

Championing Judicial Independence in time of Democratic Transition

Keynote address at the Bar Council International Committee's 13th

Annual International Rule of Law Lecture

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Members of the Bar Council of England and Wales,

Invited Guests,

Ladies and Gentlemen:

1. It is a great honour for me to join you at this year's annual International Rule of Lecture of the Bar Council of England and Wales and to address this distinguished audience on an issue of enormous significance to each and every one of us at any time and particularly so to me and my country today.
2. I also consider myself lucky to be invited especially this year when you are celebrating the 100th anniversary of the *Sex Disqualification (Removal) Act in 1919* here in the United Kingdom. I am looking forward to speaking at the *Women in Law* event this Wednesday.
3. In joining you in your celebrations to mark the centenary of this path-breaking achievement in the history of the struggle of women for emancipation and equality around the world, I am mindful of the fact that it was exactly a year ago, in November 2018, that I assumed my current position as the first female President of the Federal Supreme Court of Ethiopia.

4. Also, the fact that I am speaking today here in London a mere two years into the tenure of the very first female President of the UK Supreme Court, Lady Hale, elevates my sense of delight to the highest possible level. I still recall being so inspired when I first learnt that Baroness Hale was appointed in 2004 as the very first female Law Lord in the long history of the UK legal system.

Ladies and gentlemen,

5. The topic of my keynote address today is *Championing Judicial Independence in time of Democratic Transition*. I am cognizant that my speech is part of your International Rule of Law Lecture series. As concepts and aspirations, rule of law and judicial independence are so interrelated that it is hardly possible to conceptualise one without the other. Indeed, it is hard to imagine a democratic system of government in the absence of either of these two critical elements.

6. And when I talk about rule of law, I don't need to go beyond these islands for the most authoritative expression of its essence. As your own Lord Bingham put it, the core of the principle of rule of law is that

“all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.”

7. I thought Judge Bingham was talking about the life I lived in my own country as a child growing up, as a citizen leading my ordinary life, and as a gender and human rights activist fighting for a modicum of justice when he wrote:

“The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance,

the show trial, ... the confession extracted by torture, ... the waging of aggressive war. The list is endless.”

8. Speaking on *Judicial Independence in time of Democratic Transition*, I cannot help feeling the weight of these words from Lord Bingham.
9. Of course our laws are very clear in their articulation of the fundamental principles of legality. The principle of non-retrospective application of Criminal Law has been part of our laws since our first Penal Code in 1957; our courts “may not treat as a breach of the law and punish any act or omission which is not prohibited by law”; they “may not impose penalties or measures other than those prescribed by law”; they “may not create offences by analogy”; “nobody shall be punished twice for the same act”; etc.
10. The history of the law and legal system in my country has been a history of the use of the law and its enforcement institutions as tools for the realisation of the whims of whoever happens to be in political office. The conception of the law as a set of norms governing all of us equally, administered by neutral institutions acting as neutral arbiters, etc. remains work in progress.

Ladies and gentlemen,

11. When our laws and institutions were used as tools of political power, all citizens suffered. But, I long felt that women suffered even more. That was why I dedicated much of my professional life to the fight for women’s rights.
12. Starting in 2015 in particular, the Ethiopian society rose up demanding an end to oppression, torture, and the wanton violation of human rights. Three years later, in April 2018, a new generation of leaders assumed political office.

13. Led by Prime Minister Abiy Ahmed, the new Government was determined to answer the cry of the people, releasing thousands of prisoners, banning the use of torture and closing down the notorious Maekelawi federal crimes investigation centre in Addis Ababa that was known as the torture centre of the day, opening up the political space for groups that had been banned to operate in the country, revision of repressive laws, etc.
14. This “head-spinning” series of bold steps so early in the life of the new Government took every one of us by surprise. Thankfully, the new Government also appreciated that these changes, sweeping and necessary as they were, would not last unless they were underpinned by equally radical institutional reform. It was as part of this historic shift in the relationship between citizens and their Government that I was appointed to lead the Federal Supreme Court in November 2018. For the women’s rights activist that I had been, I was delighted to see the appointment of a female head of state and a gender-balanced cabinet in which 50% of the ministers are women.
15. Another notable change have been the appointment of a former political dissident and inspiring leader as Chairwoman of the National Electoral Board of Ethiopia, while a well-known and fearless defender of human rights and former victim of their violations himself now leads the National Human Rights Commission.

