



**The Question of Independent and Impartial Constitutional Adjudicator in
Ethiopia: A Comparative Study with Germany and South Africa**

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Abstract

The main focus of this thesis is evaluating the independence and impartiality of Ethiopian constitutional adjudicator and showing the inappropriateness of a political oriented institution to handle constitutional adjudicatory role.

To achieve the aim of this thesis, constitutional adjudicators of three jurisdictions are compared: Germany, South Africa and Ethiopia. Relevant books and articles written on these jurisdictions are consulted and specific cases that are suitable for this thesis are also used.

The organization of the institution and the way how and by whom its members are elected or appointed are decisive factors to measure the independence and impartiality constitutional adjudicator. If members of the institution are not elected or appointed in a non-political manner and free from partisan interest, the impartiality of the institution as a constitutional adjudicator will be underestimated.

Compared to Germany and South African constitutional adjudicators, the Ethiopian HOF is found to be dependent and partial. The way the institution is established as part of the legislative branch has contributed for the dependency of the institution on the legislative and executive branches of the government. Moreover, the way members of the HOF are elected and the political nature of the institution have contributed for the partiality of the HOF towards the political party that the majority of members are represented.

As a constitutional adjudicator, the HOF is dominated by State Councils only. The Federal government has no any role in the election process and its interest is not represented there. Lack of representation in the HOF undoubtedly will affect Federal government's interest in the process of constitutional adjudication and this will endanger the overall nationwide interest in the country.

Abbreviations and Terminologies

Bundesrat Upper House in Germany

Bundestag Lower House in Germany

CCI Council of Constitutional Inquiry (Legal advisor to the Ethiopian Upper House)

CUD Coalitions for Unity and Democracy (former strong opposition political party in Ethiopia)

ECtHR European Court of Human Rights

EPRDF Ethiopian People's Revolutionary Democratic Front (the current ruling political Party in Ethiopia)

HOF House of Federation

HOPRs House of Peoples Representatives

ICCPR International Covenant on Civil & Political Rights

Land The name of Constituent Units in Germany

NN&P Nations, Nationalities and Peoples of Ethiopia

TPLF Tigrian Peoples' Liberation Front (one ethnic based political party in Ethiopia)

UDHR Universal Declaration of Human Rights

UN United Nations

US United States

Introduction

After the downfall of the military regime in 1991 and five years of transition period, Ethiopia has adopted a federal constitution. The constitution has established a Federal Parliamentary system of government.¹ The introduction of this new constitution was peculiar to Ethiopia as the country had a long experience of a unitary system of government structure both in the military as well as the monarchical regimes.

As a Federal state structure, the Ethiopian Constitution has established a two Chamber parliament. The Lower Chamber of the parliament is known as the House of Peoples Representatives (herein after HOPRs) and members are elected through direct participation of the electorate every five years. The Upper Chamber of the Parliament is known as the House of Federation (herein after HOF) and it is the representative of the Ethiopian Nations, Nationalities and Peoples of Ethiopia (herein after NN&P). As Ethiopia is a Federal State, this Chamber is the home of the representatives of the members of the Federal government. Members of the Upper House of the parliament are elected by the State Councils.² The Constitution gave discretionary power to the State Councils how to elect members of the HOF and according to the constitution, “the State Councils may themselves elect representatives to the HOF, or they may hold elections to have the representatives elected by the people directly.”³ In the past four elections, there was no chance in which members of the HOF were elected by the direct participation of the people. Rather, members of the HOF were elected by State Councils among the members of the Councils themselves or from other key politicians from both the Federal and States governments. There was no direct participation of the electorate to elect members of the Upper Chamber.

¹ Art.45 of the Constitution of Ethiopia

² State Councils under the Ethiopian constitution are legislatures of constituent Regions

³ Art. 61(3) of the Constitution of Ethiopia

Electing members of the HOF by the State Councils or thorough direct participation of the public has its own problems. The representatives elected by the State Councils or the direct participation of the public would be politicians who are Chief Executives and law makers in States. Sometimes, these representatives may be elected from the Chief Executives of the Federal government. In this case, these Chief Executives of the Federal and State governments, and State law makers will be asked to adjudicate over the constitutionality of their acts. This will doubt on the question of independence and impartiality of the Ethiopian constitutional adjudicator.

The Ethiopian constitution has denied the HOF any role in the law making process. The power to enact law is only given to the HOPR. The HOF is totally devoid of any role of law making power. It has the power to interpret the constitution and to resolve all forms of constitutional disputes.⁴ As the HOF is the constitutional adjudicator, the judiciary is denied its inherent power of constitutional interpretation. The judiciary has no say in the process of constitutional adjudication. The judiciary may adjudicate all legal matters and in the moment of adjudication if the issue of constitutionality is raised, it is duty bound to refer the case to the Council of Constitutional Inquiry (CCI). We may ask a question here as to why framers of the constitution were not interested to give the Ethiopian judiciary a constitutional adjudicatory role. Different justifications are given by writers and researchers. Among these, the most dominant arguments are the political contract nature of the constitution and the fear of judicial adventurism are the important once.⁵ Since the Upper House of the parliament is the representative of NN&P of Ethiopia, the organ is given the power to adjudicate this political contract. Moreover, the framers of the constitution were not happy to bless the judiciary with constitutional adjudicatory role due to fear of judicial adventurism. As

⁴ Art 62 of the Constitution of Ethiopia

⁵ Assefa Fiseha, Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation, Mizan Law Review Vol.1 No.1.June 2007. P11-12

explained by Assefa Fiseha, the Ethiopian judiciary has not got the ‘hearts and minds’ of the ordinary citizen and due to this they prefer the upper house to have the constitutional adjudicatory role.

As the Ethiopian election system is first-past-the post, a political party that has the majority seat in the HOPRs will have the chance to establish government in the Federal Parliament.⁶ A political party that has the highest number of seats in the HOPRs will have the same majority in the HOF, though it is not always possible.⁷ Based on this reason, members of HOF will have the chance to be from a political party that has established government. In this case, the question of impartiality and independence of the HOF will be at stake.

