free from the influence of others. The second objective is achieving the accountability of the judiciary by widening the composition of the JAC.[57] This objective required the composition of JAC among others, to be widened to include members from the executive and the legislative. This objective by its nature has the effect of affecting judicial independence as it leads to the domination of non-judicial members in the council and influence the appointment, promotion and accountability of judges.

On the other hand, the preamble of Proclamation No. 1233/2021, on the other hand, came up with two fundamental judicial independence focused objectives that necessitated the restructuring of the JAC. The first one is ensuring judicial independence demanding that courts exercise their judicial functions free of all internal and external influence, upholding the supremacy of law, and in the spirit of complete independence, impartiality and accountability. The second objective is building public trust and confidence in the process by

[57] Proclamation No. 684/2010 (n 6 above), preamble.

which judges are appointed as well as by ensuring that members of the judiciary conduct their judicial function with complete independence, impartiality and accountability. [58]

As inferred from the above objectives, Proclamation No. 1233/2021 was crafted with the assumption that the way the JAC is formulated and mandated with power undermines judicial independence. Accordingly, it was determined to restructure the JAC with the view to ensure judicial independence. However, the mere desire expressed in the preamble is not enough to achieve the independence of the judiciary. Rather, the specific substantive and procedural rules of the proclamation as well as the implementation thereof must be analysed against the elements of judicial independence discussed under section two above.

3.2.2. Composition and Power of JAC

As discussed in section two, in order to achieve the personal independence of the judiciary the procedural conditions (making of the decision of appointment, withdrawal, promotion, removal and financial benefits of judges) must be free from political interference. The power to decide on these matters must be assigned to the judiciary itself or the institution that is dominated by judges to best serve the independence of judiciary. The Federal Government of Ethiopia has adopted a council system in this regard.

In the JAC Proclamations the JAC is mandated with the power to select and nominate competent judges for all federal courts, presidents and vice-presidents for the Federal High and First Instance Courts, the heads of the secretariat offices, registrars of the federal courts, assistant judges and determine their salaries and benefits, decide on disciplinary cases instituted against presidents and vice presidents of federal high and first instance courts and federal judges, decide on the promotion, salary, allowance, leave, medical and other benefits of federal judges, issue judicial code of conduct and rules of disciplinary procedure, and removes immunity of judges suspected of criminal offences.[59] With the view to ensure the judicial independence proclamation no. 1233/2021 has made two important changes with respect to the council's powers.

The first one is to empower the JAC with the power to issue a detailed directive for selection of candidates for the Federal Courts.[60] In proclamation no. 684/2010 this power was not specifically assigned to the Council. Rather in general, as it is still in proclamation no.

[58] Proclamation No. 1233/2021 (n 6 above), preamble.
[59] Proclamation No. 684/2010 (n 6 above), Article 6; Proclamation No. 1233/2021 (n 6 above), Article 8.
[60] Proclamation No. 1233/2021 (n 6 above) Article 8(11).

1233/2021, it empowered the council to issue directives or regulations necessary for the implementation of the proclamation. The second is that it outlawed the power of the Council to suspend a judge until the decision is approved by the HPR. This may be regarded as a positive departure in terms of the personal independence of the judge as it avoids temporary suspension. However, the preference of whether to suspend or not must be made taking into account the impact of the continuation of trial by the judge on the miscarriage of justice and suspension on the personal independence and tenure of the judge.

In terms of the composition of JAC, there is also a basic difference. As provided under proclamation no. 684/2010 the JAC comprises twelve members the majority (five/41.6% - not majority per se) of which are judges and two others are legal professionals taken at face value.[61] The president and vice-president of the FSC, three members of HPR, the attorney general (formerly the minister of ministry of justice), the presidents of the federal high and first instance courts, a judge selected by all federal judges, a practicing lawyer, a law academic and a distinguished citizen appointed by the council itself are the members of the council.[62]

Under proclamation no. 1233/2021 the JAC is comprised of fifteen members of whom the lion's share is judges and legal professionals. Eight of them (53.3%) are judges and the number of representatives from the legislative is reduced to two from three as compared to proclamation no. 684/2010. Furthermore, unlike proclamation no. 684/2010 under proclamation no. 1233/2021 the number of ordinary judges in the JAC increased from one to four. [63] These are, in fact, fundamental steps taken under the judicial reform program of post-2018 to ensure the independence of the JAC, in effect the judiciary.

Nonetheless, the numerical majority in representation, however, is not enough to ensure the independence of the judiciary. In a transitional democracy like Ethiopia, since the executive assumes strong power, the bargaining power and the power-relation among the members should also be taken into account.

The JACs' power and function is not only limited to workers of the court. It has power and function with respect to the other two administrative wings and working staff with in the judiciary. There are also two different legal frameworks applicable for the administration of

[61] Proclamation No. 684/2010 (n 6 above), Article 5(1).
[62] Proclamation No. 684/2010 (n 6 above), Article 5.
[63] Proclamation No. 1233/2021 (n 6 above), Article 6.

the workers of the court. The workers under the JAC are governed by a directive issued by the Council. However, the other administrative workers in the judiciary other than judges and assignees are governed by a regulation issued by the HPR.[64]

Administrative workers are non-judicial court employees excluding judges and assignees.[65] This is one of the areas that are challenging the institutional independence of the judiciary. This structure of judicial administration is a challenge for institutional independence, because administrative workers have strong connection with judicial function. Their tasks are involving case management, activities have connection with case files, budget preparation, budget allocation and budget administration of the judiciary as an institution.

3.2.3. The Process and Requirement of Appointment of Judge

As discussed above, in the FDRE Constitution and subsidiary laws the process of selection and nomination of federal judges other than the president and vice-president of the FSC is conducted by the federal JAC. Then the list of candidates is submitted to the HPR for approval via simple majority vote.

The HPR has laid down substantive requirements that must be observed in the nomination and selection process of the federal judges. Proclamation no. 684/2010 has laid down general conditions such as Ethiopian citizenship, consent, academic (LLB degree) and professional skill qualifications (completion of pre-candidacy training and scored more than average mark), personal conduct (good reputation, diligence, conduct and sense of justice, never punished with rigorous imprisonment), age (25 years and above for first instance and 30 years and above for High and Supreme Courts) and non-membership of any political organization and the executive and legislative organs.[66]

Nevertheless, some subjective standards are also enshrined in proclamation no. 684/2010, which opens space to discriminate in the appointment of judges on the basis of political outlook. For instance, the requirement of loyalty to the constitution that has to be proved in writing is an absurd standard.[67] For one thing, the essence of loyalty to the constitution is not clear and proving and showing of the same is not as such easy since it is a perception. Accordingly, any critic of any constitutional provisions may be regarded as disloyal to the constitution. For another, practically the idea of loyalty to the constitution is understood as

[64] Id Article 8 (9) and (15).
[65] Federal Courts Proclamation No. 1234/2021, Article 2 (8).
[66] Proclamation No. 684/2010 (n 6 above), Article 11.
[67] Id Article 11(1d).

non-opposition to or support of the ruling party and its policies and laws, because the proof of loyalty to the constitution is produced from the local administration office where the candidate resides. Therefore, it opens a loophole to discriminate against those who criticize the ruling party and to select those supporting it. This in effect, apart from affecting the personal independence of judges, goes against the constitutional right to equality,[68] because, in conflict with the constitution, it creates the possibility for discrimination based on political opinion, while precisely neutrality in that respect is required in the judiciary.

