



The Judicial System of Ethiopia: From 'Empire' to 'Military Junta' to 'Federal Democratic Republic': A Legacy Perspective

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Abstract

Ethiopia in her journey from an imperial regime to a Federal Democratic Republic polity has witnessed different judicial systems that has emerged from, and premised on, the then prevalent political philosophy and ideology. During the era of Emperor Menelik II, the judiciary was considered a part of the executive as the Ministry of Justice. *Afe Negus*, was the head of the judges and was entrusted with the responsibility of ensuring that the judges delivered justice in accordance with the '*Fetha Negast*'. Emperor Haile Selassie I, who took keen interest in codification of the laws, promulgated two Constitutions in 1931 and 1955 respectively during his reign and injected the idea of independence of judiciary and adjudication according to law. However, military junta, which suspended operation of the Revised Constitution (1955), made the judicial system amenable to executive and hence a crippled institution. The

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contemporary three tier judicial system established under, and governed by, the FDRE Constitution (1995) asserts judicial independence and justice according to law. But the constitutional paradigm, contrary to the constitutional assertion, does not assure structural and functional autonomy to courts and through a couple of calculative designs, leaves scope for executive interference in the administration of justice. This paper not only traces the judicial system of Ethiopia which is in vogue, but also highlights the inherent defects in its structural and functional facets and pleads for apposite reforms.

Keywords: Administration of Justice, FDRE Constitution, Judicial Independence, Judicial System, Military Junta.

Introduction

Ethiopia, an abode for over 82 million people of some 80 ethnic groups with more than 250 distinct languages, is one of Africa's largest and poorest countries. She cherishes her uninterrupted national integrity and independence. She repulsed successfully all the outside invaders and colonial powers who were lured by her strategic geographical location, climatic conditions and natural resources. With the lasting pride, she remained to be the only non colonized state in Africa.

Ethiopia, at different periods, experienced imperial to democratic ways of state governance, with spills of the Italian occupation (1936-1941) and military junta, injected with communism (1974-1991). These systems of governance, depending on their political philosophy and ideology and perception of the 'ruler' and of the 'ruled', had, for obvious reasons and justifications, their own notions of 'justice' and justice delivery systems. These notions and perceptions have shaped, rather dictated, the respective legal and judicial systems.

In 1995, 'the Empire of Ethiopia' was transformed by the Constitution of the Federal Democratic Republic of Ethiopia (FDRE Constitution)¹ to 'the Federal Democratic Republic of Ethiopia'. It

¹ 1/1995, PROCLAMATION OF THE CONSTITUTION OF THE FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA,

has opted for the federal,² republic and democratic way of governance and polity.³ In pursuance of its 'strong commitment', *inter alia*, 'to building a political community founded on the rule of law',⁴ the FDRE Constitution has also overhauled the hitherto prevailing 'models' of judicial system. Nevertheless, the contemporary judicial system carved in the FDRE Constitution retains some of the traits of the earlier judicial systems.

This paper endeavours to, in the backdrop of the constitutional ethos and the political climate that prevailed prior to the FRDE Constitution, highlight the evolutionary facets of the modern judicial system of Ethiopia.⁵ It attempts to explore some pertinent

<http://www1.umn.edu/humanrts/research/Proclamation%20no.1-1995.pdf>.

² (The Ethiopian Federation is constituted by nine ethnically-based States (for list see art. 47) and two autonomous City Administrations (of Addis Ababa and Dire Dawa)).

³ (A bilingual (Amharic and English) but slim FDRE Constitution contains a couple of 'Fundamental Principles of the Constitution' (Article 8- Article 12); formulates a set of 'Policies, Principles and Objectives' for State Governance (Article 85- Article 92); gives a comprehensive catalogue of 'Fundamental Rights and Freedoms' (Article 13- Article 44), and sketches constitutional anatomy of the Units of the Federal Polity - Executive, Legislative and Judicial - and draws orbits of their operation and inter-relation (Article 45- Article 84)).

⁴ See THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Preamble ¶ 2.

⁵ (The modern judicial system of Ethiopia is comprised of Regular Courts, Religious Courts (Sharia Courts and Ethiopian Orthodox Church Courts) and Customary Courts. For cultural, historical, and traditional reasons, the FDRE Constitution not only recognises the latter two courts but also allows them to exist along with 'regular' courts and to play a considerable role in the administration of justice in Ethiopia. See Articles 34(5) and 78(5) of the FDRE Constitution. The Sharia Courts have jurisdiction over Muslims (who constitute more than 40% of the Ethiopian population) and handle disputes relating to their family and personal matters. These courts are further streamlined by the Federal Courts of Sharia Consolidation Proclamation No. 188 of 1999. It has established the Federal First Instance Court of Sharia, the Federal High Court of Sharia, and the Federal Supreme Court of Sharia. The

historical antecedents of the modern Ethiopian judicial system. With this purpose, the instant paper offers a sketch of structural and functional orbit of courts during the era of Emperor Menelik II, Emperor Haile Selassie I, the Italian Occupation of Ethiopia, and the Transitional Government of Ethiopia. Against these pre FDRE Constitutional models of the judiciary, the instant paper delves into the constitutional scheme and spirit of the modern judicial system in Ethiopia and highlights some of the traits that the modern judicial system has inherited from the earlier ones.

The Pre FDRE Constitution Models of the Judiciary: An Overview

The structural paradigm and traits of the modern Ethiopian judiciary can be traced back to the judicial systems which evolved over six major periods of state governance. They are: the Emperor Menelik II era (1890-1930), the Emperor Haile Selassie I Pre-Italian invasion era (1930-1936); the Italian Occupation period (1936-1941); the Emperor Haile Selassie I Post liberal period (1941-1974); the *Derg* Regime (1974-1991), and the Transitional Government period (1991-1995).

The Emperor Menelik II Era (1890-1930)

Emperor Menelik II took reins of an Ethiopia that, in the immediate past, had witnessed disintegration into half a dozen regions due to the weak feudal monarchy seated at Gondar and intense internal rivalries among various regional warlords and local chiefs for the throne.⁶ Emperor Menelik II strengthened the unification initiatives

Customary Courts perform traditional tribal administration of justice functions. These courts are operative mainly in countryside areas. There also exist Social Courts established in Tigray, Amhara, Oromia, Southern Nations, Nationalities and Peoples, and Harar regions. They are established at the Kebele (community) levels in rural and urban areas. Their number runs in thousands. The present paper, however, deals merely with 'regular courts'. Nevertheless, it makes passing reference to other courts for thematic consistency).

⁶ See, F. NAHUN, CONSTITUTION FOR A NATION OF NATIONS: THE ETHIOPIAN PROSPECT Chap. 1 (Asmara, Eritrea: The Red Sea Press, 1997);

taken by his predecessors, Emperor Tewodors II (1855-1871) and Emperor Yohannes IV (1871-1889). During his reigns, the power of the empire was consolidated and the political clout of the local rulers was reduced. He divided and sub divided his empire into different administrative units. The empire was divided into six judicial districts. Two *Womber* (Judges of Appeal) were constituted in each judicial district. For proper administration of justice in the judicial districts, Emperor Menelik II established courts of first instance and appellate courts.⁷

In the beginning of the twentieth century, in 1908, Emperor Menelik II created (along with other eight ministries) the Ministry of Justice. The Minister of Justice (the *Afe Negus* - 'the Mouth of the King') became the head of the 'judges of the country', i.e. the Chief Justice.⁸ He was made 'responsible for carrying out justice according to the *Fetha Nagast*' ('the Book of Kings').⁹ Below the *Afe Negus* were three court levels presided over by the governors of the respective administrative levels. Judgments, with all documents, of the various courts were to be sent yearly to the *Afe Negus* for

M. ABIR, ETHIOPIA: THE ERA OF THE PRINCES: THE CHALLENGE OF ISLAM AND THE REUNIFICATION OF THE CHRISTIAN EMPIRE 1769-1855 (Longmans, Green & Co. Ltd, London, 1968). (Six 'emperors' claimed simultaneously to be the 'supreme ruler' of the country. This era of anarchy and internal rivalry is known as *Zemene Mesafent* (the Era of the Princes). The era was weakened when Emperor Tewodors II came to power in 1855. He initiated reunification of Ethiopia. Emperor Yohannes IV, his successor to the throne, took initiatives for further unification of Ethiopia).