As members of the house of Federation are not legal experts, the Constitution has established the CCI as an advisory body to it. When any constitutional question is raised, it is the CCI that can decide whether it has a constitutional matter or not. If it finds that there is an issue of constitutional interpretation, it will send the case with its recommendation for final decision to the HOF. But, if it finds that there is no need of constitutional interpretation, it will remand the case to regular courts (whether it comes from the court or not). In this case, if there is any party who is dissatisfied by the decision of the CCI has the right to appeal to the House of Federation.⁸

The reason I chose this topic is because the matter is a controversial area in Ethiopia. Obviously the issue that who shall interpret the constitution and whether the power of interpreting the constitution shall be assigned to the judiciary or to an organ other than the judiciary has been the subject of debate since the enactment of the constitution in 1995. In the

⁶ Art.56 of the Constitution of Ethiopia

⁷ In fact this may not be always true. For example a political party that won the majority seats in Amhara and Oromiya Regions or States has the chance to establish a government in the country. But winning in Amhara and Oromiya Regions by itself is not adequate to have a majority seat in the HOF. A political party that won a majority seat in the Southern Nations, Nationalities and Peoples Region will have the chance to control the majority seats in the HOF.

⁸ Art. 84(3) of the Constitution of Ethiopia

last four Ethiopian national elections, the issue was the center of debate between different political parties. But the debate was focusing on the efficiency of the HOF and parties who were arguing against the government were proposing either constitutional court or regular court as a constitutional adjudicator. I believe that, the debate was not revolving around issues on the independence and impartiality of the HOF.

On my behalf, dealing on the efficiency of the HOF as a constitutional adjudicator is an outdated issue and in fact it is not relevant. Wasting time by arguing whether it has to be a political institution or a regular court that is going to interpret the Ethiopian constitution is exposed for criticism. It has to be known that, there is no uniform model in this world that can solve the question of constitutional adjudication and it depends on the existing realities of countries.

The issue of efficiency of HOF is already solved by establishing the CCI as an advisory body. I believe that the main target of the discussion has to revolve around on the independence and impartiality of this political institution as a constitutional adjudicator and the question who should interpret the question will be answered after that.

This paper aims to identify the weaknesses regarding the impartiality and independence of Ethiopian Constitutional adjudicator through a comparative analysis with Germany and South Africa. It then tries to show what makes the HOF weak compared to the German and South African counterparts and then puts forward a series of recommendations which should deal with the identified problems. As I have mentioned above, the Ethiopian constitution has chosen a political institution as a constitutional adjudicator.

This thesis is a comparative study with Germany and South Africa. The reason why these two jurisdictions are selected is purposive. Both South African and German Constitutions have established a strong Constitutional court different from Ethiopia. Under Sec.167 of the South African Constitution, the Constitutional court of South Africa is the highest court in

constitutional matters. Under Art.93 of the German Basic Law (constitution), the German Constitutional Court is the highest authority to decide over constitutional matters. Both courts have a strong jurisprudence towards constitutional adjudication that Ethiopia may take a lesson.

From this diversity of practices, Ethiopia will get important lessons and it will be helpful to look the Ethiopian reality from these perspectives. So the research will cover on the issue how the question of constitutional adjudication is answered in Ethiopian, German and South African constitutions.

The research will be conducted by reviewing literature relevant for the research topic. In addition, different Court decisions from South African and the German Constitutional Court will be used as an important source of comparison if they are found to be appropriate.

This thesis has three parts. The first part of the thesis will discuss about the overall theoretical concepts of constitutional adjudication. Specifically, the very purpose of constitutional adjudication and the various organs empowered to exercise constitutional adjudication will be discussed. In the second part of the thesis, the concept of independence and impartiality of constitutional adjudication will be discussed and various standards and factors will be also investigated. Moreover, the independence and impartiality of the Ethiopian constitutional adjudicator will be evaluated by comparing it with Germany and South African. In the third part of the thesis, some concluding remarks and recommendations will be given.

Chapter One: Constitutional Adjudication: Theoretical Concepts

Introduction

Under this chapter, the theoretical overview of constitutional adjudication will be discussed and explanation will be given why constitutional interpretation is different from ordinary law interpretation. This chapter will also discuss the very function of constitutional adjudication and identify why and how constitutional adjudication is an important issue in every constitutional democracy. Moreover, this chapter will try to explore various models of constitutional adjudication that are applicable in different countries. Among these models, adjudicating constitutional issues by ordinary courts or constitutional courts are the principal means. Adjudicating constitutional issue by courts can be either centralized (only the Supreme Court of the country is entitled to adjudicate constitutional issues) or decentralized (all levels of courts in the country are entitled to participate, but with ultimate decision making power to the Supreme Court) way of adjudication. The other model that will be covered in this chapter is adjudication of constitutional issues by a special council like France and Ethiopia.

I would like to make notice that, I may use the concept of constitutional adjudication and constitutional interpretation alternatively in this thesis.

1.1. General overview of Constitutional Adjudication

It is common to read in every written constitution that, the constitution is supreme over the rest of legislations in the country. These written constitutions declared the constitution as supreme over all primary, secondary and tertiary legislations. It is this supreme document that helps every form of government to be organized and set its own structure. As a supreme

document, the constitution serves as a source of legitimizing the power of government officials. Though the constitution contains a supremacy clause and declares every legislations and acts of government officials which are contrary to it as a null and void, it is common to see violations of this supreme document in practical circumstances. When conflict arises between the constitution and other legislations or acts of government officials, we need to have an organ that can efficiently solve or adjudicate the conflict. The issue of constitutional adjudication will come at this instant. The organ that is entitled to adjudicate the conflict will start to exercise its task by interpreting the provisions of the constitution and will assure whether the legislations or acts of government officials are in conformity with the constitution or not.

