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**INDEPENDENCE OF THE JUDICIARY IN
PARLIAMENTARY DEMOCRACY: THE
ETHIOPIAN EXPERIENCE**

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ADDIS ABABA, ETHIOPIA

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INTRODUCTION

Most of the time when one discusses about justice, the role of the judiciary is the first dynamics that comes to the scene. For an effective justice system to exist judges should be guided by rule of law, protected and enforce it without fear or favors and resist any encroachments by government or political parties on their independence as judges.

Judicial independence is the parameter of the rule of law. To examine whether a certain society is under the rule of law or not one needs primarily to be enlightened about the position of the judiciary vis-à-vis other organs of the government. In a society where men not law decide the fate of individuals the judiciary could never be independent and out of such a system the delivery of justice is unthinkable.

The purpose of this paper is to familiarize the reader with the basic principles of judicial independence and to highlight the independence of the judiciary in Ethiopia.

The paper is organized into three chapters. The first chapter addresses the concept, importance and basic principles of independence of the judiciary. The second chapter deals with judicial independence in Ethiopia starting from Haile Selassie regime till today. The study will end after giving conclusion and recommendation in chapter three.

CHAPTER ONE

THE CONCEPT, IMPORTANCE AND BASIC PRINCIPLES OF JUDICIAL INDEPENDENCE

1.1 Definition of Judicial Independence

Judicial independence is the doctrine 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”¹ Gebru by quoting the American Journals of comparative law defined the concept of judicial independence as:

Judicial Independence refers to the existence, of Judges who are not manipulated for political gain, who are impartial towards the parties of a dispute and who form a judicial branch which has the power as an institution to regulate the legality of government behavior, enact “neutral” Justice, and determine significant constitutional and legal values²

As it provided in many legal instruments around the world, judges should be guided only by laws and that is the true meaning of judicial independence. Hanbury explain in this respect that:

Judges are the guardians of the gate of ordered society to them belongs the sacred office of ensuring that the principles of right dealing according to law are pursued by private citizens towards each other, and towards the state and most crucial of all, by the state towards private citizen. They must administer justice with out fear or favor, affection or ill will. ³

Further more, 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 there independence as a judges" ⁴ Judicial independence implies that "freedom

from interference by the executive or legislative with the exercise of the judicial function but does not mean that the judge is entitled to act in arbitrary manner”.⁵

Though, we say that the judiciary must be independent, it does not mean of course that judge 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 with their judicial function. The judiciary should be:

“independent in rendering judgment and yet subject to that degree of supervision, from some source, which is necessary to secure competence, integrity, efficiency and public confidence in the courts”⁶

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”⁷

Nevertheless, if any form of supervision has the effect of making a judge decide contrary to law and his conscience, then the independence of the judiciary is violated. Courts are vested with judicial power, which could be defined as “the power of a court to decide and pronounce judgment and carry into effect between persons and parties who bring a case before it for decision”⁸. Courts should be able to exercise this duty freely, without any interference from the government, political parties and higher officials.

In this regard the United Nations on the Basic principles on the Independence of Judiciary states:

“The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, with out any restrictions, improper influences, inducement, pressures, threats or interferences, direct or indirect, from any quarter or far any reason.”⁹

1.2 The Importance of an Independent Judiciary.

Judicial independence is an essential constitutional principle to the impartiality of justice and it 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 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 with 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. In this relation it is pertinent to cite what Good express as:

“It has been recognized as axiomatic that if the judiciary were placed under the authority of either the legislature or executive branches of the government then administration of the law might no longer have that impartiality which is essential if justice is to prevail”.¹¹

This is a clear indication that justice is so indispensable that its absence would certainly retard the economic, political and social development of a country. But justice could be administered properly, if the judiciary is practically independent, because an independent judiciary is a corner stone of a free society under the rule of law.