In order to address such impact of personal independence proclamation no. 1233/2021 has outlawed the requirement of 'loyalty to the Constitution'. Furthermore, it has also introduced some changes to the general requirements and introduced additional specific requirements. The changes made include the age (which is 30 years and more for all the courts), being free from criminal conviction except for minor contraventions, and be of good health.[69] The additional specific requirements are specific to each level of court (First Instance, High and Supreme Courts) and a judge is going to be appointed. The additional requirements are more of experience related years and position served.[70]

Unlike proclamation no. 684/2010, proclamation no. 1233/2021 has come up with the possibility of appointing ad hoc judges for the first instance and High Courts for the maximum duration of 3 years.[71] In which case the above requirements may not need to be observed. Instead, proclamation no. 1233/2021 requires that the candidate must have served at least for 15 years in the legal profession, demonstrated sincerity, integrity, dedication, diligence and professional competence of the highest standard and the nomination must be approved by a 2/3rd special majority vote of the Council.[72]

3.2.4. Promotion and Transfer of Judges

As discussed in section two, the nature of the institution mandated with power and the conditions for promotion and transfer of judges have an impact on personal independence of judges. It is, then, required that promotion and transfer must be based on ability, integrity and experience and it should be decided by an independent body composed of at least a majority of judges.

[68] FDRE Constitution (n 37 above) Article 25.
[69] Proclamation No. 1233/2021 (n 6 above), Article 20.
[70] Id Article 21-23.
[71] Id Article 24.
[72] Ibid.

Proclamation no. 684/2010 simply stated promotion and transfer of judges as the power of the council.[73] The incorporation and prescription of the standards was not mentioned. This makes the process subjective and open for the influence of non-judicial members of the council, as they were dominant.

To address this challenge, proclamation no. 1233/2021 apart from making judges majority of the council, has adopted competence, dedication, diligence and service and submission of recommendations to the council as requirements for promotion of judges.[74] Furthermore, the proclamation made transfer of judges from one division to another or from one place to another to be decided by the respective presidents of Federal courts in consultation with the president of the FSC taking in to account the professional competence and experience of the judge and the necessity of the situation that makes the transfer necessary.[75]

3.2.5. Tenure, Removal and Termination of Judges

As discussed above, the FDRE Constitution has stipulated security of tenure by limiting the grounds of removal and termination of judges and prescribing the procedural guarantees thereof. Nonetheless, the FDRE Constitution is silent about the removal of a judge from the bench of a particular case. Unless legal protection is afforded against arbitrary removal of a judge from a particular case, the personal independence of the judge will be compromised. This means that the pre-judgement of the judge without good cause and depriving the same from presiding and hearing a given case is interference in the personal independence of a judge. Such forms of intervention should be outlawed to secure the personal independence of a judge.

However, this doesn't mean that the judge has to continue to hear a case if there is an actual or sufficiently deemed bias. In such situations the removal of the judge from trying the case should be allowed for the sake of justice. Without compromising the personal independence of a judge, the removal may be carried out in exceptional situations for clearly defined reasons and in the judicial process without the intervention of other organs.

In the judicial system of Ethiopia, removal of judges from a case happens in cases where injustice may otherwise exist. Both the previous and the current federal court establishment proclamations provide causes for removal of judges in an illustrative manner. It provides that

[73] Proclamation No. 684/2010 (n 6 above), Article 6(1g).
[74] Proclamation No. 1233/2021 (n 6 above), Article 26.
[75] Ibid.

when the judge is related to one of the parties or advocate by consanguinity or by affinity, has previously acted in some capacity in connection with the case (the new one provides exception for remand), has a case pending in the court with one of the parties or advocate thereof, the dispute relates to a case in which one of the parties is a person for whom the judge acted as a representative in any form, or when there is sufficient cause to believe that injustice may be done, the judge must withdraw.[76] Apart from these causes, no judge may be removed from a case.

Moreover, the removal decision can be made either by the judge's own motion or upon the demand of one of the parties.[77] Whenever, the judge is aware of the presence of either of the above causes he/she should automatically remove himself/herself from trying the case. in addition, a party to the case is also entitled to apply to the court in writing about the removal of the judge when he/she is of the opinion that the judge should not sit for the reasons mentioned above. The application must be submitted to the same court and bench.[78] The concerned judge, having considered the application, may withdraw. However, in case he/she is not convinced, then he/she has to refer the application to another bench in the court or to the appellate court.[79] This implies that the decision here is totally judicial and there is no interference from another body.

Here the two proclamations are different in two aspects. First, the current federal courts establish proclamation has a period within which the decision of removal should be rendered. It states that 'A decision shall be rendered within 15(fifteen) days from the date such application reached the new division.'[80] The second difference is about the amount of fine imposed on a party who makes an application for withdrawal of a judge from bench without good cause. While in the previous federal courts establishment proclamation it did not exceed- 500 birr, in the new one it is not less than 1000 birr and does not exceed 3000 birr. Nonetheless, when the application is made maliciously with the intention of defaming or damaging the honour of the judge or delaying the proceeding the fine will be not less than

[76] Federal Courts Proclamation No. 1234/2021, Article 33(1); Federal Courts Establishment Proclamation No. 25/1996, Article 27(1).
[77] Proclamation No. 1234/2021 (n 76 above) Article 33(2) and 34(1); Proclamation No. 25/1996 (n 76 above), Article 27(2) and 28(1).
[78] Proclamation No. 1234/2021 (n 76 above) Article 34; Proclamation No. 25/1996 (n 76 above), Article 28.
[79] Ibid.
[80] Proclamation No. 1234/2021 (n 76 above) Article 34(5).

3000 birr and not exceeding 7000 birr.[81] The laws also have the intention to protect the honour and personal independence of the judge.