The issue of constitutional interpretation has to be clearly distinguished from the issue of ordinary law interpretation. In ordinary law interpretation, interpreters try to find out the intention of the law maker.⁹ In this process, the very mission of interpreters' of the legislation will be to find the reasons why the legislator intends to have that specific legislation. But, in case of constitutional interpretation, the task of the interpreter is to find "the intent of those individuals who have drafted the constitution and the electorate who ratified it."¹⁰ One basic thing that has to be understood here is that, every provision of the constitution as well as the rest of legislation does not require interpretation. When the provision of the constitution is clear and written in a plain language, there may not be room for constitutional adjudication. In this condition, the interpreter is left with little to do than as it is applying and implementing the provisions of the constitution.¹¹ It must not be wrongly thought however that, courts in every jurisdictions exercise the power to adjudicate the constitution.¹² In other words, every

⁹ Farani.M, The Interpretation of Statutes, Lahore Law Times Publications, 1977, P.32

¹⁰ Marks T.C, State Constitutional Law in a Nut Shell, St.Paul Minnesota: West Publishing Company, 1998, P.8

¹¹ Chester Anteeau , Constitutional Construction, London , Ocean Publications, 1982, P. 3

¹² Where K.C , Modern Constitution, new York : Oxford University Press, 1960, P.149

country's constitution may not allow courts to exercise the power of constitutional adjudication. There are constitutions that clearly exclude the judiciary from its inherent power of adjudicating constitutional issues.¹³

Constitutional and judicial reviews are two different and separate concepts. Judicial review is a wider and “more inclusive” term which is not limited to reviewing of the constitutionality of laws only.¹⁴ It is the power of judges to adjudicate the constitution and rejecting all other laws and practices that are contrary to the constitution.¹⁵ On the other hand, constitutional review is a mechanism used to adjudicate conflicts between branches and levels of government and does not include the general power to review the constitutionality of laws.¹⁶ For example, in Germany, constitutional review is associated with its tradition of monarchical constitutionalism and “provide the mechanism for defining the rights of the sovereign states and their relationship to the larger union in cooperation with them.”¹⁷

In general we can conclude that judicial review is the power where it is exercised by courts only. But, constitutional review does not limit itself to any organ like the judicial review by courts. It can be exercised by either regular courts or any other institutions that are empowered to exercise the activity including politically established institutions. As one writer mentioned, judicial review is court's power to find disputes related to law and includes dispute settlement act of the court.¹⁸

¹³ Among these countries, we can mention for example Ethiopia and France. The Ethiopian constitution clearly excludes the judiciary from interpreting the constitution and this power is given to the Upper chamber of the parliament. In France, the power to interpret constitutional issue is given to the Constitutional Council and regular courts are not allowed to participate in the processes of constitutional adjudication.

¹⁴ Kommers Donald, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd Ed. Durham and London : duke University Press, 1997, P.4

¹⁵ Peltsan J.W, Corwin and Peltson's *Understanding of the Constitution*, 8th ed. New York: Holt Rinehart and Winston , 1979, P.27

¹⁶ Supra note 10, P.4

¹⁷ Ibid, P.4

¹⁸ Heringa. A. W, *Constitutions Compared: An Introduction to Comparative Constitutional Law*, Antwerp : Intersentia ; [Maastricht] : METRO, c. 2007, P.95

1.2. Purposes of Constitutional Adjudication

In the previous topic, I have discussed the very nature and overview of constitutional adjudication and now this is the time to discuss some points on why constitutional adjudication is necessary for a certain constitutional system. Whether in entrenched or non-entrenched constitutional systems, disputes over constitutional matters are inevitable. In this case, question of constitutional adjudication will come on the spot and the organ that is entitled to exercise the task will do over the matter. But someone may raise an issue and ask a question why we need constitutional adjudication? What purpose does constitutional adjudication has? Herein below, I will discuss important points on it.

Constitutional adjudication protects individual rights from being violated both by the legislative and executive branches of government. The legislature may enact laws that violate constitutionally guaranteed individual rights. The executive branch may execute or implement laws in a way contrary to the overall essence of constitutionally protected individual rights. In addition, the executive branch may enact unconstitutional and suppressive regulations and directives. In this case, it is the role of the constitutional adjudicator that can reject unconstitutional legislations and remedying unconstitutionally implemented laws and policies. This role of the constitutional adjudicator is more relevant now a days where individual interest is overridden by community interest in the name of campaign against terrorism and drug trafficking. When extradition agreements are signed between countries, individual rights may be at stake. When individual rights become vulnerable for both executive and legislative abuses, the role of constitutional adjudicator is essential “in reviewing the motives behind an extradition request which await an individual upon return to a requesting state.”¹⁹

¹⁹ Tracey Hughes, Extradition Reform: The Role of the Judiciary in Protecting the Rights of a Requested Individual, 9 B.C. Int'l & Comp. L. Rev. 293 (1986), <http://lawdigitalcommons.bc.edu/iclr/vol9/> iss2/4. P. 294

Constitutional adjudication has also the purpose of implementing uniform applicability of constitutional norms throughout the country. If there is no centralized mechanism of constitutional adjudication, the same constitutional principles will have the tendency of being implemented differently within a country. In a system where there is a centralized institution that has the final say on constitutional matters, it has the tendency to establish uniform and consensual practices all over the country. According to Zylberberg P, centralized mechanism of constitutional adjudication “constitutes the judiciary as an institutional means of imposing centralized political values on local bodies across a diverse political landscape.”²⁰ But this does not mean that the same principle does not apply to other systems that entrust the power to adjudicate constitutional matters to other institutions like the French Constitutional Council or the Ethiopian HOF.

This purpose constitutional adjudication is very essential for those countries that are following the civil law legal system. In the civil law legal system, there is no concept of precedent and the lower courts are not obliged to follow the path of the higher courts. In this case, the existence centralized constitutional adjudication will help the judicial branch to have a common consensus on those basic constitutional principles addressed by the constitutional adjudicator.

Constitutional adjudication has also the role of protecting and enforcing the well-established principles of separation of power. When I say well-established principle of separation of power in this context, I am talking about Montesquieu’s understanding of the principle of separation of power.²¹ It has to be also clear that, his version of separation of

²⁰ Zylberberg P, Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective 37 McGill L. J. 27, 1992, P. 61

²¹ According to Montesquieu, the three branches of the government must be separated personally, institutionally and as well as functionally. He argues that, in order to achieve his version of separation of power, one person is not allowed to be a member of more than one institution or branch of the government. At the same time, one branch of the government is not also allowed to exercise the function of the other branch of the government.

power has to be differentiated from the Westminster's model of separation of power.²² If either the legislative or the executive branches of government violates this principle of separation of power, the judiciary will help us to control them thorough constitutional interpretation. As Alexander Hamilton said, the legislative branch is the most dangerous branch of the government and it requires a strict control by the other branches of government. As he reasoned out, since the judiciary is the least dangerous branch of government, it can properly control the dangerous power of the legislative branch via the mechanism of constitutional interpretation.²³

1.3. Organs Empowered to Adjudicate the Constitution

In the process of application and enforcement of either ordinary laws or the provisions of the constitution, the question of constitutional interpretation is inevitable. Particularly, when the essence of ordinary legislations are not found to be inconformity with the provisions of the constitution, the call of constitutional adjudication will come in the forefront. Moreover, since constitutional provisions have the nature of generality and open-endedness,²⁴ the tendency of occurring constitutional interpretation will be frequent. When ordinary laws are found to be contrary to the constitution, these laws will be declared as unconstitutional and they will be considered as null and void. The very question that immediately comes to this point is that, who is entitled to discharge this task of adjudicating constitutional issues?