16. These breath-taking domestic reforms were also accompanied with regional efforts to restore peace to the Horn of Africa, including the phenomenal deal to bring an end to the state of hostilities between Ethiopia and Eritrea that had been there for the past 20 years.

When the Norwegian Nobel Committee awarded the Nobel Peace Prize to the Ethiopian Prime Minister recently, there was a sense of jubilation and pride in my country; most of us took this prestigious award as an endorsement of the path Ethiopia has chosen more than as a recognition of what it had achieved already.

Ladies and gentlemen,

17. It is against this exciting and hopeful background that, tonight, I will share with you the path my country Ethiopia is taking to build a democratic system with an independent judiciary at the centre.

18. When I received the call offering me the position to be President of the Supreme Court, I did not hesitate to abandon my comfortable job at the UN and accept the challenge. For me, this was an opportunity to continue my lifelong passion to promote justice on a larger scale.

19. However, I also knew from day one that the task before us was and remains highly complex, even intimidating. Ethiopia has a long and proud history in many senses, but rule of law and judicial independence have not been part of that history.

Indeed, these are not attributes of the absolute monarch that ruled the country for much of the 20th century or the military dictatorship that replaced it in the mid-1970s. When the current Ethiopian constitution was adopted in 1994 following the

downfall of the military regime in 1991, whatever independence was granted to the courts was limited largely to the text of the constitution. Indeed, the judiciary was treated as just another division of an all too powerful executive.

20. Nor has the transition itself been easy; perhaps, no transition of the magnitude that is taking place in Ethiopia today could be easy. Far too many people have been victims of senseless identity-based violence, with our law-enforcement capacity stretched to the limit. In far too many occasions, and despite my best intentions, I feel powerless in the face of injustice engulfing communities. It is in times such as this that we understand the limits of the judiciary; let alone a fledgling judiciary such as the one I am leading, even the most well-established and the most well-resourced judiciary would achieve little unless it is supported by an equally competent and professional system for the detection, investigation and prosecution of crimes. Some of the challenges also require political solutions. In the final analysis, the judiciary cannot be an island.

Ladies and gentlemen,

21. In spite of these challenges, not everything about the judiciary is bleak in my country. For example, unlike in previous times, the Executive is increasingly respectful of the independence of the judiciary, as are the judges increasingly prepared to fight any undue intrusion from the Executive in their work. But of course, the painstaking process to lay the foundations for a strong and independent judiciary can only be described as work in progress, with challenges too many to count and are yet to be addressed. The lack of adequate understanding as to the status and role of the judiciary in the effort to establish and consolidate a democratic system of government, the absence of clear and objective standards for the appointment and removal of judges,

poor physical infrastructure, inadequate incentives to attract qualified lawyers to serve in the judiciary, inefficient and archaic working methods, poor use of technology, etc. are some of the challenges that I and my new leadership team are working hard to change.

22. An even greater challenge for the judiciary is the lack of public confidence in the administration of justice despite the hard work and commitment of the majority of our judges. It will take years to undo the damaging, widely-held and well-founded concern that the judiciary had been an institution in the service of the political elites rather than an impartial arbiter of justice. This lack of confidence appears to increasingly affect the perception of courts even in cases that have little to do with politics. Even though there is no reliable data on this, I have witnessed a tendency to regard judges to be corrupt and partisan. Overcoming these challenges in perception – and winning the confidence of the general public – thus constitutes one of the most important priorities of my tenure as president of the Court.

23. The approach we have taken in championing judicial independence in this time of transition is far from revolutionary; we are taking our time, focusing on empowering our judges to ensure that they stay vigilant of any attempts by the Executive to intrude into their day-to-day task of administering justice and that they discharge their duties with the highest level of professionalism and integrity.

24. Among the major steps we have taken to consolidate the independence of the judiciary include the revision of laws governing the Judicial Administration Council and those relating to the structure of the federal courts.

