Independence of the Judiciary in Parliamentary Democracy: The Ethiopian Experience

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1. The Concept, Importance and Basic Principles of Judicial Independence

1.1 Definition of Judicial Independence

Judicial independence is the doctrine founded on the premise that decisions of the judiciary should be impartial and not subject to influence from the other branches of government or from private or political interests. As provided in many legal instruments around the world, judges should be guided only by laws and that is the true meaning of judicial independence.

As declared in the Act of Athens, judges should be guided by Rule of law, protect and enforce it without fear or favor and resist any encroachments by governments or political parties on their independence as a judge. Judicial independence implies that freedom from interference by the executive or legislative with the exercise of the judicial function. However, it does not mean that the judge is entitled to act in arbitrary manner. Though we say that the judiciary must be independent, it does not mean, of course, that judges should not be subjected to any form of supervision. In fact, there should be effective ways of supervising judges for they are prone to abuse their power as any official of other organs of the state. However, this must be done with out interfering in their judicial function. Courts may be supervised through such means as appointment, disciplining and dismissing judges according to the law. In addition to these, a judge should not be allowed to try a case in which he is somehow personally interested and he should always give reason for what he decides as a judge.

1.2 The Importance of an Independent Judiciary.

Judicial independence is an essential constitutional principle to the impartiality of justice and it is related with rule of law. The rule of law implies, among other things, the existence of law which defines the rights and obligations of individuals and the supremacy of these laws over any body or person. Nevertheless legislation by itself does not create rule of law; the existence of an impartial and independent body which interprets these laws is imperative.

Thus, the role of the courts in establishing a system under the rule of law is immense. They adjudicate cases not only between individuals but also between the state and individuals, thereby being capable of safeguarding the individual from the arbitrary and illegal action of the state. Fundamental human rights could be respected through a properly functioning of courts. Courts declare laws as unconstitutional if such laws contradict with the constitution, provided however that such power is vested upon the courts.

However, courts could dispense such a glamorous responsibility if they are free from any direct or indirect pressures. Hence, judges should be morally upright, professionally competent and they should also be independent.

1.3 Basic principles of judicial independence

Before discussing the Ethiopian experience with regard to judicial independence, it is desirable to analyze the basic principles of judicial independence.

The existence of such universal principles may be questioned due to the diversity of political and legal realities of different countries. It is true that such differences would entail different mechanisms of realizing the independence of the judiciary. However, notwithstanding the diversities of political systems and legal mechanism in different countries, there is a basic and substantial consensus on the principles and minimum standards related to the independence of judiciary in the

constitutions and legal systems of the world. The following are the basic principles of judicial independence.

- Separation of the judiciary from the legislature and the executive organ
    - *Separation of persons exercising judicial power;*
    - *Separation of the function of the judiciary.*
- Direct Interference in the judicial process
- Execution of court pronouncements
- Immunity of judges
- Freedom of expression and association
- Commitments of the judges
- Provision of adequate resources for the administration of justice

2. Independence of the Judiciary in Parliamentary Democracy: The Ethiopian Experience

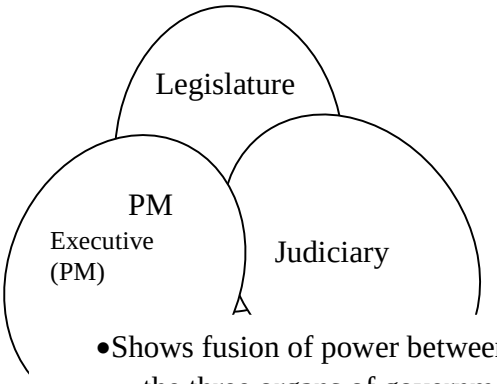
There are two main types of political systems. These are presidential and the parliamentary system. Each of them has its own advantages and disadvantages.

Parliamentary government is defined as a form of government in which the executive branch is made up of the prime minister and the official's cabinet. And in such a system the executive branch is selected by the legislature. From this one can deduce that in a parliamentary system of government there is a tendency of fusion of power between executive and legislative organ of the government.