⁷ J.C.N. PAUL & C.S. CLAPHAM, ETHIOPIAN CONSTITUTIONAL DEVELOPMENT: A SOURCEBOOK 317 (Addis Ababa, Artistic Printers, 1971).

⁸ A. JEMBERE, AN INTRODUCTION TO THE LEGAL HISTORY OF ETHIOPIA 1434-1974: SOME ASPECTS OF SUBSTANTIVE AND PROCEDURAL LAWS 219 (Erasmus University, Rotterdam, 1998).

⁹ (*Fetha Nagast* was replaced by the Penal Code of the Empire of Ethiopia of 1930 enacted during Emperor Haile Selassie I's regime). For an evolution of the *Fetha Nagast*, See P.H. Sand, *Roman Origins Of Ethiopian 'Law Of The Kings/Fetha Nagast* 11 J. ETHIOPIAN L. 74, (1980).

'examination'.¹⁰ Appeals could lie to the Emperor's *Zufan Chilot* (Crown Court).

During the Emperor Menelik II era, the institutional administration of justice, thus, was perceived as a part of the executive. He hardly maintained a sharp distinction between his executive and judicial functions. Adjudication of cases, plausibly on the assumption that King is the fountain of justice, was considered the principal function of the executive.

The Emperor Haile Selassie I: The Pre Italian Invasion Era (1930-1936)

The judicial system (as well as the codification of laws) was consolidated and streamlined during the regime of Emperor Haile Selassie I, who ascended the throne in 1930¹¹ and ruled the country until 1974, when military junta, the *Derg*, overthrew and imprisoned him. During his reign, two Constitutions, the Constitution of 1931¹² and the Revised Constitution of the Empire of Ethiopia of 1955,¹³ and six basic Codes,¹⁴ were enacted.

¹⁰ See, PAUL & CLAPHAM, *supra* note 7 at 320-22.

¹¹ (After Emperor Menelik II died in 1913, Lij Iyassu, one of his grandsons, succeeded him. He did not rule long. He was deposed in 1916. On September 29, 1916, Emperor Menelik II's daughter Zewditu, after disqualifying Lij Iyassu, , on the ground that he converted to Islam, came to the throne. She was made the Empress. She ruled the country through a regent and cousin, Ras Tafari Makonnen. In 1930, after the Empress died, the regent-adopting the throne name Haile Selassie I, was crowned emperor. During Her Majesty Zewditu's era, which was dominated by continued internal struggle with ceaseless plotting and counter-plotting for the Crown, the judicial system introduced by Emperor Menelik II could not get further consolidation).

¹² (The Constitution was modeled on the Imperial Japanese Constitution of 1889 (Meiji Constitution of Japan)). See PAUL & CLAPHAM, *supra* note 7 at 326-36. (Prior to 1931, Ethiopia had a complex traditional, unwritten constitution webbed by the ideal of the monarchy. There were quite a number of regular and non-regular courts, including ecclesiastical and Ligaba Court). See F. NAHUN, *supra* note 6.

¹³ Revised Constitution of the Empire of Ethiopia, Proclamation No. 149 of 1955, *Negarit Gazeta*, 15th year, No. 2.

The 1931 Constitution provided for two separate systems of courts; i.e. the Regular Courts and Special Courts. The former were entrusted with the adjudication of civil and criminal cases, while the latter were authorized to deal with cases 'relating to administrative affairs'. Judges, selected from among men having judicial experience, were mandated to 'administer justice in conformity with the laws' in the name of 'His Majesty the Emperor'.¹⁵ The Minister of Justice was mandated, *inter alia*, to record and submit in detail his opinions about the selection of justices and local judges, judicial authority of the Emperor, safeguarding the judicial procedure, and impartiality of judicial proceedings, and to get them passed in the Deliberative Chambers (established under the Constitution), and to work, after the Emperor's approval, in accordance with them.¹⁶ The Constitution, for the first time, separated the judiciary from the legislative wing of the state. Courts emerged as separate justice delivery institutions operated by persons with judicial experience.¹⁷

The Italian Occupation Period (1936-1941)

During the brief Italian occupation (1936-1941), the Italian colonial powers, interrupted by ongoing armed conflict with the patriots and mass atrocities committed on Ethiopians by Italians, attempted

¹⁴ (Emperor Haile Selassie I constituted Commissions composed of, and headed by, foreign legal experts of eminence to draft: (i) the Penal Code of 1957, (ii) the Civil Code of 1960, (iii) the Maritime Code of 1960, (iv) the Commercial Code of 1960, (v) the Criminal Procedure Code of 1961. The Civil Procedure Code of 1965 was drafted by an Ethiopian expert from the Ministry of Justice. Though some of these Codes are subsequently modified and revised, their basic framework remains intact and they constitute the core of the laws of Ethiopia).

¹⁵ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1931, Chap VI, Arts. 50, 51 & 54.

¹⁶ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1931, Arts. 77 & 78.

¹⁷ (However, Zufan Chilot (Crown Court), wherein the Emperor in person had the power to review cases on the basis of equity as law, continued as the apex court of the land). See THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1931, Art. 28.

to create their own court structure. Italian judges were entrusted with criminal law matters. Customary and religious laws were kept intact and made applicable in civil matters handled by the lower level native courts.¹⁸

The Emperor Haile Selassie I: Post liberal period (1941-1974)

Immediately after the Italian occupation was repelled, Emperor Haile Selassie I proclaimed the 'Administration of Justice Proclamation 2 of 1942' and issued the 'Imperial Decree and the Imperial Ministerial Order 1 of 1943' to bring certain changes in the court system. The 'Administration of Justice Proclamation 2 of 1942' established a unitary hierarchical four tier court system.¹⁸ The courts established thereunder were: (i) the Supreme Imperial Court, (ii) the High Court of Ethiopia, (iii) the Provincial Courts, and (iv) the Regional and Communal Courts.¹⁹ The Supreme Imperial Court, presided over by the *Afe Negus* as its President, was placed at the apex of the judicial hierarchy. It was vested with the appellate and supervisory authority over the courts subordinate to it.²⁰ The High Court of Ethiopia had 'full criminal and civil jurisdiction in Ethiopia'.²¹ The Provincial Courts, established in

¹⁸ See A Jembere, *Tatayyeq Muget: The Traditional Ethiopian Mode Of Litigation* 15 J. Ethiopian L. 82 (1992). (This organised system of courts, according to Emperor Haile Selassie I, was created to enable His subjects 'to seek redress for wrongs done to them and enforce the rights which the laws and the Constitution guaranteed to them'). See His Speech from the Throne of April 14, 1961, 2 ETHIOPIAN OBSERVER (1961); PAUL & CLAPHAM, *supra* note 7 at 386, 387.

¹⁹ (This is the court system that was operative for as long as the Monarchy existed in Ethiopia although structure and jurisdiction of the courts were subsequently modified by the Civil Procedure Code of 1965 and the 'Provincial' [Tekle Gezat] courts were abolished. Art. 23 of the Proclamation also recognised the then existing traditional institutional adjudication of cases).