Moreover, to implement Montesque's version of separation of power, all the three branches of the government must stand independently of the other branch and they should have separate existence. See , Sharon Krause, the Spirit of Separate Powers in Montesquieu : the Review of Politics, Vol. 62, No. 2, (Spring, 2000) pp. 231-265

²² In the Westminster's model of separation of power, we cannot find Montesquieu's version of absolute separation of power. In Westminster's model, there is a fusion of power between the legislative and executive branches of the government and at the same time a member of the executive branch of the government is allowed to be a member of the legislative branch and the vice versa is true.

²³ See Federalist Paper No. 78

²⁴ Norman, Dorsen et al. Comparative constitutionalism: cases and materials, 2nd edition, West, 2010, P.139

The above question is very crucial in the process of constitutional adjudication. The difficult task in the constitutional adjudication process is to find the appropriate organ that can discharge its mission properly. In the constitutional law making process, the most difficult task of the framers' of the constitution is also finding the proper institution that can properly address the task of constitutional adjudication.

There is no clear-cut answer for the question, who shall interpret the constitution. Different countries have tried to manage this task by establishing different institutions that can settle issues of constitutional controversies. Some countries have established a constitutional court and among these Germany, Italy, Austria and Hungary are best examples.²⁵ On the other hand, some countries like United States, Canada, Australia and Japan gave this power to the regular courts. In some other jurisdictions, a hybrid system which combines both constitutional courts and regular courts is established.²⁶ In addition to constitutional and regular courts as organs of constitutional interpreters, some countries have established political institutions as institution of constitutional adjudication. The Ethiopian House of Federation and the French Constitutional Council (*Conseil Constitutionnel*) can be cited as best examples of this model.

As we can see from the above explanation, there is no specific formula that says the constitution has to be interpreted by this and that institution. Every country can chose its own institution that can best serve for itself. But, the issue behind the processes of selecting once model is the issue of impartiality and independence of this institution to adjudicate constitutional controversies. As long as they can settle these issues, they can choose a model that can best serve for them. Now let me discuss these various models of constitutional adjudication one by one.

²⁵Ibid, pp.151-152.

²⁶ Basson Deon, South Africa's Interim Constitution: Text and Notes. (Revised edition.). Kenwyn: Juta & Co.,1995, P.148

1.3.1. Constitutional Adjudication by Courts

1.3.1.1. Adjudication by Regular Courts

Adjudication of constitutional issues by regular courts is one of the various models that are applicable now a day. The philosophical reason behind empowering regular courts to exercise the role of constitutional adjudication is the presumption that constitution is a form of law like other laws “which courts ordinarily interpret and apply.”²⁷ Moreover, constitution is considered as a legal document and in this case it is only regular courts that are entitled to exercise over such legal matter. As the constitution is believed to be the fundamental and the higher law of a country, it will prevail over any other laws or government orders in case of conflict. We said here the constitution is fundamental law due to the reason that “it is the vehicle through which the people establish their future government.”²⁸ This supreme and fundamental nature of the constitution will be more protected by courts when they have the power to decide on constitutionality of laws and other decisions of government officials.

In countries where constitutional adjudication is exercised by regular courts like USA, Argentina, Brazil, Canada and Japan, the power of judicial review is shared among different levels of courts in the country and the ultimate decision is given by the Supreme Court. In this system of judicial review, all levels of courts have the power to decide on the constitutionality of statutes and other decisions of government officials and the system is known as decentralized system.²⁹ It is known as decentralized because the power to adjudicate constitutional issues is not concentrated in the hands of a single court. Rather, all levels of courts are empowered to exercise the function. The reason behind allowing all levels

²⁷ Robert, P, Theories of Constitutional Interpretation. Representations, No.30, Special Issue: Law and the order of Culture, University of California Press. , 1990, P.15

²⁸ Ibid

²⁹ Danielle E.Frinck, Judicial Review: The US Supreme Court versus the German Constitutional Court, 20 B.C. Intel and Comp.L.Rev.123, Vol.20/iss 1/5. (1997) P.126.

of courts to participate in the process of constitutional interpretation is the presumption that “interpreting laws and applying them in concrete cases”³⁰ as the function of the judiciary.

In the United States, though the constitution does not designate an authoritative interpreter,³¹ all levels of courts are entitled to decide over any questions of constitutional adjudication which are concrete. Moreover, any judge can decide over a case where the existing legislative norm is contradicted with the constitution. In this case, the judge will disregard the contradictory legislative norm and the constitution will be applicable.³² Sometimes, disregarding the existing legislative norms by the court will create inconsistency due to different modes of constitutional interpretation. To minimize such risk of inconsistency, the system has devised the concept of doctrine of *stare decisis*.³³ This doctrine obliges the US courts to follow their former decision on similar issue. It also obliges courts to follow the precedent of higher court’s decision on the same jurisdiction. Moreover, the existence of the only and single Federal Supreme Court also helps to solve the problem of inconsistency of decisions.

In the US, courts have several ways of reviewing the constitutionality of statutes.³⁴ Among the various ways of reviewing the constitutionality of statutes, textualism is one of the methods used by Chief Justice Marshall in *Marbury V. Madison* case.³⁵ Using his argument of textualism, Chief Justice Marshall ascertain that, as long as the constitution is a law, it is the duty of courts to interpret this law whether other statutes are in conformity with it or not.

³⁰ Ibid, p.126

³¹ Art.III of the US constitution does not give either to the Supreme Court or to the other levels of courts the power to interpret the constitution. The constitution simply says that, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

³² Supra note 30, p.132.

³³ Ibid, P.132

³⁴ It is not the objective of this thesis to discuss about the various ways of reviewing the constitutionality of statutes. There are various ways of reviewing constitutionality of statutes and among these we can mention textualism, originalism, traditional court’s precedent and normative approach.