The revision of the laws is intended to more strongly champion judicial independence. The major changes in the laws relate to the composition of the Judicial Administration Council, the criteria for the appointment and removal of judges, the benefit package for judges, judicial tenure, the right of judges to form their own independent professional associations, and adjustments to the scope of jurisdictions of trial and appellate courts.

25. Once complete, these changes will mean a more pyramid-shaped structure for the courts, a system of professional staff that support the work of the judiciary to be more effective, a mechanism for a “leave to appeal” screening system, and illustrative definitions, along with guidelines, for major errors of law that would warrant the granting of leave to appeal.

26. The changes to the structure of the judiciary are expected to significantly alleviate the burden on the Supreme Court, which with its current caseload, is working more like a regular appeals court rather than the highest court of the land because of the unrestricted nature of the appeal process. Finally, we have also developed a judicial code of conduct and rules of procedure for disciplinary measure as well as a performance standard for judges.

Ladies and gentlemen,

27. An independent judiciary presupposes judges of the highest calibre and of the utmost integrity. Also, to win the confidence of the public, the judiciary must be staffed with judges that are representative of the society it is meant to serve. That is why, in the past year alone, we have appointed a number of new and highly qualified judges from diverse backgrounds, including a number of women.

Just last week, I held a seminar with female judges in federal courts. The feedback from most of them was highly encouraging and inspiring. One of them said “When I learned that a female chief justice was appointed, I made a commitment to work even harder than I already did”.

28. Also for the first time this year, the judiciary asserted its independence by submitting its own budget directly to the Parliament rather than go through the Executive as had been the tradition till now.

29. Ensuring rule of law and the independence of the judiciary has become a necessity for my country. In the current context of my country, what constitutes a great threat to judicial independence as well as its effectiveness and efficiency is no longer direct intrusion from the executive but the difficulty to respond adequately to the security challenges and the resulting mass injustice being suffered by the citizens.

Ladies and gentlemen, Distinguished Participants,

30. Under the 1995 Ethiopian Constitution, the power to review the constitutionality of laws and actions of the other government branches is not given to courts. Rather, it is the Upper House of Parliament that has the power to interpret the Constitution. This is one feature of the constitution that is subject to severe criticism from different quarters. It also created a common understanding among academics and even judges that regular courts cannot make judicial review of government acts. On the other hand, despite the power given to the Upper House, the constitution requires all state organs including the judiciary to respect and enforce fundamental rights enshrined in the constitution.

31. While the judiciary could have used this provision of the constitution to hold the executive accountable for the infringement of rights, the culture of making reference to the constitution in adjudicating cases was low due to the conviction that applying the constitution as legal document in adjudicating cases is ultra-virus and amounts to snatching the power of the Upper House. Hence, the judiciary has been inactive in effecting checks and balances against the legislature and the executive for infringement of rights guaranteed by the constitution.

32. On the other hand, the absence of an independent and robust bar has hampered the process of building strong and independent judiciary. Part of the problem is attributable to the absence of a law that enables the formation of an independent bar. Hence, the link between the bar and the bench was loose and the role lawyers could play as “officers of the court” was restricted. With the exception of the significant role played by the Ethiopian Women Lawyers’ Association in regard to advocating for the promotion and protection of the right of women, although there are associations of lawyers, the culture of challenging the government for breach of human rights collectively was close to non-existent.. Yet, the role of an independent and strong bar in ensuring the independence of the judiciary is not a matter to be overlooked. The good news is that Ethiopia is drafting a law that will enable the establishment of a bar.

Ladies and gentlemen, Distinguished Participants,

33. In this regard I would like to appreciate the work of the Bar Council of England and Wales for its work including this annual lecture.