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 relating to the independence of judiciary in the constitutions and legal systems of the world.” ¹²The following are the basic principles of judicial independence:

1.3.1 Separation of the judiciary from the legislature and the Executive organ

The separation of the judiciary from the other two organs of the state in respect of the persons who exercise judicial power and function as well as its independence from control and influence of these organs foundation of judicial independence. Each of these three elements of the separation of the judiciary will be discussed below.

❖ Separation of persons exercising judicial Power

Traditionally, “adjudication of dispute among the individuals and punishment of the wrongdoer had been recognized as inalienable rights of the administrator, no matter whether he was an absolute monarch or a popularly elected representative.”¹³ This fusion of three organs must be changed. Which means Persons who exercise judicial power should never have a position in the legislature or the executive so as to prevent a tyrannical government.

❖ Separation of the Function of the Judiciary

In principle, the legislature, the executive and the Judiciary should not exercise each others’ function. The judiciary should have jurisdiction over all issues of a judicial nature. “It is idle to boast of an independent judiciary if major judicial issues are excluded from the jurisdiction of the courts and entrusted to administrative authorities”¹⁴

In relation to this the United Nations Basic Principles of Independence on the Judiciary stipulates “Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunal”¹⁵.

On the other hand, the judiciary should not involve in legislative and executive function. Judges and courts shall not render advisory opinions except interpreting and applying express constitutional or statutory provisions.

**❖ Independence from the control and Influence of
the Executive and Legislative organ**

It is the Judiciary itself or an independent body that should be authorized to administer and supervise courts i.e. selection, appointment; removal, discipline promotion, transfer of judge etc should be conducted by the judiciary itself or other independent body not by the executive or the legislature. If such administration conducted by the executive or the legislature, the judiciary will be vulnerable for encroachment from the other branch of the government.

1.3.2 Direct Interference in the judicial process

A government and its officials, who are practically above the law, are prone to interfere directly with the judicial function if the protection of their interest required so. This could be exercised through a circular which directs courts what to decide or a threat from higher official, revision of court decision, etc.

The Basic Principles on the Independence of the Judiciary indicates: "There shall not be any interference with the judicial process nor shall judicial decisions by the courts be subject to revision..."¹⁶ The Draft Declaration on the independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers also pointed out:

“No power shall be exercised as to interfere with the judicial process.... The executive shall not have the power to close down or suspend the operation of courts ... No legislative or executive decree shall attempt retroactively to reverse specific out decision to reverse specific court decisions¹⁷

Therefore, the independence of the judiciary depends on to a greater extent on the subjection of the government and its officials to the law.

1.3.3 Execution of court pronouncements

The orders and judgments of the courts should be properly executed, if justice is to prevail in a given society. The independence of the judiciary would be grossly affected if the state hinders the execution of court pronouncement. It is stated that: “the state shall ensure the due and proper execution of orders and judgments of the courts.... the executive shall refrain from any act or omission which frustrates the proper execution of a court decision....”¹⁸

Hence, ones a court decision is passed the executive should execute the pronouncement without any attempt to reverse or amend the decisions which passed by the court.

1.3.4 Immunity of Judges

“The judge should be guaranteed against criminal or civil action or public criticism in the press for what he speaks and decide in his judicial capacity.....”¹⁹ Such immunity is imperative to the success of his or her official task .

1.3.5 Freedom of Expression and Association

Judges shall be “free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence...”²⁰.

1.3.6 The Commitment of the Judge.

The independence of judge depends not only from external forces which influence him to decide contrary to the law and his conscience, but also to some extent on his personal commitment to resist such an influence.

1.3.7 Provision of adequate resources for the Administration of Justice

“It shall be a priority of the highest order for the state to provide adequate resources to allow for the due administration of justice, including physical facilities appropriate for the maintenance of judicial independence, dignity and efficiency, Judicial and administrative personnel and operating budgets ”²¹. This includes provision of adequate remuneration and pension for judges.

1.3.8 Assignment of cases

The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court”²².