³⁵ Supra note 33, p.132; see also *Marbury V. Madison*, 5U.S.137 (1803).

1.3.1.2. Adjudication by Constitutional Courts

Adjudication of constitutional disputes through the use of centralized constitutional court is common in the majority of members of European Union countries.³⁶ Though the concept of constitutional court is originated in Europe, this court is not only limited to Europe. Rather, using centralized constitutional court as a means of adjudicating constitutional issues is also spread to South America as well as Africa.

This centralized constitutional court is manifested by various features. Different from the decentralized system of judicial review, there is only single and monopolized institution that can declare the constitutionality of statutes. The existence of constitutional court as a means constitutional adjudication will exclude all levels of courts, including the Supreme Court from disregarding statutes on their own authority.³⁷ The role of the constitutional court is not only limited to nullifying unconstitutional statutes and unconstitutional acts of government officials. As Victor F. Comella said;

*“Constitutional courts are sometimes given jurisdiction to supervise the regularity of elections and referenda, for example, or to verify the legality of political parties or to enforce the criminal law against high government authorities or to protect fundamental rights against administrative decisions.”*³⁸

It is possible to classify constitutional courts in to three categories based on the role they are playing in addition to their regular role of reviewing statutes in the system. These categories are pure constitutional courts, middle constitutional courts and constitutional courts with so many jurisdictions. The first categories of pure constitutional courts are only limited with the task of reviewing the constitutionality of laws. Beyond their normal function

³⁶ See supra note 25, p.154. Among twenty seven EU member countries, eighteen countries –Belgium, Bulgaria, Austria, France, Check Republic, Latvia, Hungary, Lithonia, Italy, Luxemburg, Malta, Germany, Poland, Portugal, Slovakia, Romania, Spain and Slovenia have established a constitutional court as a sole interpreter of constitutional issues.

³⁷ Ibid, p.155

³⁸ Victor F. Comella, The Rise of Constitutional Courts, cited at Norman, D et al. Comparative constitutionalism, p.155

of reviewing the constitutionality of laws, they do not have any jurisdiction to participate in any tasks. From this category of courts, we can mention the Belgium and Luxemburg constitutional courts as an example.³⁹ The second category of constitutional courts is entitled to exercise some additional tasks beyond their regular activity of legislative review. In this category, Italy and Portugal constitutional courts are best examples.⁴⁰ The third categories of constitutional courts have so many jurisdictions beyond their role of legislative review as their day to day function. The Austrian, German and Spain constitutional courts are best examples from this category.⁴¹

The German constitutional court is manifested with its distinctive constitutional jurisdiction. Different from the rest of German courts, the constitutional court serves as a watchdog of the German Federal system. Moreover, the constitutional court does not involve itself in ordinary settlement of disputes unless the case is related to a constitutional question. Different from decentralized system of judicial review, the German constitutional court does not limit itself to the constitutional issues emanating from specific cases.⁴² The German constitutional court has extensive and wider jurisdictions compared to the US Federal Supreme court.

1.3.2. Constitutional Adjudication by Special Political Council

Constitutional interpretation may be also exercised by other organs different from both constitutional and regular courts. These are political institution that holds the power to adjudicate constitutional disputes. The introduction of a political organ as a constitutional adjudicator is highly influenced by the pre- world wars strong European parliamentary traditions. This tradition of parliamentary supremacy has highly influenced the position of the

³⁹Ibid

⁴⁰Ibid

⁴¹Ibid

⁴²Supra note 14, p.3

judiciary in many European countries.⁴³ This historical tradition of strong parliament has influenced some European countries like France to prefer a political review of constitutionality of statutes and international treaties.

In the last years of the monarchy, French judiciary was considered as reactionary rather than as a guardian of the people's rights and liberties. Immediately after the revolution, the principle of separation of power was strictly applied in the country in order to get executive immunity from political interference.⁴⁴ Moreover, the 1791 French constitution clearly prohibited any judicial power to criticize laws for unconstitutionality reasons. According to the constitution, "the court may not interfere with the exercise of the legislative power, suspend the execution of laws, encroach up on administrative functions, or summon administrators before them for reasons connected with their duties."⁴⁵ This provision of the constitution consolidates that, the judiciary was totally devoid of the power of checking both the legislative and executive branches of the government. This shows that, the system does not have any kind of trust on the judiciary branch as a guardian of fundamental rights and freedoms.

The 1958 constitution is also very significant in French constitutional history. The constitution has granted the executive organ some traditionally considered as legislative functions and it has established a constitutional council as a means of political control any parliamentary reclaim of these functions. Here it is possible to say that, the constitutional

⁴³ Yves M and Andrew K , Government and Politics in Western Europe, 3rd edition, Oxford University Press, 1998, P.317

⁴⁴ Ibid, p.319

⁴⁵ The Constitution of France, National Assembly 3 September, 1791 .Chapter V, No. 3.

<http://www.historywiz.com/primarysources/const1791text.html> [last accessed on March 2, 2012]

council was established to protect the newly emerging executive power against the parliament.

Now, the French constitutional council is considered as the guardian of the constitution. The council has the very role of controlling the constitutionality of legislations and other international treaties signed by the executive. The decision of the French constitutional council is not subjected to appeal and the decision given by the council is final.

Outside Europe, constitutional interpretation by a political organ is also applicable in Ethiopia. The 1995 Ethiopian constitution has established a political institution as a constitutional adjudicator. The judicial branch is denied its traditional role of constitutional interpretation and this power is given to the HOF, which is the Upper Chamber of the parliament. Compared to other models, the choice made by the Ethiopian constitution framers' looks unique and peculiar. As I have mentioned earlier, having a peculiar institution as a constitutional interpreter by itself has of no problem. For that matter, countries should be encouraged to design a system that can work for them. The main issue that has to be considered from this point is the nature of this peculiar feature as a constitutional adjudicator to resolve disputes in an impartial and independent manner. As long as countries design a solution to assure the independence and impartiality of the constitutional adjudicator, preferring a new model by itself is not a problem. I will discuss more about the Ethiopian constitutional adjudicator in the next chapter.