²⁰ Administration of Justice Proclamation No. 2 of 1942 arts. 2-18.

²¹ *Id* at Art. 7. (Judges of British Nationality, to be determined by the Emperor, had to be on the Bench).

each province of the empire,²² had original criminal and civil jurisdiction (on the matters indicated in the Proclamation) and appellate jurisdiction over the Regional and Communal Courts. The Provincial Courts were, in order of judicial hierarchy, placed below the High Court of Ethiopia.²³ The Proclamation mandated every court established thereunder not to give effect to any (existing) law that was 'contrary to natural justice or humanity' or which made 'any harsh or inequitable differentiation' between Ethiopians and foreigners.²⁴

The Imperial Decree and the Imperial Ministerial Order of 1943²⁵ placed Governor Generals and Governors, (of an administrative area) at all levels, as Presidents of the courts established in the places of their residence. This legislative move, plausibly, emerged from two compelling pragmatic reasons. First, to overcome the necessity of sending additional judicial personnel to those areas at a time when many officials were reluctant to move out of Addis Ababa, the capital of the country. Secondly, the Governors insisted that they need to have executive as well as judicial powers to keep order in their respective areas.

The inevitable consequences of the Imperial Decree were dual. Firstly, it led not only to the absence of the sharp distinction between the executive and judicial functions of the government, but also paved way for the Governors to have a greater say in the appointment of judges and administration of justice. Secondly, it stalled the growth of an independent judiciary outside the capital.²⁶

²² See Administration of Justice Proclamation No. 2 of 1942 at Part V. (The regional and communal courts were to be set up by warrant. This resulted in the recognition and systematisation of numerous subordinate courts in the provinces.)

²³ Administration of Justice Proclamation No. 2 of 1942 arts. 7 & 17.

²⁴ Administration of Justice Proclamation No. 2 of 1942 art. 24.

²⁵ The Ministers (Definition of Powers), (Order No. 1 of 1943) Negarit Gazeta, 2nd Year, No. 5, 1943 (It was subsequently amended, without altering its basic framework, by the Ministers (Definition of Powers) (Amendment) Order 44 of 1966).

²⁶ See R.A. Sedler, *The Development of Legal Systems: The Ethiopian Experience*, 53 IOWA L. REV. 562, 611-12 (1967). (The fusion of judicial and administrative power was in continuation of the past tradition of the

The Imperial Order of 1943, *inter alia*, empowered the Minister of Justice to (i) nominate persons for appointment as judges and judicial officers by the Emperor; (ii) make arrangements for the establishment of courts throughout the country; (iii) organise and supervise the administration of justice; (iv) submit to the Emperor a record of cases where the death sentence had been passed and required confirmation of the Emperor; (v) submit, with his recommendations, petitions addressed to the Emperor for the exercise of His prerogatives; and (vi) prepare and submit draft laws relating to criminal and civil matters.²⁷

In pursuance of a formal agreement of 1942, a number of judges of British nationality were called during the post liberation period, to adorn the benches of the Supreme Imperial Court and of the High Court. In 1944, the agreement was modified to enable the Emperor, if he wished, to dispense with the service of any British or European judges for 'judges of proven judicial experience in other lands'. These judges, along with senior Ethiopian Judges and the Ministry of Justice officials, endeavoured to bring improvements in the administration of justice and to streamline the justice delivery system in Ethiopia. They, advertently or inadvertently, through their pronouncements, injected common law principles in the Ethiopian legal system. Written judgments were delivered, though not reported. In 1943, procedural rules, primarily premised on the common law rules, were also promulgated. In 1947, through the Establishment of Local Judges Proclamation 90 of 1947, a system of *Atbia Dagna* (local or village judges) was introduced at each 'locality' to cope with the increasing litigation.

However, the Emperor, by virtue of the 1942 Proclamation, read with relevant provisions of the Imperial Decree and Order, had a great role to play in the composition of courts (except the Supreme Imperial Court) and in the selection and removal of judges thereof. The composition of the Supreme Imperial Court was determined

Ruler. Proclamation 323 of 1973 formally brought an end to the influence of the administration in judicial adjudication. It, thus, marked the first legislative move for formally making the judiciary independent from the executive).

²⁷ THE IMPERIAL DECREE 1943, Art. 60.

under the Proclamation itself. It comprised of the *Afe Negus* as its President, and two judges from the High Court nominated by the President of the High Court.²⁸ The Emperor had the unbridled power to appoint, *inter alia*, on advice of the Minister of Justice, judges of the High Court and the courts subordinate to it. He also had unguided discretion to remove them at any time. The judiciary, other than the Supreme Imperial Court, thus, was brought under the direct supervision of the executive wing of the government. The Supreme Imperial Court and the High Court of Ethiopia, to some extent, were relatively free from the influence of Governor Generals and Governors, the provincial administrators.

The judicial system webbed through the Constitution of 1931, the Proclamation of 1942, the Imperial Decree of 1943, and the Establishment of Local Judges Proclamation of 1947 remained operative until 1955, when Emperor Haile Selassie I, through the Revised Constitution of the Empire of Ethiopia,²⁹ effected some major changes in the court system. The 1955 Constitution kept alive some of the traits of the prevailing court system, modified a few, and injected some new traits to make the judiciary more effective and independent.³⁰ It retained the Supreme Imperial Court but it left to 'law' to recognize or establish other courts and to determine their jurisdiction.³¹ Keeping the Emperor's power to appoint judges intact, the 1955 Constitution deviated from the relevant legal provisions, by suggesting a set of broad (and undefined) qualifications for a person to be a Judge and mandating a special law for regulating selection, appointment, promotion, transfer, retirement and dismissal of a Judge.³²

²⁸ Administration of Justice Proclamation No. 2 of 1942 art. 3.

²⁹ Revised Constitution of the Empire of Ethiopia, Proclamation No. 149 of 1955, *Negarit Gazeta*, 15th year, No. 2. See PAUL & CLAPHAM, *supra* note 7 at 388.

³⁰ See THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1931, Chap V.

³¹ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1955, Art. 109.

³² THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1955 art. 111. (The Revised Constitution, thus, not only curtailed the

Article 108 and Article 110 of the Constitution, for the first time, injected some new ideas of far reaching consequences into the administration of justice in Ethiopia. Article 108 declared that ‘the judicial power’ vested in the Supreme Imperial Court and other ‘courts established by law’, were required to exercise the same ‘in accordance with the law’ and in the ‘name of the Emperor’. Article 110 mandated a judge: (i) to be ‘independent in conducting trials’, (ii) to give judgments in accordance with ‘law’, and (iii) to submit to ‘no other authority than that of law’. The judicial system designed under the Revised Constitution, thus, had two significant attributes, *namely* the separation of the judiciary from the other two organs of the government and the independence of judiciary.

The Emperor, as one of his royal prerogatives, however, had ‘the right and duty to maintain justice through the courts’,³³ and ‘everyone in the Empire’, as a corollary of the prerogative, had the ‘right to present petitions to the Emperor’.³⁴ It may, therefore, be argued that the Emperor, in light of the tradition and continuing practice, preserved his ‘judicial power’ to adjudicate (in *Zufan Chilot*) as an ‘ultimate court’ and this, thereby, vitiated the constitutional assertion that ‘judicial power’ vested with the ‘courts established by law’ and the separation of judiciary from other branches of the government was not real. Others may, with equal force, argue that the Emperor was expected to maintain justice through courts established by law only and the Emperor’s *Zufan Chilot* could not be labeled as a ‘court’ simply because it did not form part of Article 109 of the Constitution. The Emperor, at the

unbridled power of the Emperor to appoint and remove a Judge, but also initiated regulation, through law, of the service conditions of a Judge. However, the Emperor took almost eighteen years to bring the spirit of the constitutional provision into reality. In 1973, a Proclamation establishing the Judicial Administration Commission was issued. The Commission was empowered to select persons for appointment as judges, to make recommendations for the promotion of a judge, and to regulate the transfer of judges).