With respect to termination of tenure, as discussed in the theoretical and constitutional frameworks in subsidiary laws, particularly, proclamation no. 1233/2021 in principle have upheld that no judge is to be removed from his/her duties before the age of retirement of 65 years.[82] Proclamation no. 684//2010 on the other hand, stipulated that the age of retirement as 60 years, simply listed the grounds of termination.[83] Moreover, unlike proclamation no. 684//2010 proclamation no. 1233/2021 has come up with different ages of retirement at the request of the concerned judges. It provides that any judge can, if he so wishes retire at the age of 60. Any judge who has served in public service for 25 years can also retire at the age of 55. Those who have served for 20 years as a judge and encounter serious illness that affect their judicial work can also be allowed by the Council to retire without waiting for the retirement age and their judicial tenure is terminated on other grounds.[84]

The two judicial administration proclamations listed out the following grounds to terminate judicial tenure before the age of retirement: resignation, violation of disciplinary rules, gross incompetence or inefficiency, and inability to carry out responsibilities on account of illness.[85] Here the two proclamations differ fundamentally on who should have the final power to decide the termination. As it is stipulated in the FDRE Constitution Article 79(4) the JAC's decision of termination on all the above grounds other than resignation must be approved by a majority vote of the parliament. While the previous judicial administration proclamation is cognizant of the constitutional rule, proclamation no. 1233/2021 is designed in a way to seek parliamentary approval of the termination on the grounds of gross incompetence or inefficiency and breach of discipline.[86] It creates the impression that termination on the ground of gross incompetence or inefficiency doesn't need parliamentary approval, which of course is against the expressed constitutional rule.

In the previous judicial administration proclamations, though it is not clear on which ground of termination it falls, absence of loyalty to the constitution was served to terminate the tenure of judge. A good example to explain this scenario is the dismissal of federal high

[81] Proclamation No. 1234/2021 (n 76 above) Article 34; Proclamation No. 25/1996 (n 76 above), Article 28.
[82] Proclamation No. 1233/2021 (n 6 above), Article 25 and 32.
[83] Proclamation No. 684/2010 (n 6 above), Article 12.
[84] Proclamation No. 1233/2021 (n 6 above), Article 32.
[85] Proclamation No. 1233/2021 (n 6 above), Article 32; Proclamation No. 684/2010 (n 6 above), Article 12.
[86] Proclamation No. 1233/2021 (n 6 above), Article 31(2)

court judge Gizachew Mitiku Belete.[87] The reason mentioned in the resolution demanding his withdrawal from judgeship is that he was not loyal to the constitution. His criticism of the government in different meetings and suggestion of amendment of certain provisions of the FDRE Constitution was regarded as a "political activity" in violation of judicial duty. The JAC in its recommendation and the HPR while approving his dismissal insisted that his acts shed light on political bias and undermine the personal independence of the judge.

This decision was a landmark decision on the basis of which to examine what constitutes "political activity" that affects the personal independence and impartiality of judges, whether the judge is expected to be loyal and support each and every provision of the constitution; whether he/she is expected to respect and implement the constitution even in the presence of his/her reservations on the Constitution; whether there is any special restriction on freedom of opinion and expression in reference to judgeship; and whether the personal independence of the judge is threatened by the interference of the executive itself or by the political view of the judge.

3.2.6. Budget and Administrative Autonomy

As discussed in the theoretical framework, the budget and administrative autonomy of the judiciary, especial from the executive is one of the indicators for institutional independence. In line with this, the FDRE Constitution empowered the FSC to draw up the budget of the federal courts and submit same for parliament approval and administer it. Furthermore, the FDRE Constitution empowered the JAC to determine the professional conduct and discipline as well as transfer of judges.

In the subsidiary laws, judicial autonomy on budget and its internal administration can be determined in terms of how far the judiciary is free to determine its working procedures, the power sharing with the JAC, and delineation of the power of budget preparation and implementation. About the preparation and implementation of budget, the subsidiary laws have affirmed the constitutional rules. The FSC president has the power to prepare and submit the work plan and budget to House of people's representative and implement same upon approval.[88] The president also has a duty to submit to the House of people's representatives reports on the budget implementation of the federal courts.[89]

[87] Solomon Goshu. Constitutional loyalty: is it a must for judiciary? (The Report English, nd).
[88] Proclamation No. 1234/2021 (n 76 above) Article 17(1).
[89] Ibid.

However, there is still a question as to what extent the freedom of preparation is given to the judiciary without indirect control. First, it is up to the HPR to approve or reject the prepared budget request and this approving organ of the government is regarded as a mouthpiece of and highly controlled by the executive branch of the government. Second, there is no legally backed objective and predictable budget preparation standard. This implies that the request and approval process is controlled by subjective negotiation and this invites the involvement of the executive. Third, there is a rule that the salary of the president and vice president of the FSC and all other federal judges may be determined by the judicial administration council taking into account the living standard and economic capacity of the country. It is recognized that the economic capacity of the country should be taken into account in the preparation of budget proposals and determination of salary and benefits of judges.[90] However, who determines the economic capacity of a country is critical. This open way of considering the economic capacity of a country clearly invites an involvement of the Ministry of Finance.

Although the JAC is dominated by judges, still the extent to which it shares the administrative power of the judiciary determines the institutional independence. Without being indifferent from its predecessor, proclamation no. 1233/2021 has empowered the council itself to decide on the placement, promotion, salary and benefits of the judges.[91] Unlike the previous one, it even empowers the council to remove the immunity of the judges, which was previously the power of the parliament. Furthermore, proclamation no. 1233/2021 has empowered the council to decide on leave as well, which would have been the power of the court itself. This, in effect, impacts the institutional autonomy of the federal judiciary on administrative matters.

When we see the scope of judicial administration proclamation it seems the proclamation is applicable to all staffs of the federal courts.[92] However, the council has no power to issue code of conduct to administer administrative workers of the court. It is the power of the judicial administration council to issue a judicial code of conduct and rules of disciplinary procedure for federal judges, to appoint heads of the secretariat office of the council, registrars of the federal courts, assistant judges and other officials of the council up on presentation by the president and decides on their salary and other befits, and to decide on the

[90] Proclamation No. 1233/2021 (n 6 above), Article 40.
[91] Proclamation No. 1233/2021 (n 6 above), Article 8(8); Proclamation No. 684/2010 (n 6 above), Article 6(1g).
[92] Proclamation No. 1233/2021 (n 6 above), Article 4. The provision says "This proclamation shall be applicable on federal courts and federal judges appointed at all level of courts and non-judicial personal working in federal courts."

promotion, salary and other benefits of federal judges.[93] The same legislation excludes some workers to be governed by the regulation issued by the HPR.[94] These excluded workers are named as non-judicial workers.[95] Majority of non-judicial personnel are working in finance and human resource department. These are playing a major role in internal administration process of budget and human resource while they are not accountable to the disciplinary measures of JAC unlike judicial-personnel. Therefore, it difficult to say that internal budget administration freedom is fully free from interference.