This basic principles of judicial independence could be fully realized if there exists constitution adapted with effective participation of the people freely and popularly elected legislature and an executive duly elected and accountable to the legislature .

These principles are desirable to ensure the prevalence of justice and rule of law. They are not destined for granting judges a position exceeding the law and regulation.

CHAPTER – TWO

INDEPENDENCE OF THE JUDICIARY IN PARLIAMENTARY DEMOCRACY: THE ETHIOPIAN EXPERIENCE

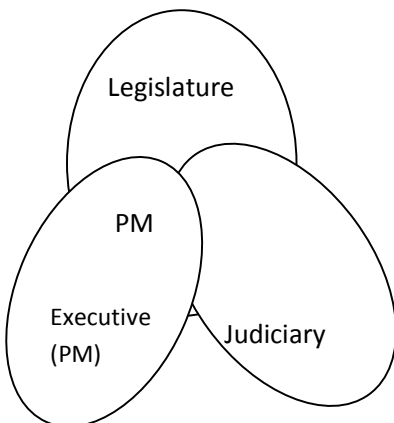
There are two main types of political systems. These are presidential and the parliamentary system. Each of them has their own advantages and disadvantages.

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.”¹ And in such a system “the executive branch is selected by the legislature”.² From this one can deduce that in a parliamentary system of government there is a tendency of fusion of power between the 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”³. Hence in presidential system the three branches of the government appear to be separated.

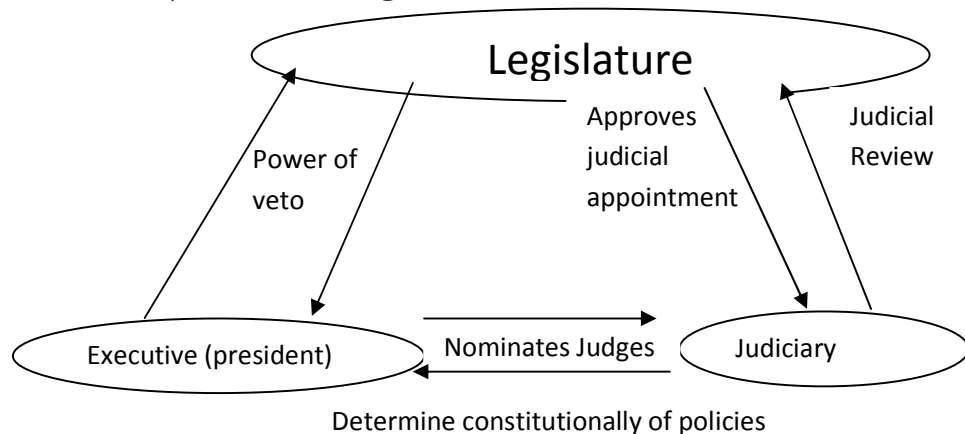
The following diagram is clearly shows the different of the two form of government.⁴

A) Parliamentary government



- Shows fusion of power between the three organs of government

B) Presidential government



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

In presidential system the legislative branch separated from the executive branch and this entails the higher chance of check and balances 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 less likely.

Although the legislative and executive branches are connected in parliamentary system “there is an independent judiciary who are the final arbiters of judiciary dispute.”⁵ 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 enables 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.*⁶

Using these instruments to minimize the disadvantages of parliamentary system, many countries in the world applied parliamentary government because it is “much easier to implement than presidential government”.⁷ This holds true for Ethiopia which, with all its pros and cons adopted a parliamentary form of government.

The 1995 constitution of the Federal Democratic Republic of Ethiopia established a parliamentarian form of government; the constitution provides that “the Federal Democratic Republic of Ethiopia shall have a parliamentarian form of government”.⁸ In the following pages the two

important principle of democracy i.e. separation of powers and judicial independence in Ethiopia will be discussed briefly.