³³ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1955, art. 35.

³⁴ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1955, art. 63.

most, could have, at his discretion, exercised his review powers.³⁵ In my view, the latter assertion seems to be more consistent with Articles 108 and 110 of the Revised Constitution than the former. The source of the Emperor's right and duty to maintain justice rested in the sovereign prerogative and not in the Revised Constitution.³⁶ The Emperor's 'judicial power' (to adjudicate in *Zufan Chilot*) could, therefore, at the most, be perceived as 'imperial supervision' over the 'judiciary' in the quest to ensure 'justice' to his 'subjects'.

Further, Article 21 of the Revised Constitution gave 'supremacy' to the Constitution. It, by necessary implication, implied that any legislative instrument, judicial decision or executive order inconsistent with the Constitution did not have any legal force. Article 21 also lent indirect support to the independence of the judiciary, as any legal instrument or an executive order interfering with the administration of justice could be declared 'null and void'.

The Revised Constitution, thus, was designed to do away with the assumption that the King has the absolute power to enact laws, to execute them, and to adjudicate disputes. It articulated powers of

³⁵ R.A. Sedler, *The Chilot Jurisdiction of the Emperor of Ethiopia: A Legal Analysis in Historical and Comparative Perspective* 8 J. AFRICAN L. 59 (1964); Berekat Habte Selassie, *Constitutional Development in Ethiopia* 10 J. AFRICAN L. 74 (1966) and R.A. SEDLER, ETHIOPIAN CIVIL PROCEDURE 8-18 (Oxford, Addis Ababa, 1968).

³⁶ (Traditionally, the Emperor has been perceived as the fountain of justice. Such a perception, in the Ethiopian context, gets support from two historical facts. First, the Criminal Procedure Code (1961) and the Civil Procedure Code (1965), enacted during the reign of Emperor Haile Selassie I after he promulgated the Revised Constitution, contained provisions regulating procedure for submitting petitions to His Imperial Majesty's Chilot. (See art 183 of the Criminal Procedural Code of Ethiopia of 1961 and arts 322 and 361-370 of the Civil Procedure Code of 1965). Secondly, Emperor Haile Selassie I, in his speech on the occasion of promulgating the Revised Constitution, stressed that he had deliberately kept with him the 'right to do justice' and conferred the right on his subjects to 'petition' him for doing 'justice' to them. See, His Speech from the Throne of April 14, 1961 published in the Ethiopian Herald, November 5, 1955); PAUL & CLAPHAM, *supra* note 7 at 389, 392.

the three branches of the Empire, *namely*, the legislature, the executive, and the judiciary in a definite manner.³⁷ By such a division of powers, the Constitution endeavoured to ensure the independence of the judiciary and to allow courts to adjudicate cases in accordance with law and without any interference or influence of the other two wings of the Empire. It mandated the courts to submit to 'no authority than that of law'.

The Derg Regime (1974-1991)

In 1974, the Coordinating Committee of the Armed Forces, Police, and Territorial Army, popularly known as *Derg*, the Marxist regime, overthrew Emperor Haile Selassie I, imprisoned him, and established itself as the provisional military government. The *Derg* installed a government that was socialist in name and military in style. Major Mengistu Haile Mariam assumed power as Head of the State and *Derg* Chairman. For obvious political reasons, the *Derg* regime resorted to systematic eradication of dissent and to arbitrary arrests, detentions, enforced disappearances and extra-judicial executions of its political opponents.³⁸

It suspended key civil institutions. Senior members of the judiciary and those who had been active players during the imperial regime were stripped off their powers. Some of them were dismissed from service or forced to resign or retire, and others were imprisoned. They were replaced by persons of lesser qualifications and experience. The *Derg* regime set up countless special tribunals usurping the powers of the judiciary. It created Special Courts Martial to try certain types of cases. Courts were left to deal with

³⁷ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA 1955, Chapters IV, V and VI.

³⁸ (Thousands of suspected enemies of the Derg were tortured or killed in a purge called 'red terror'. Thousands of cases of summary executions, disappearances and tortures were reported. Estimated numbers of people killed by the red terror ranges from 150,000 to 500,000); See generally, K.M. Wigger, *Ethiopia: A Dichotomy of Despair and Hope* 5 TULSA J. COMP. & INT'L L. 389 (1998); M.J. McCracken, *Abusing Self-Determination and Democracy: How TPLF is Looting Ethiopia*, 36 CASE W. RES. J. INT'L L., 183 (2004); N.B. Herther-Spiro, *Can Ethnic Federalism Prevent 'Recourse To Rebellion'? A Comparative Analysis of the Ethiopian and Iraqi Constitutional Structures* 21 EMORY INT'L L. REV. 321 (2007).

petty and mundane matters of no interest to the regime. The judiciary was literally reduced to an insignificant institution. It was brought under the authority of the Minister of Law and Justice. Further, rampant unlawful executions of political opponents by *Derg* with impunity had, in fact, reestablished the imperial assumption that judicial authority was vested in the head of the state and that he was the supreme judge of the land.

Derg suspended the operation of the Revised Constitution.³⁹ It ruled the country without any Constitution until 1987, when it enacted the Constitution of the People's Democratic Republic of Ethiopia (PDRE Constitution).⁴⁰ The PDRE Constitution, providing for a civilian government, brought some drastic structural and operational changes in the judicial system of the country. It made the Federal Supreme Court an autonomous and independent judicial institution, leaving the High Court and other courts under the control of the Ministry of Law and Justice.

The PDRE Constitution vested judicial authority in the Supreme Court, courts of administrative and autonomous regions and other courts established or to be established by law.⁴¹ It designated the Supreme Court as the highest judicial institution and entrusted it with the task of administrating national judicial system and of

³⁹ (The Suspension of the 1955 Constitution: Proclamation 1 of 1974. Art 5(a) of the Proclamation stated that 'the Constitution of 1955 is 'hereby suspended'. However, by virtue of art 10 of the Proclamation, the then 'existing laws that did not conflict with the Proclamation and future laws, orders and regulations' were kept alive and operative. Art 7 of the Proclamation also allowed 'all courts' to 'continue their normal functions').

⁴⁰ (It came into force on February 22, 1987. The Constitution, according to its critiques, was an abridged version of the 1977 Soviet Constitution, with two exceptions: (i) it conferred vast powers on the country's President, and (ii) it declared the country to be a unitary multi-ethnic state rather than a federation). See C. Clapham, *The Constitution of the People's Democratic Republic of Ethiopia* 3 J. COMM. ST. TRANS. POLIT. 192 (1987).

⁴¹ THE CONSTITUTION OF PEOPLE'S DEMOCRATIC REPUBLIC OF ETHIOPIA 1987, Art. 100.

supervising all judicial aspects of the lower courts in the country.⁴² It also assured judicial independence to the courts. The Supreme Court and higher courts at the regional level were independent of the Ministry of Law and Justice.⁴³ However, the constitutional scheme for appointing and removing judges was not in tune with the constitutionally asserted principle of judicial independence. All judges were made electable for a term of five years⁴⁴ by the *Shengo* (Legislative Assemblies) at various levels (national, administrative and autonomous regions). Term of a judge was concurrent with that of the *Shengo* that elected him. The *Shengo* was empowered to dismiss a judge at its will.⁴⁵ The President of the country was authorized to appoint and dismiss the President, Vice President and Judges of the Supreme Court when the National *Shengo* was not in session and when 'compelling' circumstances arose.⁴⁶

The constitutional protection of judicial independence, thus, was diluted by the provisions providing for the appointment of judges (by election by the Legislative Assemblies) with no assurance of their tenure (beyond five years) and their removal at any time by the *Shengo* (that elected them) or the President of the country (when *Shengo* was not in session). The Constitution, thus, by design crippled the independence of the higher judiciary.