4. The Law in Action: Institutional and Personal Independence

The normative measures of the FDRE Constitution and subsidiary laws may not give us the full picture of judicial independence in Ethiopia. How far the implementation reflects the norms in the text is also fundamental. Accordingly, this section examines what the judges and the judicial administration perceive about judicial independence in action and what they encountered with what compromises personal and institutional independence of the judiciary.

4.1. The Judicial Administration Perspectives: Institutional Independence

Concerning the practice of institutional independence of the judiciary, interview is conducted with the judicial administration members, and the judicial and non-judicial workers of the judiciary at the three-tiers of the federal courts. The research participants assessed the practice of the institutional independence of the judiciary in the post-2018 period in three important standards. These are: the appointment and removal of top leadership of the court, the autonomy in the administration of the court, and the respect and enforceability of judicial decisions by others.

4.1.1. Appointment and Removal from Leadership

The participants are cognizant of the fact that in the judiciary there are two types of appointments. These are appointment by merit (profession) and political appointment. Judges are appointed by their profession and merits by taking the relevant legislations into consideration. They also identified that the top management positions in the court system are presidents, registrar, court manager and assigned judges. Their appointment is more related to political appointment.[96] That is the main reason for the absence of clear criteria for

[93] Proclamation No. 1233/2021 (n 6 above), Article 8
[94] Proclamation No. 1233/2021 (n 6 above), Article 8 (15) and 42.
[95] Proclamation No. 1233/2021 (n 6 above), Article 2 (12); Proclamation No. 1234/2021 (n 76 above) Article 2 (8), 39 and 55.
[96] Interviewee 15, assigned official of the Federal Supreme Court, interview conducted on April 10, 2023 (Addis Ababa, Ethiopia).

appointment and removal. There is no written procedure or criteria for appointment or removal. This makes the job of the presidents' dependent on the good will of the appointer.

The participants considered differences in the appointment of president to the different layer of courts. As enshrined in the FDRE Constitution it is the prime minister, the highest executive authority, who recommends and submits the candidate president and vice president of the FSC to the HPR for approval.[97] The Constitution is silent about the appointment of the presidents and vice presidents for the FHC and the FFIC, and for other leadership positions. The JAC proclamations have identified the authority who can nominate and appoint them. According to proclamation no. 684//2010, from the list provided by the president of the FSC, the JAC nominates the presidents and vice-presidents and submits the same for parliamentary approval.[98] The appointment of the other leadership personnels like the registrars and other court officials is made by the JAC upon the presentation of the FSC president.[99]

Proclamation no. 1233/2021 differs from proclamation no. 684//2010 in that the president of the FSC is not as such empowered to provide a list of candidates to the JAC for the position of presidents and vice-presidents of the FHC and FFIC, registrars and other court officials. It is the JAC that nominates and presents the presidents and vice-presidents of the courts to the prime minster and it directly appoints the registrars and other court officials.[100]

Some of the interviewees noted that the nomination process of the court leaderships is not transparent. For instance, taking the case of the FFIC one of the interviewee states:

> *"In talking about assignment of the presidents, some say that there is a committee that selects top managers including the presidents and propose them to the prime minister office for assignment. However, there is no clarity on who the committee is, how they are selected and who selected them. No one even knows their names. The selection of the committee was supposed to be transparent and inclusive unfortunately it's not and no one bothered to ask."*[101]

Other interviewees concluded that:

[97] FDRE Constitution (n 37 above) Article 81(1).
[98] Proclamation No. 684/2010 (n 6 above), Article 6(1c).
[99] Id Article 6(1d).
[100] Proclamation No. 1233/2021 (n 6 above), Article 8(3).
[101] Interviewee 13, judge and assigned official of the Federal First Instance Court, interview conducted on April 5, 2023 (Addis Ababa, Ethiopia).

> *"The appointment of the court leadership is entirely politically motivated than merit-based. The process of appointment is highly exposed to the influence of the executive as it is the prime minster who nominates the president and vice-president of the FSC, who in turn, have an immense role in the nomination of other leadership of the court. Moreover, there are no standards and criteria for nomination. As such, it can be concluded that the appointment of the leadership of Federal Courts is totally political. It, in effect, affects the institutional independence."*[102]

The interviewees also revealed that the removal process also cast a doubt on the institutional independence of the judiciary. Particularly, with regard to the judicial appointees, the interviewees challenge their removal as exposed to the whim of the politicians. Particularly, the interviewees are not sure whether their removal is required to be based on those grounds for the termination of the judge. Citing instances of the past and the present, an interviewee claims that their removal is more of the whim of the executive. They state that:

> *"In the pre-2018 period the removal of the court leadership was random. In the previous years some presidents resigned and were removed from their position without clarifying their reason or providing explanation. We don't see any reasons mentioned. However, in the post-2018 period, the recent incidents of removal of the President and vice-president of the FSC at least mentioned personal reasons. However, whether the reason mentioned is genuine and true is not clear."*[103]

4.1.2. Autonomy in the Administration of the Court

The interviewees consider the autonomy of the court mainly from financial autonomy perspectives. They particularly emphasized on the liberty of the judiciary to prepare and administer its own budget without the interference of the executive. Accordingly, an interviewee noted that:

> *"The judiciary is an independent organ of the government entitled to administer its own budget. Prior to 2018 the trend was against this. Budget of the judiciary was administered by the ministry of finance. There was a direct involvement by*

[102] Interviewee 14, judge and assigned official of the Federal High Court, interview conducted on April 13, 2023 (Addis Ababa, Ethiopia); Interviewee 15 (n 96 above); Interviewee 13 (n 101 above).
[103] Ibid.

the executive organ of the government and violation of article 78 of the FDRE Constitution. Currently the FSC submits the budget of federal courts to the HPR, and administers it after approval. This can be considered as one of the positive measures taken after the reform."[104]

Nonetheless, the interviewees from the FFIC and FHC claimed that there is interference in the administration of the day-to-day activities of the Courts. They state that:

"In administering the court system there is a well-organized structure which is transparent and accountable. The top management like finance, HR, and property management directors are accountable to the court manager. Research and legal affair, strategic director, women affair and inspection director are accountable to the president. Defense attorney's director, ICT directorate and execution directors are accountable to the vice president. In this regard there is no direct interference by the other organs of the government. However, indirectly there is some involvement in the daily administration of the sector. For instance, to purchase the necessary services and goods the judiciary is obliged to request permission from the procurement administrative authority which is an executive organ. This can be considered as an indirect involvement and creates a prolonged purchase system. The institutional independence of the judiciary is affected by this in numerous ways. Courts do not have secure buildings and court rooms because of the bureaucratic system of the executive organ restraining the judiciary in the purchase of things or in receiving consultancy services."[105]

With regard to other matters of institutional independence, the interviewees are of the opinion that the practice is in line with the law and there is no divergence between the law and the implementation thereof.