Chapter Two: Independence and Impartiality of Ethiopian, Germany and South African Constitutional Adjudicators: Comparative Analysis

Introduction

In every system of government, the existence of independent and impartial constitutional adjudicator is vital for the proper functioning of the overall system. The presence of this independent and impartial constitutional adjudicator will help the system to guarantee the protection of fundamental rights and liberties of the people against the executive and legislative branches of government.

The main focus of this chapter is to explore the basic requirements and standards of an independent and impartial constitutional adjudicator. Though there are various standards that can help to measure the independence and impartiality of constitutional adjudicator, I will focus on the most important one. Based on the explored standards, these three jurisdictions (Ethiopia, Germany and South Africa) will be compared.

2.1. *Independence of Constitutional Adjudicator*

2.1. 1. Overview

It is undisputable fact that, the presence of an independent constitutional adjudicator is vital for the smooth functioning of a constitutional order and for the recognition of rule of law. In countries where there is an entrenched constitution, controversies related to the constitution are inevitable and in case of such controversy, an independent adjudicator is needed to settle it in a proper manner.

The concept of independence of the constitutional adjudicator as well as the independence of the judiciary in general depends on various factors related to the political, legal and other

situations of that specific legal system. The essence of judicial independence in common law legal system is stronger than the civil law legal system and judges in the common law legal system enjoyed more independence compared to their civil law counter parts.⁴⁶ It has to be known that, this topic is dealing about the concept of judicial independence in the context of constitutional adjudication. Based on that, I am going to discuss basic essence of judicial independence that can help me to compare the independence of the German Constitutional Court, the South African Constitutional court and the Ethiopian House of Federation.

2.1. 2. Elements of Judicial Independence and its Standards

It is universally accepted truth that, judicial independence is essential and one of the building blocks of rule of law.⁴⁷ The concept of judicial independence is included in different international and regional instruments. For example, the UN principle on the independence of the judiciary said that, “the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.”⁴⁸ Moreover, the independence of the judiciary is also recognized in regional instruments like in the Council of Europe’s *Recommendation on the Independence of Judges*⁴⁹, the African Commission on

⁴⁶Supra note 36, P.165

⁴⁷ John Bridge, Constitutional Guarantees of the Independence of the Judiciary, Vol.11.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW(2007).< <http://www.ejcl.org/113/article113-24.pdf>> [last accessed on March 3, 2012]

⁴⁸ United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁴⁹ See Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994, Principle 2 (b).

Human and People's Rights⁵⁰ and the *Beijing Statement of Principles of the Independence of the Judiciary*.⁵¹

The overall aim of making the judiciary to be independent is to enable the institution to discharge its function without the influence of either the legislative or executive branches of the government. Moreover, making the judiciary to be independent will also help the institution to be free from the influence of those economic and political interest groups.

Judicial independence has to be considered as an “institutional safeguard of the judiciary, and it is not a privilege or a right that is given for the individual judge.”⁵² Furthermore, judicial independence aims to minimize the influence of the legislative and executive branches of the government on the judicial branch. As it has been rightly explained by Stephen Burbank, the overall aim of judicial independence is proving that judges are the authors of their decisions, and that they should be free from any inappropriate influence from the other branches of the government.⁵³ Sometimes it looks there is an overlap between the concepts of judicial independence and judicial impartiality. Various explanations and court decisions are given that helps us to differentiate the two concepts.⁵⁴

Commonly, judicial independence is evaluated based on elements like: substantive independence, structural independence and personal independence. These elements are protected in international, regional as well as domestic legislations.

⁵⁰ See African Commission on Human and People's Rights' Adoption in April 1996 at the 19th Session

⁵¹ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in 1995 and adopted by the LAWASIA Council in 2001, operative para.3.a.

⁵² Supra note 43

⁵³ See. Stephen B. Burbank (ed.). *Judicial independence at the crossroads: An interdisciplinary approach*, New York: Sage Publishers, 2002 pp 46–49

⁵⁴ See. *Valente* [1985] SCR 673, 23 CCC 3d 193 (Can. 1985). For example, the Canadian Supreme court held in *Valente* case that, “Although recognizing the ‘close relationship’ between the two, they are nevertheless separate and distinct requirements. Specifically, impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word “independent”, however, connotes not only the state of mind or attitude in the actual exercise of the judicial functions, but a status or relationship with others, particularly to the Executive Branch of government, that rests on the objective conditions or guarantees.” From this court decision we can understand that, the concept of judicial impartiality is wider than judicial independence.

This topic only focuses on the elements that can help us to measure the independence of the constitutional adjudicator in the delimited three jurisdictions. That means this topic will not focus on all elements that help us to measure the independence and impartiality of judicial independence. In the following, the protection of these elements under the South African, the German and the Ethiopian constitutions shall be elaborated and compared.

2.1. 2.1. Substantive Independence

The concept of an independent judiciary is derived from the well established principle of separation of power. The principle of separation of power is among the basic components of rule of law. As the executive, legislative and the judiciary are separate branches of government, one branch should not influence the other branch in the process of discharging its function. Particularly, since the judicial branch is a protectorate of the constitution, its independence from both the legislative and executive branches should be absolutely protected. But, this does not mean that, the judicial branch of the government be left unchecked by the other branches. For the sake of this topic, I will focus on the substantive independence of constitutional adjudicator from the legislative and executive branches of the government.

2.1.2.1.1. Independence from the Legislative

The existence of a separate and independent judiciary from the legislative branch of the government is essential for a fair administration of justice and the implementation of rule of law. In one of its decision, the European Court of Human Rights explained that,

“In case in which a parliament adopted a law overturning the jurisdiction of the courts to hear certain requests for compensation against the Government and declaring the

*legality decreed damages to null and void, the court found that the independence of the court has been violated.”*⁵⁵

The above decision of the court shows that, the independence of the judiciary must be protected against the interference of the legislature. The court more announced that, apart from its legislative competence, the legislature must be prevented from committing abuses and it is not allowed to intervene on the jurisdiction of the judiciary. Moreover, the legislative organ must be constrained from passing legislations that retroactively affect and reverse the decision of the judiciary.⁵⁶ The law should clearly close such kind of opportunity to the legislative branch of the government.