⁴² THE CONSTITUTION OF PEOPLE'S DEMOCRATIC REPUBLIC OF ETHIOPIA 1987, Art. 2. (The Supreme Court was authorised, on request of the Prosecutor General or its President, to review any case from any court of the country. However, interpretation of laws was not the sole prerogative of the Supreme Court. *Shengo*, the Council of State and the Prosecutor General were also entrusted with the interpretative power). See THE CONSTITUTION OF PEOPLE'S DEMOCRATIC REPUBLIC OF ETHIOPIA 1987, Chapter 15.

⁴³ THE CONSTITUTION OF PEOPLE'S DEMOCRATIC REPUBLIC OF ETHIOPIA 1987, Art. 104.

⁴⁴ THE CONSTITUTION OF PEOPLE'S DEMOCRATIC REPUBLIC OF ETHIOPIA 1987, Art. 101.

⁴⁵ THE CONSTITUTION OF PEOPLE'S DEMOCRATIC REPUBLIC OF ETHIOPIA 1987, Art. 101.

⁴⁶ THE CONSTITUTION OF PEOPLE'S DEMOCRATIC REPUBLIC OF ETHIOPIA 1987, Art. 86.

Nevertheless, the *Derg* regime, within the first two years after the PDRE Constitution came into force, with a view to improving supervision of judges and of making the administration of justice fairer and effective, restructured the Supreme Court and established the Supreme Court Council. The Council was entrusted with the task of overseeing the Supreme Court's work relating to registration and training of judges and lawyers. The Council, in its first annual meeting held in 1988, also passed a set of rules of procedure and rules and regulations for judges.

The PDRE Constitution, however, kept the Peoples' Courts⁴⁷ i.e., the *Kebele* (local) tribunals and Peasants' Association tribunals, unaffected. All matters relating to land distribution and expropriation were recalled from the Ministry of Law and Justice and were transferred to the Peasants' tribunals. A number of minor criminal offences, including intimidation, violation of privacy of domicile, and violation of the peasant association regulations were also brought under their jurisdiction. These tribunals also had jurisdiction over disputes involving petty amount of money and conflicts between peasants' associations, their members, and other associations. The *Kebele* tribunals had powers similar to that of their counterparts in the peasants' association. Appeals from both the peoples' tribunals could be heard by the respective regional courts.⁴⁸

The Transitional Government of Ethiopia Period (1991-1995)

May 28, 1991 marked the demise of the *Derg* regime of brutality and terror. Drought, corruption, and forced resettlement of more than one million Ethiopians during the *Derg's* rule and the consequential widespread famine and impoverishment, coupled with the internal and external military operations, including

⁴⁷ (People's courts were originally established under the jurisdiction of Peasants Association and Kebeles. Members of the tribunals were elected by Association members. Kebele tribunals had powers similar to those of their counterparts in the Peasants Association).

⁴⁸ See T. Regassa, *Ethnic Federalism and the Right to Self-Determination as a Constitutional Legal Solution to the Problem of Multi-Ethnic Societies: The Case of Ethiopia* (Unpublished LL.M. Thesis, ECSC, 2001, available in the Ethiopian Civil Service College Library, Addis Ababa, Ethiopia).

internal insurgencies in Tigray and Eritrea, as well as Somalia's attempted annexation of the Ethiopian region of Ogaden, led to the virtual bankruptcy of the government. The Ethiopian People's Revolutionary Democratic Front (EPRDF), a combined group of different ethnic democratic forces dominated by the Tigray People's Liberation Front (TPLF), joined by the Eritrean People's Liberation Front (EPLF), after a protracted civil war, brought about the demise of the *Derg* regime. Major Mengistu Haile Mariam, the then President of the People's Democratic Republic of Ethiopia, who had tight control of the *Derg* regime, left the country and took asylum in Zimbabwe.⁴⁹

The EPRDF established the Transitional Government of Ethiopia (TGE) with the TPLF leader the Late Meles Zenawi as the President of the country. The TGE governed Ethiopia for more than five years (July 1991-August 1995). The Transitional Period Charter of Ethiopia (TPC),⁵⁰ that governed the TGE, proclaimed to set in motion 'a new chapter in Ethiopian history in which freedom, equal rights and self determination of all the peoples' would be the 'governing principles of political, economic and social life'.⁵¹ The TPC and the Establishment of 'National/Regional Self Government Proclamation 7 of 1991', enacted in pursuance of the TPC, envisaged a parallel court system with comparable jurisdiction at the federal and regional levels. The TPC, *inter alia*, mandated 'the courts' 'to be free from any governmental interference' in their work. With the passage of time, the Constitutional Assembly was elected under the TPC to draft the Constitution for the country. It drafted the FDRE Constitution, which was adopted in 1994 and came into force in 1995.

⁴⁹ Wigger, *supra* note 38 at 397-99; McCracken, *supra* note 38 at 183-84, 190-92; E.A. Baylis, *Beyond Rights: Legal Process and Ethnic Conflicts*, 25 MICH. J. INT'L L., 529, 568 (2004); D. Demissie, *Self-Determination Including Secession Versus the Territorial Integrity of Nation-States: A Prima Facie Case for Secession*, 20 SUFFOLK TRANSNAT'L L. REV. 165, 181 (1996).

⁵⁰ (Proclaimed by the Peace and Democracy Conference, Jul. 1-5, 1991, Addis Ababa).

⁵¹ The Phoenix Collective Charter Preamble http://cybernations.wikia.com/wiki/The_Phoenix_Collective.

Modern Judicial System: Constitutional Scheme and Spirit

Determination of the Appropriate Judicial Model

On the eve of the making of the FDRE Constitution, the Constitutional Assembly had four judicial models to choose from while designing a judicial system for the 'Federal Democratic Republic of Ethiopia'. Theoretically, it was at liberty either to pick up, with or without apposite modifications, any of the prevailing judicial structural outlays or to carve out a hybrid system or to formulate a totally new system for the modern Ethiopia.

The four broad paradigms of the court system that prevailed at different phases of the evolution of the judicial system in Ethiopia, as outlined above, were: (i) the imperial court system headed and managed by the executive (the King) with extensive supervision through the Ministry of Justice (the Emperor Menelik II model), (ii) the imperial court system constituted, regulated and governed by the Constitution and 'law' and operationally independent of the executive with minimal executive supervision (the Emperor Haile Selassie I model), (iii) the fully centralised judicial system headed and intensively controlled by the Chief Executive of the State with cosmetic judicial independence and operational freedom (the *Derg* model), and (iv) the parallel dual system of courts at the central and regional levels with comparable jurisdiction (the TPC model).

The Constitutional Assembly, predominantly drawn from the revolutionary EPRDF,⁵² it appears, was influenced by the political ideology of the TGE⁵³ and the judicial system designed under the

⁵²(The EPDRF comprised approximately 85% of the Constitutional Assembly. The opposing political parties refused to participate in the Constitutional Assembly elections because they had been excluded from participating in the drafting of the 1995 Constitution). See M Haile, *The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development* 20 SUFFOLK TRANSNAT'L L. REV., 9 (1996). (The Oromo, Ethiopia's largest ethnic group which comprised 40% of the population, left the TGE and had no role in drafting of the FDRE Constitution). See E.A. Baylis, *supra* note 49 at 547 and 550.