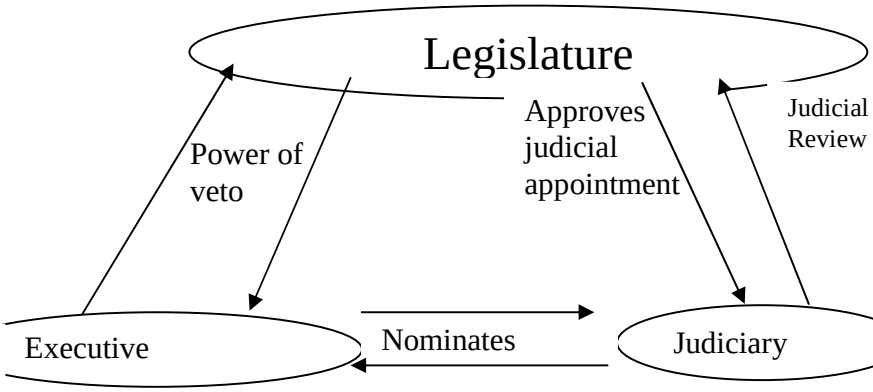
Unlike parliamentary government, presidential government is a form of government in which the legislative and executive branches are separated, independent and co-equal. Hence, in presidential system the three branches of the government appear to be separated.

The following diagram clearly shows the difference in the two forms of government.

A)Parliamentary government B) Presidential government



- Shows fusion of power between the three organs of government



Determines constitutionality of policies

- Shows greater separation of powers and use of check and balance

In presidential system, the legislative branch is separated from the executive branch and these entails the higher chance of check and balance of one another. But in parliamentary government, the system allows fusion of power between the executive and legislative branches of the governments. Hence, in the latter case the probability of check and balance appears to be less likely. Therefore, the existence of an independent judiciary is a pillar in parliamentary form of government to check the activity of the government. There are different mechanisms which enable countries to have strong and independent judiciary in parliamentary system. These are:

1. *Constitutional guarantee of the independence of the judiciary.*
2. *Non political selection of judges.*
3. *Self – regulating legal profession.*
4. *Parliament does not comment on the cases which are before the court.*

The 1995 constitution of the Federal Democratic Republic of Ethiopia established a parliamentarian form of government.

3. Separation of powers under FDRE Constitution

Separation of power is the division of governmental authority into three branches of government legislative, executive and judicial- each with specified duties on which non of the other branches can encroach.

From this, one can understand that the power of the government must be divided into legislature, which has the supreme and exclusive power to make law (Rule initiation), executive to enforces the law (Rule application), and the judicial whose sole function is to make binding orders to settle dispute (Rule adjudication).Each of these organs must carry on their own respective duty. Historically, in the past two regimes, the idea of separation of power would not be expected because of the over whole nature of their system. The FDRE constitution incorporates these organs of government under its provision. Both, the federal government and member states shall have legislative, executive and judicial power.

However, a mere fact of structuring the organs of the state into legislative, executive and judiciary does not entail separation of powers because in addition to such organization there are different parameters that help examine the degree of separation of power in any country.

In this regard, Vile (1967) lists some yardsticks that help to evaluate the degree of separation of power. These are:

- The government should be divided in to three categories, legislative, executive and judiciary;
- The three specific government powers should be separated, and
- The three branches of government shall be composed of quite separate and distinct groups of people, with no overlapping membership.

On the bases of Vile's criteria it is better to see the FDRE constitution to evaluate the constitutional principle and pillar of democracy, that is separation of powers. Under this very constitution it is provided that:

> *The federal government and member states shall have legislative, executive and judicial power. The house of Peoples Representatives shall have the power of legislation in all matters assigned by this constitution to federal jurisdiction. The highest executive powers of the federal government are vested in the prime minister and the council of ministers. Judicial powers, both at federal and state levels, are vested in the courts.*

The very existence of these articles suggests that the FDRE constitution upholds the principle of separation of power because it seems to satisfy the first and the second criteria set by Vile. However, with regard to the third yardsticks of Vile, there seems to be no separation of power in the FDRE Constitution, since it is provided in the Constitution that a political party or a coalition of political parties that have the greatest number of seats in the House of People's Representatives shall form the executive and lead it.

This article of the Constitution allows members of the House of People's Representatives to be members of the executive at the same time. This inevitably creates a solid line fusion of power in the two organs. As empirical observation shows, the different individuals sitting at the top as ministers who are responsible for rule implementation, at the same time are sitting as a member of the parliament to promulgate law.

In addition, in the mentioned articles the executive branches of the government through its various administrative agencies have come to do tasks which are similar to those done by the legislature and the judiciary. This act of the executive organ contradicts with the principle of separation of power which holds that the executive, legislative and judicial powers should not be combined in the same person or the same group of persons.