4.1.3. Respect and Enforceability of Judicial Decisions

The main challenge of institutional independence of the judiciary that the research participants identified is the newly evolving trend of disrespecting and disregarding judicial decisions and rules. An interviewee from the leadership of the FFIC noted that:

"The most challenging issue in recent years is implementation of court orders. Police and public prosecutor fail to obey the court. These types of problems are

[104] Ibid.
[105] Interviewee 13 (n 101 above); Interviewee 14 (n 102 above).

very perilous in regions. In this regard there are some initiatives taken to establish groups like the judicial plenum and the judicial IJR (inter-governmental relation). But this needs to be strengthened and needs to create a strategy to work in collaboration."[106]

Similar concern is raised by the leadership of the FHC stating that:

"There are intentional delays and disobedience. Serving justice was not supposed to be the job of the judiciary. It needs coordination and cooperation of other government organs. But it seems like the executive organ is non-cooperative."[107]

The FSC leadership also sensed this challenge that threatens the institutional independence of the judiciary. This is stated as follows:

"In recent years there are some challenges regarding disobedience and failure to implement court decisions especially by the executive organ of the government both in civil and criminal matters. Article 51 of proclamation no 1234/2022 states that decision and order rendered by any Federal Court shall be binding and shall be executed by any government body or institution, non-governmental organization or individuals. It also states that any person who fails to discharge his obligation imposed by this Proclamation shall be held accountable. Article 52 also states that anyone who fails to obey a court order or decision is punishable with simple imprisonment not exceeding two years or with a fine not exceeding birr 5,000. The law is protective. Using this and executing orders is the role of the judge since they have the power to command and even arrest the non-cooperative organs if needed."[108]

Generally, the federal court leadership appreciates the legal reform of the judicial administration brought in the post-2018 period. It also senses a bit positive development and departure from the previous political regime. Nonetheless, the developments are not adequate and a new trend of disobeying court decisions and orders threatened the institutional independence. Similar senses are developed concerning personal independence of judges, as discussed below.

[106] Interviewee 13 (n 101 above).
[107] Interviewee 14 (n 102 above).
[108] Interviewee 15 (n 96 above).

4.2. The Judge's Personal Independence

As it is noted in section two**,** the attitude and appointment, the tenure security, immunity and accountability, financial security, and freedom of association and expression are the fundamental standards to analyse the status of personal independence of the judge. In Chapter Two, against these elements, the Ethiopian legal framework is assessed. In the current sub-section, the extent to which the legal protections of the judge's personal independence are implemented and how judges perceive their independence is discussed.

4.2.1. Attitude and Appointment

The judge's attitude towards the judicial work and the way they are appointed has its impact on their personal independence. The interview with the federal court judges reveals that most of them joined the judiciary on their own will and desire. The majority considered judgeship as their dream carer they aspired since their childhood. With all the odds they have been facing, they have a positive attitude towards the profession.

However, there are exceptional judges who have joined the judiciary to win their daily bread or inspired by revenge for the injustice committed against their family. These exceptions are manifested among the high and first instance courts. One of the interviewees from FFIC stated:

> *"I joined the sector for survival. I was looking for a job after graduation. At that time there was a call from the justice sector so I applied and joined the sector."*[109]

Another interviewee from the FHC states:

> *"I joined the judiciary because of a family matter. My uncle was illegally detained for years. I used to go to court to attend my uncle's trial. Because of that, I developed an interest in being a judge."*[110]

The latter attitudes and reasons for joining the judiciary produce negative spill overs on the personal independence of the judge.

Regarding their appointment all the interviewed judges noted that there are objective criteria such as qualification, age, exam result and experience. However, there are different possible

[109] Interviewee 4, Judge at the Federal First Instance Court, interview conducted on March 22, 2023 (Addis Ababa, Ethiopia).
[110] Interviewee 7, Judge at the Federal High Court, interview conducted on March 29, 2023 (Addis Ababa, Ethiopia).

ways that affect independence in the appointment procedure. The first one is during the time of registration and interview for the vacancy. One of the interviewees stated that:

> *"There are problems even at the registration stage. I was rejected during the registration stage by administrators, who claimed that my experience was insufficient. Although my qualification met the standard, they indicated that my service at the regional level was not relevant and that only experience at the federal level was accepted. This is not a valid reason and it is totally against the proclamation. Another issue to be considered is the nature of interview questions. Frequently, during interviews, questions are asked that are personal, rather than method-based or work-related. It can adversely impact one's chance of being appointed to a higher position if they are not able to establish affable relations with authorities.*"[111]

The second one is about the result of public opinion. It is a requirement to gather public opinion on the candidate judges. Nevertheless, the result is not made public. As a result, it opens room for authorities to abuse it as noted by the interviewees. An interviewee from the FHC says:

> *"Practically the result of the public opinion will not be informed. Using this gap, the authority might reject a judge by saying that there is a negative public opinion. The lack of transparency can be used as a tool to exclude some candidates."*[112]

The interviewees also noted that sometimes the appointments may not be merit-based. The authorities' good will and the quota system on the basis of ethnic background are the other challenges. An interviewee noted that:

> *"Practically appointment of judges is not only based on merits unfortunately it also needs the council's goodwill. There is also a quota system based on race and gender. The quota system is very argumentative. To maintain quota the probability of the administration appointing a judge without expected competency*

[111] Interviewee 10, Judge at the Federal Supreme Court, interview conducted April 25, 2023 (Addis Ababa, Ethiopia).
[112] Interviewee 5, Judge at the Federal High Court, interview conducted on March 30, 2023 (Addis Ababa, Ethiopia).

is very high. Once I was excluded because of the quota system. It was very discriminatory."[113]

Majority of interviewees from the FHC claimed that there is random appointment of judges. The following two quotes are worth mentioning in this regard.

> *"The appointment of judges is the most corrupt and controversial issue. The appointment usually follows the willingness of the authority. The authorities sometimes follow the law and sometimes appoint judges without any clear criteria."*[114]

> *"In principle the criteria for appointment is clear. It includes a written exam, interview and public opinion. But sometimes judges are appointed without taking the written exam. Some are appointed with a recommendation. Judges who don't know anybody in the sector were denied just because they cannot provide a recommendation. The practical problems in appointment must be addressed and the law must also be respected and checked by the concerned bodies."*[115]

These practical problems in the appointment of judges are also shared by the FSC judges.