⁵³(The Constitutional Assembly, plausibly, was influenced by the philosophy with which the EPRDF waged and won the long fought civil

Proclamation 7 of 1991, enacted in pursuance of the TPC, when it, in principle, established a dual system of three tier courts at the federal and regional state levels. It, however, retained, with or without necessary modifications, some of the traits of the judicial systems known to the pre FDRE Constitution era.

Judicial System Designed under the FDRE Constitution

Structural Framework

The FDRE Constitution, in tune with the judicial system reflected in the TPC, provides for the establishment of a three tier 'regular'⁵⁴ court system at the federal and regional (state) levels. The judicial system envisaged at the Federal level is comprised of: (i) the Federal First Instance Courts, (ii) the Federal High Court, and (iii) the Federal Supreme Court.⁵⁵ At the Regional (State) level, the Constitution envisages a court system composed of: (i) State First Instance Courts (*Woreda* Courts), (ii) State High Courts (Zonal Courts), and (iii) the State Supreme Court.⁵⁶

The Constitution provides for a set of common principles and rules that are applicable to the federal and regional courts as well as specific rules and principles that are exclusively applicable to either

war against the Derg regime, and the manner in which judicial systems were designed and made operative during the pre-1994 era).

⁵⁴ (The phrase, it seems, is used in Art. 78(5) of the Federal Democratic Republic of Ethiopia Constitution to distinguish these constitutionally established courts from the Religious Courts (Sharia Courts), recognised under, and protected by art 34(5) of the Constitution and the Customary Courts referred to in its Art. 78(5)).

⁵⁵ See THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 78(2). (The Federal Courts Proclamation 25 of 1996 formally established a three-tier court system as envisaged under the FDRE Constitution. It deals in minute details with their structural and functional aspects. It also enumerates powers and duties of the Presidents and Vice-Presidents of the Federal Courts; lays down the 'principles of jurisdiction' of these courts, and specifies the substantive and procedural laws to be applied by them).

⁵⁶ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 78(3).

of them. It, *inter alia*, also provides common rules with respect to the appointment,⁵⁷ transfer⁵⁸ and removal of judges,⁵⁹ and court budgets.⁶⁰ It explicitly indicates the manner of appointing the high ranking judges (Presidents, Vice Presidents, and other judges on the Federal and State Supreme Courts) as well as judges of the courts subordinate to the Federal and State Supreme Courts. It empowers the Prime Minister, through the House of Peoples' Representatives (HoPR), and the Chief Executive of the Regional State, through the State Council, to appoint the President and Vice President of the Federal Supreme Court and the State Supreme Court respectively. The Federal and the State Judicial Administration Councils are entrusted with the primary responsibility of selecting other judges, respectively, for the Federal and State Courts.⁶¹

The Federal Judicial Administration Commission (FJAC), established by Proclamation 24 of 1996, is composed of nine members. Most of them come from the federal judiciary. They are, the President and the Vice President of the Federal Supreme Court, the senior most judge of the Federal Supreme Court, the President of the Federal High Court, the senior most judge of the Federal High Court, the President of the Federal First Instance Court and three members of the HoPR.⁶² The President of the Federal Supreme Court is the Chairman of the FJAC. All the Regional States, through their respective legislative instruments, have followed the suit of the Federal Government in establishing their own (State) Judicial Administration Councils (SJACs) along the

⁵⁷ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 81.

⁵⁸ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 81(6).

⁵⁹ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 79(4).

⁶⁰ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 79(6), (7).

⁶¹ See THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 81.

⁶² Federal Judicial Administration Commission *Establishment Proclamation No. 24 of 1996*, Art. 4(1).

lines of the FJAC and entrusting them with the task of selecting judges, except the President and Vice President of the State Supreme Court, for the State Courts.

JACs at both levels have extensive powers and duties to recommend candidates to fill up judicial positions, issue and enforce disciplinary and ethical standards, investigate disciplinary complaints, and decide issues pertaining to transfer, salary, allowance, suspension and termination of judges. They are, however, guided by a couple of very vague and subjective criteria. Any Ethiopian, who is not below twenty five years of age and is not a member of the legislative or executive branch of the government or a political organization, can be appointed as a federal judge if he (i) is loyal to the Constitution, (ii) has legal training or acquired adequate legal skill through experience, and (iii) has a good reputation for his diligence, sense of justice and good conduct.⁶³ A law degree is not required to become a judge of any court, including the Federal Supreme Court. No judicial vacancies are advertised. In the absence of set procedure and criteria, judicial appointments become unpredictable. The initiative and recruitment process of judicial appointments is marred with secrecy, arbitrariness and favouritism. The procedure followed for

⁶³ Federal Judicial Administration Commission *Establishment Proclamation No. 24 of 1996*, Art. 8.

(The reasons for these vague & liberal criteria could be traced to certain historical facts. When Derg overthrew the Imperial Government of Emperor Haile Selassie I's regime, it, through imprisonment, forced retirement and resignation, removed most of the senior judges who, according to it, had been active players in the previous regime. And during the overthrow of the Derg, members of the legal profession, who were seen as an integral part of the oppressive military junta, were targeted for retribution. Most of the then sitting experienced judges were killed, imprisoned, fled or compelled to retire. When the FDRE Constitution introduced a new three-tier judicial system at the Federal and Regional levels, the then existing pool of legally trained judges, who were unconnected with the Derg regime, was utterly insufficient to sit on the newly created courts. The stipulated qualifications, thus, emerged out of necessity arising from the acute shortage of qualified judges to sit on the plethora of courts established in the Federal Democratic Republic of Ethiopia).

judicial promotions and disciplinary actions is also subject to similar criticism.

Jurisdiction

The Constitution vests the 'judicial power' of the federal government and the regional state governments in the federal and state courts respectively.⁶⁴ In principle, all the federal courts are bestowed with original and appellate jurisdiction over cases arising under the Constitution, federal laws and international treaties; parties specified in federal laws, and places specified in the Constitution or federal laws.⁶⁵

The Federal Supreme Court has the 'highest and final judicial power over federal matters'.⁶⁶ It has three divisions namely civil, criminal and labour. Each division sits with a minimum of three judges.⁶⁷ However, cases relating to a provision of law that has been interpreted in a fundamentally different way among the divisions of the Federal Supreme Court, cassation cases, and cases to be heard by the President of the Court, pursuant to Article 21(1) of Proclamation 25 of 1996, should be adjudicated by a bench of five or more judges. In addition, the Federal Supreme Court has a Cassation Division, which has the power to review final decisions of the Federal High Court (rendered in its appellate jurisdiction), final decisions of the Federal Supreme Court itself, and final decisions of the State Supreme Courts containing fundamental errors of law.⁶⁸ By virtue of Article 10(4) of the Proclamation 25 of 1996, inserted by the Proclamation 454 of 2005,⁶⁹ interpretation of law by the Cassation Division, with not less than five judges, is

⁶⁴ See THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 79 (1), 50(7).

⁶⁵ Federal Courts Proclamation 25 of 1996, art. 3.

⁶⁶ THE CONSTITUTION OF PEOPLE DEMOCRATIC REPUBLIC OF ETHIOPIA, Art. 80(1).

⁶⁷ Federal Courts Proclamation 25 of 1996, art. 20.

⁶⁸ Federal Courts Proclamation 25 of 1996, art. 10; *See also* THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 80(3)(a).

⁶⁹ Federal Courts Proclamation Re-amendment Proclamation 454 of 2005.

binding on all federal and regional courts. The Cassation Division, however, has the power to overrule its earlier interpretation.