34. Looking at opportunities and challenges ahead, the prospect of promoting judicial independence in Ethiopia is likely to be tested by the 2020 general election.
35. Regular and periodic elections are a pillar of any democratic process. Elections are also instrumental in peace building and conflict resolution by creating an inclusive space for all rivals to political office and a sense of ownership of the political process by the electorate. Often election results are affected by simple human error, incompetence of election officials, corruption, fraud, violence, intimidation, and other irregularities. Some of these irregularities may be minor and inconsequential. However, many others are significant and affect the fairness and legitimacy of an election outcome. Moreover, irregularities in elections can be a source of violence. For example Kenya, Zimbabwe and Ivory Coast have experienced violence in post-election periods following a contested result. Indeed, an independent judiciary plays crucial role in such period. And the legitimacy of the decision of the judiciary on electoral disputes relies on the perception whether it is a compromised or independent judiciary.
36. Ethiopia will conduct a general election sometime in 2020. Therefore, while I cross my fingers that these elections will take place smoothly, we are making plans to establish a steering committee to lead our preparations for all contingencies, to train judges, and issue an electoral dispute resolution guideline.
37. Another task for an independent judiciary in a time of transition is to serve as a medium of progressive social transformation through innovative and progressive decisions that are founded on principles of human dignity, equality and fundamental rights.

Social transformation is not achievable without a holistic approach of promoting all generations of rights, and the role the judiciary can play in social transformation should not be undermined.

38. The democratization process in many African countries is linked with social transformation. In addition to classical constitutionalism where the focus had been on civil and political rights, the developing jurisprudence in the continent addresses government's duty to respect and protect social, economic and cultural rights. This is immensely contributing for social transformation and hence to democratic transition. In this regards I would like to mention few examples of court decisions that shows the role courts can play in transforming society.

39. The first case is from Ethiopia where I myself was involved as the Directress of the Ethiopian Women Lawyers' Association (EWLA). The case was brought against a 14-year-old girl charged for murder of a man who had abducted and raped her. The girl was kidnapped on her way home from school by a man who wanted to marry her and his 11 accomplices. The girl escaped with a rifle and shot her kidnapper while on the run. EWLA succeeded in getting the accused an acquittal on the ground of self-defence. The decision set off a public debate over Ethiopia's age-old tradition of kidnapping for marriage. A globally acclaimed feature film entitled 'Difret' meaning Courage was produced later based on this case.

40. The second notable case is from Tanzania whereby in October this year, the Supreme Court of Tanzania rendered a decision for the minimum age of marriage to be 18.

The case was initiated at the High Court by a Civil Society Organisation challenging the constitutionality of the Law of Marriage that set the age of marriage for girls at 15 with parental consent.

The High Court resolved the case in favor of the applicant. The Attorney General of the State appealed against the ruling claiming that the disparity in the minimum age of marriage between men and women was a compromise to accommodate customary, traditional and religious values on marriage. The Supreme Court endorsed the decision of the High Court upholding that the law violates girls' fundamental rights to equality, dignity, and access to education.

41. A third case I would like to mention is a ruling of the Ugandan Supreme Court in relation to violation of maternal health rights. The case was initiated against the Attorney General in 2011 at the Constitutional Court by a CSO and families of two pregnant women who died in childbirth because of lack of adequate treatment. The Constitutional Court agreed with the government's argument that the issue contravenes with the doctrine of separation of powers and the judiciary had no right to dictate to the executive on matters related to budget allocation and service delivery. The petitioners appealed the case to the Supreme Court. The Court referred the matter to the Constitutional Court ruling that the constitutional court indeed is not required to determine, formulate or implement the health policies of government but to determine whether the government has provided or taken all practical measures to ensure basic medical service is provided to the people.

Ladies and gentlemen,

42. Before I conclude, I would like to re-affirm to you that the promotion of rule of law is a global issue as much as it is a national agenda. The decision of the UK Supreme Court to adjudicate the case of Shell vs Ogale/Bille Community in the Niger Delta is evidence of the transcendent nature of rule of law. The recent decision of the Court on the constitutionality of the parliament's suspension, too, once again reminded us that an independent judiciary is the guardian of checks and balances between the legislature and the executive in the interest of citizens.

43. I would like to recognize that the work of the British judiciary and its wealth of jurisprudence is a source of inspiration for judges and institutions in countries like mine across the globe. In fact, part of the reason why I and five members of my delegation are in the UK this week is to learn a great deal from the experience of your exemplary justice system. And let me take this opportunity to thank the Embassy of the United Kingdom in Addis Ababa and broadly the UK government for hosting us this week.

Ladies and gentlemen, thank you for your attention!