2.1 Separation of powers under F.D.R.E Constitution

Separation of power is “the division of governmental authority in to three branches of government legislative, executive and judicial- each with specified duties on which neither of the other branches can encroach”⁹.

From this, one can understand that the power of the government must divide in to “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)”¹⁰ also each of those organ must carry on their own respective duty.

Historically, in the past two regimes, the idea of separation of power wouldn't be expected because of the over hole nature of their system.

The F.D.R.E constitution incorporates these organs of government under its provision." The federal government and the states shall have legislative, executive and judicial power"¹¹

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

In this regard, Vile list some yardsticks that helps to evaluate the degree of separation of power. These are:

- ❖ *The government should be divided in to three categories, the legislative, the executive and the judiciary.*
- ❖ *The three specific government powers should be separated.*
- ❖ *The three branches of government shall be composed of quite separate and distinct groups of people, with no overlapping membership.*¹²

On the bases of Vile criteria it is better to see the F.D.R.E 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 the states shall have legislative, executive and judicial power”*¹³.*The house of peoples Representatives shall have the power of legislation in all matters assigned by this constitution to federal jurisdiction*¹⁴.*The highest executive power of the federal government are vested in the prime minister and the council of ministers.*¹⁵ *Judicial powers, both at federal and state levels, are vested in the courts.*¹⁶

The very existence of these articles suggests that the F.D.R.E constitution up holds the principle of separation of power because it seems to satisfy the first and the second criteria set by Vile. However, with regarding to the third yardsticks of Vile, it seems to be no separation of powers in the F.D.R.E constitution, for it is provided that "political party or a coalition of political parties that has the greatest number of seats in the house of people's representatives shall form the executive and lead it."¹⁷

This article of the constitution allows the members of the house of people's representative to be member of the executive at the same time. This inevitably creates a solid line fusion of the power of 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 has sited as a member of the parliament to produce law.

In such a system it is very difficult to claim the existence of separation of powers, rather it is better to declare simply there is division of labor. To make this argument more strong its better to see some provision of the F.D.R.E constitution which dose not enshrine the universally accepted constitutional principles.

When it comes to the judiciary, it is stated in the constitution that "He [the prime Minster] selects and submits for approval to the house of peoples representatives nomination for posts of the president and vice president of the federal Supreme Court"¹⁸

Even though, this article will be broadly discussed in the next part of this paper the article allow the prime minister to stretch his hand on the judicial organ of the state which can be taken as one of the pit fall for the existence of independent judiciary.

The universally accepted principle regarding to the appointment of judiciary states "the appointment and disciplinary measure should be taken by the judiciary itself or by independent body"¹⁹ from this, one can conclude that this can be considered as the minimum criteria to assume the existence of separation of powers.

Further more, the F.D.R.E constitution snatched the very inherent right and power of the judiciary when under its article states that "The house of federation has the power to interpret the constitution"²⁰

Therefore, the F.D.R.E constitution does not clearly stipulated the constitutional principle of separation of power but all it provides for is

that 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 addition, in the mentioned articles “the executive branch 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” ²¹ where this act of the executive organ contradict with the principle of separation of power which holds that “the executive, the legislative and the judicial powers should not be combined in the same person or the same group of persons” ²².

In this regard Montesquieu who was 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 separate form the legislative and executive power. If the three functions merge in to one organ, everything will come to end”²³.

This perfectly reflects the reality of the current political and legal system in Ethiopia where the separation of power is non existence.

The principle of separation of power tries to avoid the merging of power in any one of the three branches of the government “the principle is adopted not to promote efficiency but to preclude the exercise of arbitrary power to save the people from autocracy ” ²⁴. Hence the absence of separation of power entails the absence of protection of the people from arbitrary power.

2.2 Judicial Independence in Ethiopia

Judicial independence is an instrumental value for the pursuit of rule of law and democracy. It is undeniable fact that for the effective justice administration there should be an independent judiciary organ. This independence could be either personal or institutional. In the following pages the degree of independence of the Judiciary during Haile selassie Reqime, Dergue and today's practice will be discussed.