The Federal High Court and the Federal First Instance Court have criminal as well as civil jurisdiction over the matters enumerated under Proclamation 25 of 1996.⁷⁰ A State Supreme Court has the 'highest and final judicial power over state matters' and exercises the jurisdiction of the Federal High Court in the state concerned.⁷¹ Decisions rendered by a State High Court on federal matters are, however, appealable to the Federal Supreme Court.⁷² A State Supreme Court, like the Federal Supreme Court, has the power of cassation. A State Cassation Division is empowered to review final decisions of state courts (including those of the regular divisions of the State Supreme Court) tainted with a basic error of law.⁷³ A State High Court, in addition to its state jurisdiction, has jurisdiction of the Federal First Instance Court. Its decisions are appealable to the State Supreme Court.⁷⁴

Judicial Independence

The FDRE Constitution asserts judicial independence in more than one provision and in different tones. Article 78(1) of the FDRE Constitution proclaims that the judiciary established under the Constitution is 'independent'. Article 79(2) asserts that all courts are required to be 'free from any interference or influence of any governmental body, government official or from any other source'. Article 79(3) mandates a Judge to exercise his judicial functions in 'full independence' and to be 'directed solely by the law'. With this spirit, Article 79(4) assures a judge of full tenure of service and provides him a constitutional safeguard against arbitrary removal.

⁷⁰ Federal Courts Proclamation 25 of 1996 arts. 11-12 and 14-15.

⁷¹ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 80(2).

⁷² THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 80(6).

⁷³ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 80(3)(b).

⁷⁴ THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 80(4) and (5).

Judicial independence, broadly speaking, refers to the autonomy of judges and the judiciary as an institution, in the exercise of their judicial functions. Judges must be free from the influence of other branches of the government or other sources of pressure or interference.⁷⁵ Judicial independence cannot either be judged in the abstract or on mere constitutional assertions. It must be measured in the manner in which judges are appointed, promoted and impeached. The operational freedom of judges also matters a lot in the ascertainment of their judicial independence.

The scheme for the appointment and service conditions of judges, judicial supervision, and judicial review is not consistent with the constitutional spirit of the independence of judiciary. The JACs (established at the Federal and Regional levels) are assigned a major role in the appointment and promotion of judges and in disciplining them.⁷⁶ The composition of the JACs, both at the federal and regional level, their role in the appointment of judges and in the matters pertaining to judicial discipline, and the procedure followed by them while making judicial appointments and promotions and taking disciplinary actions, *inter alia*, however, leave room for the executive to influence the structural and functional facets of the judiciary.⁷⁷ The JACs are dominated by the executive.⁷⁸ The role of JACs in appointments⁷⁹ or dismissal⁸⁰ of

⁷⁵ S. Burbank, *What Do We Mean by Judicial Independence*, OHIO ST. L. J., 323 (2003).

⁷⁶ Federal Judicial Administration Commission Establishment Proclamation 24 of 1996.

⁷⁷ (The presence of key executive or influential political figures on JAC creates a chilling effect on its ability to act independently in appointing or promoting judges. The appointment and promotion of judges is conducted behind closed doors by the executive and the role of the JAC is to approve lists before they are sent to the legislature). See A. Fiseha, *Some Reflections on the Role of the Judiciary in Ethiopia*, RECHT IN AFRIKA, 1, 23 (2011).

⁷⁸ The World Bank, *Ethiopia: Legal and Judicial Sector Assessment* (Washington, USA: The World Bank, 2004) 17-18.

⁷⁹ (There are some reported instances where judicial appointments are made with no involvement of JACs at all. In the Oromia Regional State, sixty judges were appointed for the (State) Supreme Court, High Court

judges is minimal. There is an observable tendency for the executive and/or the legislative to try to retain or reclaim powers through appointments, influence on the composition of judicial oversight bodies and new legislation.⁸¹ Further, the JACs are constitutionally empowered to decide on the salary and other allowances but their decision cannot be operative unless it is approved by the executive. Judiciary also does not have any power to prescribe qualifications, recruit or transfer its supporting staff. These roles are assigned to the Civil Service Commission.

The FDRE Constitution vests judicial powers in courts only⁸³ and requires the judges to be solely directed by the law.⁸⁴ 'Judicial powers' naturally include the power to interpret and apply the law

and Wereda courts by the President of the Supreme Court in 2002. The Regional Council also appointed judges without involving the JAC). See A Tegene, *Independence and Accountability of Oromia Regional State Judiciary in Light of the Judicial Reform Program* (Unpublished LL.M. Thesis, Addis Ababa University, 2007) 82.

⁸⁰ (By virtue of art. 79(4) of the FDRE Constitution, no judge, except on the grounds of proved violation of disciplinary rules, gross incompetence, inefficiency, illness that precludes him from discharging his judicial functions, can be removed from his office before he reaches the retirement age. The retirement age of judges, by virtue of the Proclamation 24 of 1996, is sixty years. Judges can be removed from office based on any of these grounds only when the JCA concerned arrives at the decision and it is approved by a majority vote by the concerned legislature. However, certain instances exhibit deviation from the rule and procedure. For example, in 1995 in the Oromia Regional State, three hundred and eighteen judges were dismissed without the involvement of the JAC and without following any constitutional procedure. In 2000, thirteen judges were dismissed by the Oromia Regional Council without the knowledge of the JAC. See Tegene, above note 79, 68 and 87. In the Gambela Region also three Supreme Court judges were arrested for releasing a suspect on bail and later on dismissed by the regional government without following the stipulated procedure). See O.O. Gilo, *Problems faced by the Judiciary in the Gambela Region* (unpublished, LL.B. thesis, Ethiopian Civil Service College, 2000) 15-25.

⁸¹ Ministry of Capacity Building of the Federal Democratic Republic of Ethiopia, *Comprehensive Justice Reform Program: Baseline Study Report* (Amsterdam, the Netherlands: Justice Reform Program, 2005) 160.

and to ensure the observance of the Constitution. However, the FDRE Constitution confers on the House of the Federation (HoF), one of the bicameral Federal Parliamentary Houses,⁸² the power of judicial review, constitutional interpretation and adjudication of constitutional disputes.⁸³ Courts in Ethiopia are stripped off the power of judicial review and constitutional interpretation.

The constitutional spirit and scheme of non judicial constitutional review is further extended to issues arising from any: (i) proclamation emanating from the federal or state legislature, (ii) regulation and directive issued by any federal or state governmental institution or authority, and (iii) international agreements ratified by Ethiopia.⁸⁴ The constitutional design for non judicial review and adjudication of constitutional issues by the HoF, not by the courts, gives another blow to judicial independence.⁸⁵ It, in ultimate analysis, doubts professional ability and credibility of the Ethiopian courts in handling constitutional issues.

There is a general perception that the autonomy of the judiciary in Ethiopia is weak.⁸⁶ Ethiopians have a low perception of judicial

⁸² THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Art. 53. See Art. 61 for its composition.

⁸³ See THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Arts. 62(1), 83(1). (The HoF, however, is required to seek investigation of constitutional disputes and controversies through the Council of Constitutional Inquiry (CCI). See THE CONSTITUTION OF FEDERAL DEMOCRATIC REPUBLIC OF ETHIOPIA, 1995, Arts. 62(2), 82(2).

⁸⁴ See Council of Constitutional Inquiry Proclamation 250 of 2001, and arts. 2(5); Consolidation of the House of the Federation and Definition of its Powers and Responsibilities Proclamation 251 of 2001. art. 2(2).