> *"It's hard to conclude that the practice is perfect and in line with the legal framework. Some are appointed without expected qualifications and some are denied opportunities even though they are suitable for the job."*[116]

Another FSC judge also criticises the appointment process as follows:

> *"The judiciary is the most important organ which requires professionalism and merit. It is different from the parliament it doesn't need to consider race quota. The only criteria should be knowledge and discipline. Before 2018 there was a legal framework to guide appointments. But the application was very limited and the judiciary was filled with the quota system. Judges used to be appointed without taking exams or interviews. The judiciary by itself was acting contrary to*

[113] Interviewee 12, Judge at the Federal Supreme Court, interview conducted April 20, 2023 (Addis Ababa, Ethiopia).
[114] Interviewee 6, Judge at the Federal High Court, interview conducted March 28, 2023 (Addis Ababa, Ethiopia).
[115] Interviewee 8, Judge at the Federal High Court, interview conducted March 27, 2023 (Addis Ababa, Ethiopia).
[116] Interviewee 9, Judge at the Federal Supreme Court, interview conducted April 26, 2023 (Addis Ababa, Ethiopia).

the law. Not only this; but the competition to join the federal court was not open to all regions. Judges serving at regions didn't get the chance to compete. Judges who have good connections with some organs get the chance while judges who have good merits but have no connections are ignored."[117]

Similarly another FSC judge provides his experience regarding the appointment process as follows:

"When I was a state Supreme Court judge I applied for the federal Supreme Court I passed the written exam and was waiting for the interview. But I heard that some judges were picked randomly and interviewed. Following this I complained to the council and then got appointed in the federal Supreme Court. If I didn't complain the probability of me not being assigned was high. The appointment procedure was not clear. The council was not following the law. There is also appointment known as temporary appointment. This creates a huge grievance by the high court judges. Some judges were selected by the administration and temporarily serving as high court judges. The reason the administration raised was mitigating case load. However, the judges were supposed to be assigned as an assistant judge and they were assigned by the council without approval of the parliament it was totally against the law. Besides this the appointment was not transparent. The criterion for appointment was not clear."[118]

The other appointment related practice that was raised as a factor that undermines the judge's personal independence is the process of appointment of temporary judges. Proclamation no. 1233/2021 has come up with a provision about the appointment of ad hoc judges as noted in the previous chapter. The interviewed judges question the procedure and practice of such appointments. The interviewees provide that:

"There is also an appointment known as temporary appointment. This creates a huge grievance among the high court judges. Some judges were selected by the administration and are temporarily serving as high court judges. The reason the administration raised was the need to mitigate the caseload. However, the judges

[117] Interviewee 11, Judge at the Federal Supreme Court, interview conducted April 18, 2023 (Addis Ababa, Ethiopia).
[118] Interviewee 12 (n 113 above).

were supposed to be assigned as assistant judges and they were assigned by the council without the approval of the parliament it was totally against the law. Besides this, the appointment was not transparent. The criterion for the appointment was not clear."[119]

The above illustrations indicate that in the practice there are flaws in the appointment of judges which have the tendency to undermine the personal independence of the judges. Similar incidents are also common in the promotion and bench assignment of judges.

4.2.2. Financial Security

In relation to the financial security of judges, the collected data implies different perceptions prevailing among judges. Majority of them believe that the salary and other benefits of the judges are not adequate enough. To quote the FSC:

> *"The salary and financial benefits of a judge are not enough. We get a total of 20,000 ETB per month. I personally benefited from housing and transportation. The organization has provided a house and a car for me. I can say I am one of the beneficiaries from the sector. But I still think that what I earn is not compatible to the inflation and the work load i handle. I am leading my life because of my wife's support had it not been for her I would have struggled for survival."*[120]

Another FSC judge explains the inadequacy of the financial benefits of judges as follows:

> *"Concerning financial security judges earn very small salary. It is hard to think that the salary is rewarding for the job judges provide. The job by itself is very stressful and needs attention. It is hard to focus on the job while you are thinking about your financial problems. Financial independence is the key for judicial independence. The insufficiency of salary leads to corruption, bias and favouritism. Many judges are forced to explore other options only because of the salary. Judges get a lesser salary than junior lawyers get in other organizations. Furthermore, in the system, all the experienced and junior judges get the same salary. This by itself is discouraging. There should be a distinction between senior and junior judges. The senior judges need appreciation and recognition for their service. As far as other benefits are concerned, an apartment was built and given*

[119] Interviewee 3, Judge at the Federal First Instance Court, interview conducted on April 6, 2023 (Addis Ababa, Ethiopia); Interviewee 9 (n 116 above); Interviewee 11 (n 117 above).
[120] Interviewee 10 (n 111).

to judges last year. The criterion for receiving the house was experience, family size, and gender. Before the reform houses used to be provided by federal house corporation randomly without any criteria which was very discriminatory and leads to abuse of power. However, after the reform, there are some positive steps taken to avoid discrimination and accommodate the interest of most judges. The main problem in this regard is the lack of willingness of the administration to cooperate with banks to facilitate loans. Those judges who are not beneficiaries of the apartment are still living in rental houses. The house allowance by itself is not enough. It does not consider the current inflation. The administration and executive body of the government take a minimum role to secure the financial independence of the judiciary. No clear and satisfactory steps are taken to solve the problem."[121]

Nevertheless, the judges recognise the salary increment made post-2018. One of the interviewee stated:

"After the reform, there was a 70% salary raise which was a good step. But now inflation almost took the entire raise we got, three years passed this way and no measures are taken to mitigate the problem."[122]

On the other extreme from the FFIC, there is a tendency to perceive that the judges have financial security and that their personal independence doesn't depend on financial security. One of the interviewees from the FFIC says:

"In talking about financial benefits, the salary is enough to live a normal life. Judges get better payment than other government employees. Independence is more related to moral integrity and religion. I disagree with the belief that financial insecurities might affect judicial independence. Independence is related to morality, not money. Human interests are unlimited. No matter how much you earn if you lack integrity, you will never be independent. As a human, I want good things for myself and my family but financial insecurities will never affect my independence. The moral satisfaction we get cannot be measured by anything. Satisfaction cannot be measured with a cost-benefit analysis. Moral satisfaction

[121] Interviewee 12 (n 115 above).
[122] Interviewee 2, Judge at the Federal First Instance Court, interview conducted on April 13, 2023 (Addis Ababa, Ethiopia).

is beyond personal interests and judges who serve here are aware that they can earn more than they get in here but they want to serve the community and they work here for their mental peace."[123]

However, the lion's share of the judges state that irrespective of the recent salary increment, judges are financially insecure. The prevailing inflation has further undermined their financial capability. This situation leads judges to corruption and forces them to leave their profession and become private attorneys as the latter financially pays off.