2.2.1 Judicial Independence during Haile Selassie Regime

In the traditions system “there was no established legal profession or judicial services, government courts and judges...”²⁵ During Haile Selassie Period 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 were not in line with the demand of the judicial independence. In relation to this the 1955 revised constitution provided that:

The Emperor has the right and duty to maintain justice through the courts, and amnesties and to grant pardons and amnesties and to commute penalties. ²⁶

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.²⁷

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 “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”²⁸ Governors interference in the administration of justice was immense. In this regard Clapham in his book of Ethiopian constitutional development stated that:

There was no sharp distinction between the executive and judiciary function of government. The governor of the administrative area was the president of the court in that area... the governors insisted that they had to exercise judicial power as well as executive power to keep order... because of the position of the governor and his role in such administration, it may have been assumed that the judges were subservient to him. ²⁹

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 may set-aside the court decision”.³⁰which made the judiciary to be dependent in rendering judgment.

To sum up, the government of Haile Selassie is characterized by the fusion of powers i.e. there is no separation of power rather the constitution empower the emperor to have an absolute power. Therefore, in such a system it is very difficult to assume the independent judiciary that establish for the administration of justice.

2.2.2. Judicial Independence during 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 and then Marxism Leninism remained 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 case..... 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. ³¹

Therefore, in the socialist state the judiciary would not 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 which is against the universally accepted principle of institutional and personal

independence of the judiciary. The situation that was prevailing is clear from the following statement:

It was a time when politics totally dominated law, when the powers of the judiciary were snatched by political institutionsmass participation in the administration of law increased in an ever seen scale. Kebele and peasant Associations tribunals are established to settle disputes with in the confines of their jurisdiction. These popular tribunals are neither the “open air court” of traditional Ethiopia nor the civil courts of to day.³²

During this time it was a period of political instability and armed conflict, therefore citizens were denied a fair public trial. The government takes 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 are subject to political control and are responsive to the requests and directions of Ethiopia’s leadership. Even there were various laws used to be issued which authorizes security forces to search, arrest, imprison and use force with out any authorization from courts.

At the end of the regime, Dergue after ruling the country with out constitution for about 14 years which was characterized by gross human right violation and prevalence of rule of men in 1987 it introduce a socialist oriented constitution called “the constitution of the People’s Democratic Republic of Ethiopia (PDRE).³³ This constitution declared the establishment of an independent judiciary as follows:

Judicial power was vested on one supreme courts and courts of administrative and autonomous regions and other courts.³⁴ Judges of the supreme courts are elected by the National Shengo, and those of regional courts are elected by their respective regional Shengo.³⁵ The president, vice president and judges of the supreme courts are appointed by the National Shengo presented by the president of the republic.³⁶ 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. ³⁷

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 Dergue regime which follow Marxism – Leninism ideology the judiciary was not independence.

2.2.3- Judicial Independence Since 1991

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

From the fall of the previous government till today efforts made to improve the justice system of the state in general and to create independent judiciary in particular. In the following paragraph the degree of the independence of the judiciary will be discussed.

A. Personal independence

There is a principle embodied in many modern constitutions 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.³⁸

It is very important that judges should be free from external influence when they sit on bench to decide matters brought to them. “The crucial condition for judicial independence is the personal independence of the Judge”³⁹. Therefore, judge 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 developed through judicial training. Regarding to judicial training in Ethiopia there is a kind of “Quota system” judicial training.

Individual who are members of political party recruited from the different regional state and sent to judicial training institution and trained there both “Legal” and “Political” skill. This trend is in violation of the international practice of judicial training.

The international 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” ⁴⁰.