Therefore, the FDRE Constitution does not clearly stipulate the constitutional principle of separation of power but all it provides is the function and duties of the three branches of the government. Hence, it is more of a division of labor than separation of power. Even this division of labor is highly contested, owing to the entitlement of the upper house to interpret the constitution which is the fundamental law of the land. In this regard Montesquieu, a French jurist and philosopher, says:

> *There can be no liberty when legislative and executive powers are joined in the same person or body of lords because it is to be administered in a tyrannical way. Nor is there any liberty if the judicial power is not separated form the legislative and executive power. If the three functions merge in to one organ, everything will come to an end.*

4. Judicial Independence in Ethiopia

Judicial independence is an instrumental value for the pursuit of rule of law and democracy. It is an undeniable fact that for effective justice administration, there should be an independent judiciary organ. This independence could be either personal or institutional.

4.1 Judicial Independence during Haile Selassie Regime

In the traditional system, there was no established legal profession or judicial services, government courts and judge. During Haile Selassie regime, there was a change in the traditional administration of justice. Although during this period courts were established by the law and vested with judicial power, the separation of the judiciary was not real because the power of the emperor was not in line with the demand of the judicial independence. In relation to this the 1955 revised constitution provided that:

> *The Emperor had the right and duty to maintain justice through the courts, pardons and amnesties and to commute penalties.*

In addition, the Emperor had the power to appoint judges with out any requirement of approval from the parliament. This all coupled with the Zufan Chilot jurisdiction had subordinated the Judiciary to the Emperor. This was evident from the following statement by Clapham:

> *…the principle of judicial independence conflicted with the absence in the traditional system of any distinction between judicial and administrative powers. The problem was resolved on paper by affirming the independence of the judiciary, while the emperor received powers to pardon to commute penalties and to maintain Justice through the courts. The balance has in practice been tipped to wards the Emperor by the continuation of traditional practices.*

During this period, there was no separation of power between the executive and judicial organ of the state. Hence, the attempt to separate the judiciary from the executive was not

an easy task. Thus, only the highest benches, that is, the high courts and the supreme imperial courts were able to be relatively free from the influence of provincial administrators. Governors' interference in the administration of justice was immense.

Furthermore, at this period, one could hardly say that the government and its officials were subjected to the law as to be restrained from directly interfering in the judicial process. The judges could not independently make a decision contrary to the will of the governor. If the judges made any decision against the will of the governor the governor might set-aside the court decision. This made the judiciary to be dependent in rendering judgment.

To sum up, the government during Haile Selassie is characterized by the fusion of powers. In other words, there is no separation of power; the constitution rather empowers the emperor to have an absolute power. Therefore, in such a system it is very difficult to assume an independent judiciary that is established for the administration of justice.

4.2 Judicial Independence during the Dergue Regime

After a long period of coronation, the absolute monarchical regime of Haile Selassie was over thrown by a military group called Dergue. With the coming of Dergue to office, a new change in the economic, social, legal, political and, most importantly, ideological sphere began to be introduced.

Dergue declared that Ethiopia is a socialist state with Marxist Leninist ideology. The system lasted for seventeen years till the fall of the regime. In the socialist state the idea of judicial independence is contrary to the Marxist theory of state organization because:

> *…… the judges have to submit to the direction of those who control soviet power…….. The judge is also a member of the party in the great majority of cases..….. As a member of the party he has to follow the prescribed line. The establishment of judicial independence by the constitution is a striking example of the gulf between law and reality.*

Therefore, in the socialist state the judiciary would not be expected to be an independent body from the state. As a result of the ideological line taken by the Dergue, the western concepts of rule of law and judicial independence had no place in Ethiopia. The absence

of rule of law means arbitrary and direct interference of the government, political parties and higher officials in the judicial function.

The Dergue was known for establishing various tribunals outside the judiciary assigning political appointees as judges, who rendered decisions under the influence and order of government officials. This is against the universally accepted principle of institutional and personal independence of the judiciary.

This time it was a period of political instability and armed conflict, therefore citizens were denied a fair public trial. The government took any "revolutionary measure" so as to maintain "peace" and "order" of the country.

At the time, there was no separation of powers between the executive branch of the government and the judiciary. Courts were subject to political control and were responsive to the requests and directions of Ethiopia's leadership. Various laws used to be issued which authorized security forces to search, arrest, imprison and use force with out any authorization from courts.