The Basic Law of Germany (herein after the German Constitution) has recognized the substantive independence of the judiciary from the other branches of the government. Though the German constitution recognized judicial independence, the judiciary is not relived from compliance of the law.⁵⁷ The institutional independence of the judiciary deters the legislature not to interfere in the activity of the judiciary by enacting case specific laws.⁵⁸ Moreover, the principle prohibits the German legislature from adopting decisions which may influence a judge either to decide or not on a certain case in a specific manner.⁵⁹ As the German constitutional adjudicator is part of the judiciary, this principle will highly influence the legislature not to interfere on the activity of the Constitutional Court. The German

⁵⁵ *Stran Greek Refineries and Straits Andreadis V. Greece*. 13427/87 (ECtHR, December 9, 1994, Serious A301-B, Para.49.

⁵⁶ Minimum Standards of Judicial Independence adopted by the International bar association in New Delhi, 1982.

⁵⁷ Art. 97(1) of the Constitution of Germany

⁵⁸ S.detter beck, in: sachs, Rn.12. Cited in Seibert-Fohr, Anja, Constitutional Guarantees of Judicial Independence in Germany (June 10, 2006). Recent Trends in German and European Constitutional Law, pp. 267- 287, E. Riedel, R. Wolfrum, eds., Springer Berlin/Heidelberg/New York, 2006. Available at SSRN: <http://ssrn.com/abstract=1706565> [last accessed on March 5, 2012]

⁵⁹ Ibid, Rn.12.

Constitutional Court is the final adjudicator of the constitution and the legislature is duty bound to accept the decision of the court.⁶⁰

The constitution not only protects the constitutional court against the interference of the legislative branch, but also it gave the power to control the constitutionality of laws enacted by the legislature. The constitutional court has the power to decide on the compatibility between laws enacted by the legislative branch of the government and the constitution.⁶¹ The Constitutional Court has the power to reject laws that are enacted by the law maker if they are found to be incompatible with the constitution which is the supreme law of the land in Germany. The existence of judicial-constitutional review has contributed a lot to protect the constitutional adjudicator against the interference of the legislative branch.

In the same condition, the Constitution of the Republic of South Africa has also guaranteed the substantive independence of the judiciary. The constitution declares that, “courts are independent and subject only to the constitution and the law...”⁶² Moreover, the constitution affirmed that, “no person or organ of the government may interfere with the function of the courts.”⁶³ From the above mentioned provisions of the constitution one can concluded that, the judiciary is regulated only by the law; short of that any interference by the other branches of the government is strictly forbidden.

The South African Constitutional Court is not only protected from the unnecessary interference of the legislative branch, rather the constitutional court also has the power to annul the work of the legislature if it is found to be contrary to the constitution. The Constitutional court has power to “decide on the constitutionality of any parliamentary or

⁶⁰ Art.93(1) of the Constitution of Germany

⁶¹ Art.93(1(2)) of the Constitution of Germany

⁶² Art.165(2) of the Constitution of South Africa

⁶³ Art.165(3) of the Constitution of South Africa

provincial bills”⁶⁴ and in doing so, it can exercise its role of check and balance against the legislative branch of the government

Like the German and the South African constitutions, an independent judiciary is also established by the Ethiopian Constitution. In Ethiopia, courts at the Federal and State level are free from any interference or influence of any governmental body, government official or from any other source. Judges exercise their functions in full independence and are directed solely by the law.⁶⁵ Though the constitution declares the independence of the judiciary from the influence of the legislative branch of the government, the judiciary has no any role to check the constitutionality of laws enacted by the Ethiopian legislature.

The arrangement of the Ethiopian constitutional adjudicator is quite different and unique. The framers of the Ethiopian constitution have preferred non-judicial constitutional review mechanism rather than granting the judiciary to have a power of reviewing constitutionality of laws. The trend followed by the Ethiopian constitution is different from the German and the South African practice. In Germany and South Africa, the power to review the constitutionality of legislative acts is given to the judiciary branch, though it is a specially established constitutional court. But in Ethiopia, the power to review and control the constitutionality of legislative acts is given to the non-judiciary organ which is the other wing of the Ethiopian parliament.⁶⁶

The Ethiopian constitutional adjudicator is not part of the judiciary and the same logic may not apply here as the German and South African constitutional courts. As explained above, since the German and South African Constitutional adjudicators are part of the judiciary, the constitutional principle of judicial independence can be applicable for the protection of the independence of the Constitutional Courts. In Ethiopia, it is the HOF that can interpret the constitution and it is not part of the judiciary. Rather, it is part of the legislative branch of the

⁶⁴ Art.167(4)(b) of the Constitution of South Africa

⁶⁵ Art.79(3) of the Constitution of Ethiopia

⁶⁶ Art.53 of the Constitution of Ethiopia

government.⁶⁷ The basic question that has to be raised here is that, why the Ethiopian Constitution devised a non-judicial mechanism of constitutional adjudication? Why the constitution failed to establish a constitutional court as a constitutional adjudicator?

Different views are forwarded by different writers as an answer for the above questions. One of the basic reasons is related to the nature of the Ethiopian constitution itself and the role played by the Nations Nationalities and Peoples (NN&P) of Ethiopia as the sovereign power holder.⁶⁸ The Ethiopian Federal system is the coming together and the constitution is a political contract signed between NN&P. As it is a political document and the signatories are NN&P, the constitution has to be interpreted by those political representatives of NN&P. Each NN&P of Ethiopia are represented at least by one member and additional one representation is also given for every one million population.⁶⁹

The second reason for establishing a political institution as a constitutional interpreter and denying the judiciary from its inherent power of judicial review is related to fear of “judicial activism” which they thought that the judiciary would usurp the power of the NN&P in the name of constitutional interpretation. They further argue that, the Ethiopian judiciary historically lacks trust by the people. Under the rulings of both the monarchical and military regimes, the judiciary was an instrument of suppressing and achieving the policy of the regimes. But, the argument which is related to lack of public confidence on the judiciary does not seem sound. Research was not even conducted and the Ethiopian people were not consulted whether they prefer a judicial or non-judicial constitutional review. This argument is also related to the socialist ideology of the ruling party. Before 1991, the current Tigrayan People’s Liberation Front/TPLF dominated ruling party (Ethiopian People’s Revolutionary Democratic Front /EPRDF) was officially *pro-Marxist-Leninist* group and the choice is

⁶⁷ See Art. 53 of the Ethiopian constitution, “There shall be two Federal Houses: The House of Peoples’ Representatives and the House of the Federation.”