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

Hence, on the basis of judicial training particularly “Quota system” makes the judge personally to be dependent on the other branches of the government which results the judiciary not to win the heart of the society because it is just continuation of the executive organ. This argument will support 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.*⁴¹

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” .⁴²

Although the Prime Minister brought his nomination to the House of Peoples Representatives for approval, there is no any yardsticks that used by the house to check the nomination whether it is based on loyalty to the ruling party or not.

Regarding to other federal judges the selection of judge is conducted by the Federal Judicial Administration Commission. “The commission shall have the power to select those who qualify for judgeship...”⁴³

This power of the commission makes the personal independence of judges vulnerable for encroachment because the commission is not purely a judicial organ rather there are individuals who are “member of the House of Peoples Representative”⁴⁴ 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 personal independence of judges because judges should not be able to decide case solely based on law and fact without letting 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.

B. Institutional Independence.

Personal independence is a necessary but not sufficient condition for the prevalence of 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’.⁴⁵

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

*An independent judiciary is established by this constitution⁴⁶.
Judicial powers, both at federal and state levels, are vested in courts ⁴⁷Judges shall exercise their functions in full independence and shall be directed solely by the law ⁴⁸*

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 give power to the House of Federation to interpreted the constitution which is not common in the federal state structure.

In many federal system “the power of interpretation is either to the ordinary court or separate constitutional court” ⁴⁹. Accordingly these courts not only have the power to interpreted the constitution “but are also and even more importantly entitled to decide on conformity of the laws with the constitution”⁵⁰. The practice of constitutional interpretation in Ethiopia, the F.D.R.E construction 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 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.⁵¹All constitutional disputes shall be decided by the House of the Federation ⁵²

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 prohibit the inherent right of the judiciary to interpret the constitution which can be consider as a pit fall for institutional independence of the judiciary because it is a political organ which interested to resolve any constitutional issue.

Furthermore “the judiciary complains about a whole list of factors affecting its performance.... lack of trained judges, resource.... and political pressure...” ⁵³. From this, one can conclude that there is direct interference with the judicial process from the other branches of the government. The prime minister by his own directive to the minister of justice and even to courts attacks directly the very heart of due process which is contrary to the judicial independence. One of the evidence is the directive of the Prime Minister which instructs the minister of justice on

two issues in relation to matters related to property which was confiscated during Dergue regime.

1st Hence forth and until further notice, the courts shall not decide on matters related to property that was illegally confiscated by the defunct regime⁵⁴

2nd The prime minister directive asserts that the implementation of all cases on such issues that have already been decided upon by the courts will be suspended⁵⁵.

This directive evidenced that the courts are there to function as the instrument of the executive and not as independent and any decision of courts outside the executive directive will not be implemented. Therefore, this makes judiciary to be subordinated to the executive.

This directive of the prime minister is contrary to the basic principle of judicial independence of direct interference in the judicial process and execution of court pronouncements respectively.

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 interested to rule adjudication efforts need from every stake holders.

CHAPTER THREE

CONCLUSION AND RECOMENDATION

3.1 CONCLUSION

When we see the long history of Ethiopia regarding to the concept of separation of power there was 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 be come above the laws.

The modernization in state organization during Haile Selassie brought about a significant change on the administration of Justice separating to the 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 entrusted with rule adjudication.

During the Dergue regime, from the very ideology of the system which contradict 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 entrusted with rule adjudication, therefore the struggle to limit the act of government and for creating a powerful and independent judiciary must continue till with out bowing to the will of any body is created.

3.2 RECOMMENDATION

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

- ❖ There should be a constitution which is a legal document not of a political document that protect the interest of the ruling class which is common in Ethiopia constitution
- ❖ The executive should be limited by the law and controlled y the legislature
- ❖ The separation of powers of three organs of the state with methods of check and balance should be embodied in the constitution
- ❖ Courts should be authorized to interpreted and having final say on constitutional issues
- ❖ Supervision of the judiciary i.e. appointment, disciplinary measure, promotion etc should be conducted by 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 with out redefined 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.

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