Dergue, after ruling the country with out a constitution for about 14 years which was characterized by gross human right violation and prevalence of rule of men, introduced a socialist oriented constitution called the constitution of the People's Democratic Republic of Ethiopia (PDRE) in 1987. This constitution declared the establishment of an independent judiciary as follows:

> *Judicial power was vested on one supreme court and courts of administrative and autonomous regions and other courts. Judges of the supreme courts are elected by the National Shengo, and those of regional courts are elected by their respective regional Shengo. The president, vice president and judges of the supreme courts are appointed by the National Shengo presented by the president of the republic. Judges and peoples assessors shall exercise their judicial function in complete independence; they shall be guided by no other authority than that of the law.*

Nevertheless, as the political and ideological realities were against judicial independence, one could not conclude that the constitution would establish practically an independent judiciary. Therefore during the Dergue regime the judiciary was not independence.

4.3 Judicial Independence Since 1991

After long years of civil war between Dergue and different political groups; in 1991 the EPRDF won the battle against military regime of Dergue in 1991.

Since the fall of the previous government efforts have been made to improve the justice system of the state in general and to create independent judiciary in particular.

4.3.1 Personal independence

There is a principle embodied in many modern constitutions that emphasize that:

> *Every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law, without any improper influence, inducement, or pressure, direct or indirect, from any quarter or for any reason.*

It is very important that judges should be free from external influence when they sit on the bench to decide matters brought to them. The crucial condition for judicial independence is the personal independence of the judge. Therefore, judges should resist any external influence so as to preserve justice and equity. To do so judges must be competent enough academically and professionally, otherwise, they become simply the "instrument" of the executive.

Competency is developed through judicial training. Regarding to judicial training in Ethiopia there is a kind of "Quota system" judicial training. Individuals who are members of a political party recruited from the different regional state are sent to a judicial training institution and trained there both "Legal" and "Political" skills. This trend is in violation of the international practice of judicial training.

The internationally accepted practice of judicial training is life long, well structured and accessible training programs for all judges, based on…modern adult education method…controlled by the judiciary and focused largely on the acquisition of judicial skills and attitudes.

Therefore, judges who are not competent, knowledgeable and confident enough to perform their task properly, will not be ready to resist and say no to any pressure from the executive organ.

Hence, this kind of judicial training particularly "Quota system" makes the judges to be dependent on the other branches of the government resulting in the judiciary being unable to win the heart of the society because such judges are an extension of the executive organ. This argument is supported by the following statement:

> *….if a country lacks….wise judges who will command respect and who are schooled and realistically prepared to enforce the constitution and other laws, there are indeed risks in placing too heavy a responsibility and too much expectation on the judiciary.*

Besides "Quota system" judicial training, the procedure of appointment of judges is another pitfall for the existence of independent judges. In relation to the appointment the F.D.R.E constitution provides that, "The president and vice president of the Federal Supreme Court shall up on recommendation by the Prime Minister, be appointed by the House of People's Representatives."

Although the Prime Minister brings his nomination to the House of Peoples Representatives for approval, there is no any yardsticks that is used by the House to check whether is the nomination based on loyalty to the ruling party or not. Regarding to other federal judges, the selection of judges is conducted by the Federal Judicial Administration Commission. The commission shall have the power to select those who qualify for judgeship.

This power of the commission makes the personal independence of judges vulnerable for encroachment because the commission is not purely a judicial organ; there are individuals

who are member of the House of Peoples Representative init. From this, one can conclude that there is fusion of power which violates the basic principles of independence of the judiciary from the control and influence of the executive and legislature.

Therefore, it is very difficult to assume the personal independence of judges because judges may not be able to decide cases solely based on the law and facts without leaning to politics and without fearing penalty for their decision.

In addition, though the objective of the proclamation is to establish the judicial administration commission in a way free from the influence of government organs, no article in the proclamation clearly states that judicial administration commission is explicitly protected from political interference.

Institutional Independence.

Personal independence is a necessary but not sufficient condition for the prevalence of an independent judicial organ. Judicial independence also means that the judiciary is independent of the executive and legislature and has jurisdiction, directly or by way of review, over all issue of a judicial nature.

The FDRE constitution declared the establishment of an independent judicial organ which evidenced from the following provisions:

> *An independent judiciary is established by this constitution. Judicial powers, both at federal and state levels, are vested in courts Judges shall exercise their functions in full independence and shall be directed solely by the law.*

By and large, it would be a gross misinterpretation of facts to assume the judiciary is independent from the control of the government because of the mere existence of a law governing the judiciary.

The FDRE constitution, though empower courts for any judicial act, it also gives power to the House of Federation to interprete the constitution which is not common in the federal state structure.