⁸⁵ K.I. Vibhute, *Non Judicial Review in Ethiopia: Constitutional Paradigm, Premise and Precinct* 22(1) AF. J. INT'L COM. L. 120 (2014); T.S. Bulto, *Judicial Referral of Constitutional Disputes in Ethiopia: From Practice to Theory* 19 (1) AF. J. INT'L COM. L. 99 (2011).

⁸⁶ (Under the Institutions Pillar of the 2007 Global Competitiveness Index, Ethiopia was ranked 117 out of 128 countries with respect to judicial independence). See, African Development Fund *Federal Democratic Republic of Ethiopia: Country governance profile* (African Development Bank, 2009) ¶ 3.7.1.

independence.⁸⁷ Majority of Ethiopians believe that the judiciary in Ethiopia is not an impartial institution for the resolution of disputes. It does not enjoy the required level of trust both from the political branches and the wider public.⁸⁸

Legislative Function

Proclamation 271 of 2002 allows the 'judiciary' in Ethiopia to 'initiate' and 'submit' draft laws on matters within its 'jurisdiction' to the HoPR.⁸⁹ This provision, in the absence of a definition of the key term 'judiciary' in the Proclamation, becomes vague. It is not clear as to whether the proclamation allows each and every Ethiopian court to 'initiate' and 'submit' draft laws. Further, in a democratic polity, where legislative initiatives primarily rest with the peoples' representatives, the statutory provision seems to be inconsistent with, and goes against the spirit and canons of the doctrine of separation of powers.

Further, a court may not be impartial and truly objective in deciding contested claims based on, or arising from, the 'law' initiated by it, as the court would be the real author of that law. The provision, thus, goes against the spirit of judicial independence and objectivity. It, in a way, also amounts to an unconstitutional encroachment on the powers of the legislative and executive wings of the state.⁹⁰

Conclusion

During the first phase of the imperial era, the judicial and executive branches of the state were not separated. The judiciary, as an institution, emerged as a part of the executive. Adjudication of cases by courts was closely monitored and supervised by the executive. The judiciary hardly had any separate existence of its own and was considered as a part of the public administration.

⁸⁷ Ministry of Capacity Building, *supra* note 81 at 159.

⁸⁸ Fiseha, *supra* note 77 at 25.

⁸⁹ House of Peoples' Representatives Legislative Procedure, Committees Structure, Art. 4(2) & 4(3); Working Proclamation 271 of 2002.

⁹⁰ Ministry of Capacity Building, *supra* note 81 at 131.

Plausibly, placing reliance on the political dictum that the King is an ultimate source of 'justice', courts in Ethiopia, during the era of Emperor Menelik II and Emperor Haile Selassie I, were supposed to dispense 'justice' on behalf of and in the name of 'His Majesty'. The Minister of Justice had a major say in the administration of justice. The monarch, who used to sit in person in *His Majesty's Zufan Chilot* (Crown Court), had also the ultimate power to review cases and thereby to do 'justice' to his subjects.

Only after the 1931 Constitution was adopted did the judiciary emerge as a separate institution to be constituted by persons having judicial experience. The Imperial Supreme Court and the High Court of Ethiopia were made relatively free from executive influence. The 1955 Revised Constitution gave further boost to the independence of judiciary. It not only vested 'judicial power' in the courts but also mandated them not to be subservient to 'an authority other than the law', to be independent in conducting trials, and to decide cases 'in accordance with the law'. It also injected the idea of the supremacy of the Constitution in the administration of justice.

However, the judiciary in Ethiopia saw a decline during the *Derg* regime. It was reduced to an insignificant institution. It, with newly recruited judges of lesser experience and qualifications, was left to handle merely mundane matters. Countless special tribunals, with judicial powers, were established to undermine the judicial authority of the courts. It brought the judiciary under the authority of the Minister of Law and Justice. Judicial independence, though assured in the PDRE Constitution, was put at stake by, *inter alia*, introducing the system of appointment of judges by election by the *Shengo* (Legislative Assemblies) at the national, administrative and autonomous regions for a term of five years and empowering the President of the country, in certain circumstances, to dismiss the President, Vice President and judges of the Supreme Court. *Shengo* was empowered to remove judges at its whim.

The FDRE Constitution, supplemented by a couple of proclamations enacted in pursuance thereof, has introduced a highly decentralized and parallel three tier court system at the federal and regional levels. Similar to the 1955 Revised

Constitution, it vests the 'judicial power' of the federal government in the federal courts and that of a state government in the state courts. It assures the independence of judiciary as it directs the courts to be 'free from any interference of influence of any governmental body or official' and to be 'directed solely by the law' in the performance of their functions.

Now, unlike in the pre FDRE Constitution era, the Ministry of Justice and the State Justice Bureaus have no authority over the federal and state courts respectively. However, the manner of recruitment of judges by the JAC and the non judicial review and the interpretation of the Constitution, as indicated in the preceding sections, go against the spirit of judicial independence. Contemporary Ethiopian courts have limited judicial autonomy. The statutory provision authorizing the judiciary to 'initiate' and 'submit' draft laws to the HoPR goes against the canons of the doctrine of separation of powers.

The Ethiopians, plausibly due to their professionally less competent judges, the constitutional design that restricts the autonomy of the judges, and the interference of the executive in the administration of justice, have a low perception of the judiciary as a 'justice' delivery institution. Judges hardly have any prestige in Ethiopia. This public perception may be construed as a historical hangover. At no point did the Ethiopian court system have a separate identity and existence. This trend has created a mind set in the succeeding generations of Ethiopians that the executive is the most important or sole institution of the government.⁹¹

History also reveals that the judiciary never survived the downfall of the regime under which it was established. The *Derg* regime ensured that the imperial judiciary was crippled when it took reins of the country. It, by a variety of measures and pretexts, got rid of most of the senior and experienced judges of the imperial courts. Subsequently, the EPRDF, when it overthrew the *Derg* regime after a long civil war, again by a variety of measures, removed most of the judges associated with the brutal military government. One of

⁹¹ Canadian International Development Agency (CIDA) *Independence, Transparency and Accountability in the Judiciary of Ethiopia* 99 (A Draft for Consultation) (August 2008).

the cumulative effects of these historical facts is that the modern judiciary, to a large extent, is structurally weak. It is managed by professionally less qualified and less independent judges.⁹² An inevitable consequence of such a structurally and operationally weak judiciary and of low prestige of the judges is that the public hardly has any respect for, and trust and confidence in, the courts.⁹³

Judicial reforms, in general, and the system of appointing, promoting, and removing judges in particular deserve to be a top priority for the modern democratic government so that the judiciary, unlike in the past, can emerge as an effective third branch of the government as well as a meaningful institution for the dispensation of justice. Every possible legislative as well as administrative measure, with utmost political sincerity and will has to be directed to ensure and strengthen the independence of the judiciary; it deserves to be an agenda of the state managers. With this spirit, the system of appointment, promotion, removal, along with other related matters, deserves reconsideration with an open mind. Judicial independence and separation of powers in Ethiopia also deserve serious deliberations amongst all the stakeholders at all the possible platforms.⁹⁴

⁹²(The historical merger of judicial and executive functions and interference of the executive in the administration of justice is not without impact even today. The Executive, at the regional level, even today, thinks that it is neither unnatural nor unethical to dictate its decisions to a judge or to blatantly interfere, in a variety of ways, with the administration of justice). See Fiseha, *supra* note 77 at 23-24.

⁹³ See Ministry of Capacity Building, *supra* note 81 at 160; The World Bank, *supra* note 78 at 20-21; CIDA, *supra* note 93.

⁹⁴ See Ministry of Capacity Building, *supra* note 81, and CIDA, *supra* note 93.