4.2.3. Immunity and Accountability

Federal court judges state that the new fundamental development they have seen in the post-2018 period is an express stipulation of the immunity against the civil liability for actions taken in their official capacity and arrest, detention and prosecution unless for the commission of grave crime in flagrante delicto. In other cases, the immunity must first be lifted by the JAC. As they reveal so far, they haven't faced any challenge in relation to their work that undermines their immunity. Nonetheless, the practice of detaining judges from the bench has become a common and new trend in the regional state and forced them to feel insecure. Interviewees from the three level courts consider the following:

"Regarding immunity in criminal cases, there were some gaps in implementation. There are some cases in which the police arrested a judge from the courtroom. This kind of trend is obvious in regions."[124]

Furthermore, the interviewees have also indicated the non-implementation of the civil case immunity of judges. It was stated:

"*As far as immunity in civil cases is concerned there is not enough protection. Judges are sued for judicial errors. This affects the immunity of judges."*[125]

In relation to accountability, the interviewees are of the view that a judge's accountability mostly raises in relation to judicial misconduct in breach of the judicial code of conduct. The disciplinary cases are entertained by the JAC. The interviewed judges indicated that there are both positive and negative measures taken in post-2018 in relation to judicial accountability.

[123] Interviewee 1, Judge at the Federal First Instance Court, interview conducted on April 11, 2023 (Addis Ababa, Ethiopia).
[124] Interviewee 2 (n 122 above); Interviewee 8 (n 115 above); interviewee 9 (n 116 above).
[125] Interviewee 1 (n 123 above); Interviewee 5 (n 112 above); Interviewee 11 (n 117 above).

The positive development they noted is designing of a procedure by which the accused judge can defend the disciplinary compliant brought against him. They state:

> *"[The pre-2018 period] does not allow the judge to defend himself. Decisions were imposed on the judge without any hearing. But now there is better procedure the judge can defend himself and challenge the claim."*[126]

> *"Disciplinary claims are usually raised by attorneys and litigant parties. According to the new disciplinary law, a judge is required to defend him/herself only if the [JAC] believes that there is a reasonable ground for disciplinary misconduct. If not, the judge might not even know about the case."*[127]

However, they stated the negative developments as 'one step forward, two steps back.' This is because they identified three measures introduced in the post-2018 period which adversely affects the judge's independence in this regard. The first one is the absence of the appeal procedure. As they stated:

> *"The problem in this regard is the lack of procedure to appeal. At first the draft bill of the JAC incorporates appeal procedure. However, in the approved and promulgated bill it was removed. So now there is no appeal procedure. The reason the council raises regarding this is the decision of the council so it is irrelevant to have two decision making bodies. But there are decisions which are not entertained by the parliament such as deduction of salary. The parliament review of decisions leads to removal of a judge. For instance, if the council decides to deduct salary, there is no way of appeal for the judge. Even though the decision is removal the judge should have the right to exhaust all remedies before the approval of the parliament."*[128]

The second defect is the confusion made about judicial error and judicial misconduct. In the post-2018 period judicial error is perceived as judicial misconduct, as stated by the interviewees:

> *"As far as disciplinary conduct is concerned there is confusion between judicial error and judicial misconduct. Judicial error cannot be avoided for many reasons*

[126] Interviewee 6 (n 114 above).
[127] Interviewee 3 (n 119 above).
[128] Interviewee 2 (n 122 above); Interviewee 6 (n 114 above); Interviewee 10 (n 111 above).

and that is why appeal system is put in place and appellate courts are established. It's hard to separate court systems from judicial error. This should not be considered as a disciplinary act. There is a huge gap in differentiating judicial error and misconduct."[129]

"The problem here is the unclear differentiation between judicial error and judicial misconduct. Some judges are sued for judicial error. This is very stressful a judge should not be sued for a mere error that occurred in his/ her job. Avoiding error is impossible and using this to sue someone is immoral."[130]

"The problem in this regard is the wrong interpretation of judicial error. The judicial error can easily be corrected by appeal. But the authorities sometimes fail to differentiate between judicial error and judicial misconduct."[131]

The third problem identified is regarding disciplinary complaints submitted to presidents of Federal Courts. Interviewees reveal that:

"There are some gaps especially on complaints directly submitted to the presidents. This may open door for abuse. The presidents may use their power to intentionally remove judges. Especially in the high and first instance courts these kinds of trends are obvious."[132]

4.2.4. The Tenure Security

One area of personal independence that all interviewees perceived the existence of a positive progression is with regard to the security of the judge's tenure. They appreciated the discontinuity of the use of subjective grounds, like loyalty to the Constitution, to terminate a judges tenure. However, they challenged the continuation of the way presidents and vice presidents of the federal courts were removed from their positions. An interviewee provided the following:

[129] Interviewee 3 (n 119 above).
[130] Interviewee 7 (n 110 above).
[131] Interviewee 9 (n 116 above).
[132] Interviewee 8 (n 115 above).

"Their removal is not transparent. When we see the experience of other countries the presidents and vice presidents of courts are removed by impeachment procedure. However, in Ethiopia, the practice is totally different."[133]

4.2.5. Interference with the Administration of Justice

There is no common stance among the judges about their freedom from interference in entertaining of cases. Three different reflections were identified from the interviewees. Some believe that intimidation of judges, which affect their impartiality in entertaining cases, has continued in the post-2018 period but the form is different. In the past, there was direct intimation and interference of the executive. Currently, the intimidation and coercion has taken an indirect way in relation to sensitive and political cases. The following two quotes from interviewees establish this claim.

"After 2018 there is no direct intimidation of judges to decide contrary to the law or evidence. But there are some indirect pressures. This can be done by removing a judge from his bench. Since the court assignments have no clear criteria or procedure the admin can use this to assign any judge they want to manipulate. To solve this W/ro Meaza Ashenafi tried to pressure the government to amend and enact laws. But she was removed before accomplishing it. It is hard to conclude that there is full independence in the sector but there are some positive steps taken. There is no direct involvement but there is some indirect interference by the executive and wealthy people. The media and society can also cause intimidation and negative pressure. The media released news stating the name of the judges which is against judicial independence. It might also expose the judge to danger."[134]

"Concerning intimidation some judges complained that administrators informally communicate them to focus on some cases. This can be considered as intervention because it adversely affects the mind-set of a judge. There is no direct intervention but systematic removing of a judge from his bench can be an issue. The admin can assign a judge from one court to another. Since there are no rules

[133] Interviewee 11 (n 117 above).
[134] Interviewee 10 (n 111 above).

in this regard it opens door for intervention and pressure. Benches related to criminal, terrorism and corruption cases can be the target of intervention."[135]

The other perspective one interviewee claimed that one of the significant steps taken to ensure the judicial independence in Ethiopia in the post-2018 period is avoiding interference and inflecting of undue influence in the trying of a case.