In many federal systems the power of interpretation is given either to the ordinary court or separate constitutional court. Accordingly, these courts not only have the power to interpret the constitution but are also, and even more importantly, entitled to decide on conformity of the laws with the constitution. The practice of constitutional interpretation in Ethiopia; however the F.D.R.E constitution snatched the inherent right and powers of the judiciary.

According to the constitution the authority to interpret the constitution is vested in the House of Federation which is composed of representatives of nationalities indirectly elected by the electorate at regional level. This seems to give the House of Federation the profile of a political organ than a judicial one. However, it is vested with a power which is a judicial one as provided in the constitution that the house has the power to interpret the constitution. All constitutional disputes shall be decided by the House of the Federation

These provisions of the constitution not only empower the House of Federation to interpret the constitution but also to decide constitutional dispute which is not common in many federal system.

Hence, the Ethiopian practice of interpretation of the constitution lacks a theoretically sound base to interpret and resolve dispute in relation to the constitution. Therefore, the F.D.R.E constitution prohibits the inherent right of the judiciary to interpret the constitution which can be considered as a pitfall for institutional independence of the judiciary because it is a political organ which is interested to resolve any constitutional issue.

Furthermore the judiciary complains about a whole list of factors affecting its performance…. lack of trained judges and resource…. and political pressure... From this, one can conclude that there is direct interference with the judicial process from the other branches of the government.

To conclude, although efforts are made to improve the justice system in Ethiopia, there is a direct or indirect interference from the other branches of the government in the activity of the judiciary. Therefore to establish a real and independent judiciary which is interested to rule adjudication efforts need from every stake holders.

5. Conclusion

When we see the long history of Ethiopia with regard to the concept of separation of power, there has been a solid fusion of power of law making, executing and adjudicating of cases in the hands of a few individuals. This fusion of power makes the individuals to become above the laws.

The modernization in state organization during Haile Selassie brought about a significant change on the administration of justice separating to some extent the judiciary from the government. Though there was some development, it is very difficult to assume the existence of an independent organ which was entrusted with rule adjudication.

During the Dergue regime, the very ideology of the system contradicts with the concept of constitutional principle of rule of law and independent judiciary. It was a time of the total subordination of the judiciary to the government. At that time, there was a gross violation of human right because of the fusion of the power of the three branches of the government in the hands of a few political elites.

After the coming of EPRDF to office efforts, were made to improve the justice system and try to limit the act of government by introducing the constitutional principle of separation of power and independent judiciary. However, there is no real independent organ which is entrusted with rule adjudication; therefore, the struggle to limit the act of government and for creating a powerful and independent judiciary must continue till not bowing to the will of any body is created.

6. Recommendation

The following points should be taken into consideration for the existence of an independent judiciary which will enable to adjudicate cases on the bases of law not guided by another authority.

- ❖ There should be a constitution which is a legal document not of a political document that protects the interest of the ruling class which is common in Ethiopia's constitution.
- ❖ The executive should be limited by the law and controlled by the legislature
- ❖ The separation of powers of three the organs of the state with methods of check and balance should be embodied in the constitution
- ❖ Courts should be authorized to interpret and have final say on constitutional issues
- ❖ Supervision of the judiciary i.e. appointment, disciplinary measure, promotion etc should be conducted by a purely judicial organ or an independent organ
- ❖ The act of administrative agencies should be limited by the law.
- ❖ Judicial training should be designed on the bases of the international practice of judicial training
- ❖ The executive should execute court pronouncement without redefining it
- ❖ There should not be any interference in the judiciary process of the state from the other branches of the government.
- ❖ The state should provide adequate material resources for the administration of justice.

References

1. Aharon B., (). ***The judge in Democracy***, Princeton University Press.
2. D.I, and et. al (1979). ***Case in Constitutional Law***. Oxford University Press.
3. Fasil N. (1997) ***Constitution for a Nations of Nations***. The Ethiopian Prospect, The Red Sea Press, inc
4. James C., (1997). ***Ethiopian Constitutional Development***. A source book, Haile Selasssie I University.
5. Jerome A. (1986). ***Constitutional Law, In a Nutshell***. (5^{th} edn). West Publishing Co.

6. ---------- (). Juridical independence. Wikipedia, the Free Encyclopedia.
7. Micheal G. (1994). ***Political Science: An Introduction***. Prentice Hall Inc.
8. M.J.C.vile (1967). ***Constitutionalism and Separation of Power***. Oxford Clarendom Press.
9. The international commission of Jurists, "Act of Athens." (1959) ***In the Rule of law in a free society***. A report on the international congress of jurists, New Delhi, India,
10. St. Mary's University collage Constitution Module