Very few, on the other hand, believe that:

"Intimidation and coercion are related to the personality of a judge. If you do not have enough knowledge and experience you might be exposed to abuse and intimidation."[136]

4.2.6. Freedom of Expression and Association

One of the new developments introduced in the post-2018 period is an express stipulation of the judge's freedom of expression in the JAC proclamation. Proclamation no. 1233/2021, unlike proclamation no. 684//2010, has recognized judge's freedom of expression. Particularly, under article 35 of proclamation No. 1233/2021it is provided that:

"[The] federal judges shall have the right to speak, write, participate in social and religious affairs, participate in training and research undertakings as provided for and guaranteed under the [FDRE] Constitution and other laws."[137]

The only limit to the right enshrined in the proclamation is that '…[it shouldn't be] inconsistent with the principle of judicial independence and impartiality.'[138] The interviewed judges appreciated the recognition of the right and with the hope that the judge's criticism of the FDRE Constitution wouldn't cause the termination of her tenure as it happened in the pre-2018 period.

However, they criticized the non-recognition of the freedom of association in the proclamation. As result, federal judges have no professional association, which may help better defend their independence and other professional interests.

[135] Interviewee 2 (n 122 above).
[136] Interviewee 3 (n 119 above).
[137] Proclamation No. 1233/2021 (n 6 above), Article 35.
[138] Ibid.

5. Conclusion

The issue of judicial independence was one of the questioned matters in Ethiopia following the 2005-election. Particularly, with the enactment of the first anti-terrorism proclamation, courts' in Ethiopia were characterized as 'kangaroo court' by which the then incumbent used to silence political dissent with. That is why in 2018, Prime Minster Abiy after assuming power declared that 'it is the government that is terrorist' and released all the political prisoners who were convicted by the courts which were used for political purpose and to target oppositions.

What followed was the judicial reform as part of democratization process of the country to build and install the judicial independence. The judicial reform targeted and was initially praised for two important things. The first one is regarding the attempt made to reform the judiciary as an institution by bringing changes in leadership. The second one is changing the judicial administration law in a way to secure the judicial independence as part of the legal reform.

However, a comparative assessment of the legal changes and practice of the judicial independence against the international principles of personal and institutional independence of the judiciary in the post-2018 Ethiopia reveals a mixed result. The elements of judicial independence stipulated in the FDRE Constitution are in place the post-2018 Ethiopia. As such, its stipulation about the establishment of an independent judiciary; judges' freedom from any influence and guarantee to be guided solely by law; restrictive stipulations on grounds of withdrawal; the need of law-makers' approval in appointment and withdrawal of judges; prohibition in establishing special or *ad hoc* courts; and empowering of the judiciary in preparing its budget are positive steps to ensure the independence and impartiality of the judiciary.

The legal reform made on the judicial administration law in the post-2018 period, emphasized on ensuring judicial independence as its main objective. In line with this, it introduced changes in the form of ensuring the domination of judges (41.6% to 53.6%) in the JAC, outlawing of the power of the JAC to suspend a judge until the removal decision is approved by the HPR, outlawing of subjective requirements like loyalty to the constitution for appointment of judge, introducing of merit-based standards for promotion and transfer of a judge, protecting judges from malicious demand of removal of the judge from a case, and recognizing the judges' freedom of expression expressly. Empirically, the judiciary's

financial autonomy, increment of salary, decrement of direct interference and intimidation of the judge by the executive in the trial, provision of the judge with the opportunity to defend the disciplinary complaints brought, and the judge's enjoyment of freedom expression are the positive developments seen in the post-2018 period on judicial independence.

Nonetheless, there are abundant of legislative gaps and hurdles, and practices that continued to adversely impact the judicial independence. The absence of criteria of selection and impeachment mechanism for termination of the presidents and vice-presidents of the federal courts, failure to prescribe requirements for appointment of ad hoc judges, failure to require parliamentary approval of termination of a judge on the ground of gross incompetence or inefficiency, empowering of the JAC to lift the immunity of judge, taking away the power to decide on leave from the court to the JAC, and failure to expressly recognize the judge's right to association are fundamental legislative gaps which adversely affect judicial independence post-2018.

The empirical evidence, on the other hand, identifed that termination of the president and vice-presidents of the courts in a non-transparent way and without impeachment, unreasoned rejection of candidate registration for judgeship vacancy, failure to publicize public opinion about the candidate judge, prevalence of still recommendation and quota based appointment of judges, the executive disobedience and disregard of courts' orders, absence of experience-based salary scale and its inadequacy, absence of appeal system on the disciplinary measures against the judge, confusing of judicial errors with judicial conduct, prevalence of indirect intimidation and systemic removal of judges from bench, and the detaining of judges from bench are fundamental challenges adversely affecting judicial independence in the post-2018 period.

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List of Interviewees

- Interviewee 1, Judge at the Federal First Instance Court, interview conducted on April 11, 2023 (Addis Ababa, Ethiopia).
- Interviewee 10, Judge at the Federal Supreme Court, interview conducted April 25, 2023 (Addis Ababa, Ethiopia).
- Interviewee 11, Judge at the Federal Supreme Court, interview conducted April 18, 2023 (Addis Ababa, Ethiopia).
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- Interviewee 3, Judge at the Federal First Instance Court, interview conducted on April 6, 2023 (Addis Ababa, Ethiopia).
- Interviewee 4, Judge at the Federal First Instance Court, interview conducted on March 22, 2023 (Addis Ababa, Ethiopia).
- Interviewee 5, Judge at the Federal High Court, interview conducted on March 30, 2023 (Addis Ababa, Ethiopia).
- Interviewee 6, Judge at the Federal High Court, interview conducted March 28, 2023 (Addis Ababa, Ethiopia).
- Interviewee 7, Judge at the Federal High Court, interview conducted on March 29, 2023 (Addis Ababa, Ethiopia).
- Interviewee 8, Judge at the Federal High Court, interview conducted March 27, 2023 (Addis Ababa, Ethiopia).
- Interviewee 9, Judge at the Federal Supreme Court, interview conducted April 26, 2023 (Addis Ababa, Ethiopia).

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