⁶⁸ Assefa Fiseha, Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience, 52 NETH.INT’L L.REV.1,4n. ,(2005) .p.7

⁶⁹ Art.61(2)

influenced by its former political ideology. As evidences show that, “*Marxist* political system generally vests the power of constitutional review in parliamentary bodies while purposefully weakening the judiciary.”⁷⁰ *Marxist* regimes do not want to see a strong judiciary as they fear that it would create an obstacle on their desire of uncontrolled power.

The other justification given for the establishment of a non-judicial constitutional review in Ethiopia is related to the Framers assumption about the efficiency of the Ethiopian judiciary to handle the matter. The framers thought that “the judiciary would remain the weakest branch of the government” and empowering the judiciary to play constitutional adjudicatory role will be non-sense.⁷¹ In my opinion, this justification of the framers does not seem sound and it amounts to despising the institution of the judiciary as whole. It looks also more political than proper legal justification for the existing problem in the country.

The other basic issue that has to be discussed here is the question of the independence of the Ethiopian constitutional adjudicator (HOF) from the legislative branch and its role to control the legislature. An organ which is empowered to adjudicate constitutional dispute has to be independent and free from any kind of political pressure.⁷² When we look members of the HOF, they are the representatives of NN&P and they are accountable to the State Councils’ as well as the NN&P. Even members of the HOF are not accountable to their conscience and the Ethiopian constitution. As they are practically elected by the State Councils, they will be obliged to embrace the political interest of the party that establishes a government in the State level or in the Federal government. Due to this reason, members of the HOF will be under the influence of the legislative branch of the government and unconstitutional legislations may not be challenged.

⁷⁰ Zdenek Khun, *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement*, 52 AM.J.COMP, 2004, L.531,539-540

⁷¹ Chi Mgbako et al, *Silencing the Ethiopian Courts: Non-Judicial Constitutional Review and its Impact on Human Rights*, Fordham International Law Journal Vol.32, Issue.1, Art.15. ,(2008)P268

⁷²Ibid, P.284.

As far as I know, since Ethiopian People's Democratic Front (EPRDF) took power in Ethiopia, 893 Proclamations and 391 Regulations are enacted and totally 1284 Proclamations and Regulations are enacted in the country.⁷³ But, no law or regulation is challenged and rejected by the HOF due to its incompatibility with the constitution. There are some laws in Ethiopia which are alleged as unconstitutional by the opposing political parties, human rights groups⁷⁴ and civic societies, but these laws are still working and in practice. It is difficult to expect from the HOF to exercise its controlling role as a guardian of the constitution against the legislative organ as both of them are different wings of the same branch of government.

It is also difficult to say that the HOF will be independent from the influence of the legislative branch of the government. The party politics that ties both the HOF and the HOPR would make the former to be dependent on the later. Moreover, since members of the HOF are accountable to State Councils, Councils are entitled to remove representative as long as they lose a confidence on them. There is also a strong bondage between the Federal legislature and State legislatures and this by itself will put a pressure on the HOF. Because of this reason, the HOF will be indirectly under the influence of the Federal legislature and its independence will be affected.

2.1.2.1.2. Independence from the Executive

The right to fair trial is an absolute right that may not be presented for bargaining between the government and citizens. To achieve this absolute right, the role of an independent

⁷³ <http://www.abbyssinialaw.com/index.php/law-information> [Last accessed on March 5,2012]

⁷⁴ Human Rights Watch Group for example opposed the Ethiopian anti-terrorist law during its draft and called the government to revise the draft. Finally, the draft law approved by the legislature as it is. The main argument of the Human Rights Watch was *"If implemented, this law would provide the Ethiopian government with a potent instrument to crack down on political dissent, including peaceful political demonstrations and public criticisms of government policy that are deemed supportive of armed opposition activity. It would permit long-term imprisonment and even the death penalty for "crimes" that bear no resemblance, under any credible definition, to terrorism. It would in certain cases deprive defendants of the right to be presumed innocent, and of protections against use of evidence obtained through torture."*
http://www.icj.org/IMG/Analysis_of_Ethiopia_s_Draft_CT_Proclamation_3_9_09.pdf
 [last accessed on march ,2012]

judiciary is essential. Especially, since the executive branch of the government is controlling the day to day functioning of the government; the influence of this branch is very immense to affect the independence of the judiciary. The principle of separation of powers obliges the executive to refrain from interfering in the activity of the judiciary and it is in fact one of the basic pillars of the principle of separation of powers and functions. The UN Special *Rapporteur* on the independence of the judiciary recommended that, “Separation of powers and executive respect for such separation is *a sine qua non* for an independent and impartial judiciary to function effectively.”⁷⁵

The principle of substantive judicial independence advocates the protection of the judiciary from the unnecessary influence of the executive branch of the government. This principle highly condemns “phone justice”. The objective is that, the judiciary should not be influenced by the executive and no direction is required by the executive how the judiciary manages its task. Generally, the judiciary branch must not be advised by the executive “as how an individual case is to be solved.”⁷⁶ If this act is done by the executive, it may be considered as an evil act committed against the judiciary.

The German constitution takes a strong position that, the independence of the judiciary is highly protected from the interference of the executive branch. Ordering the judiciary to decide a certain case in a specific output and enacting administrative regulation with the purpose of influencing the judiciary is highly prohibited.⁷⁷ But this does not mean that, the executive branch is not entitled to have a say on the appointment of the judiciary. As the judiciary itself is responsible and governed by the law, judges will be responsible according

⁷⁵ Report of Special Rapporteur on the situation of human rights in Nigeria, UN document E/CN.4/1997/62/Add.1, para. 71.

⁷⁶ Michal Bobek, The Fortress of Judicial Independence and the Mental of the Central European Judiciaries, European Public Law, Vol., Issue. 1-(2008) .P.3 Available at <http://ssrn.com/abstract=995220>

⁷⁷ Seibert-Fohr, Anja, Constitutional Guarantees of Judicial Independence in Germany (June 10, 2006). RECENT TRENDS IN GERMAN AND EUROPEAN CONSTITUTIONAL LAW, (2006) pp. 267- 287, E. Riedel, R. Wolfrum, eds., Springer Berlin/Heidelberg/New York. Available at SSRN: <http://ssrn.com/abstract=1706565>

to the existing governing law if they exceed their constitutionally limited power. Judicial independence does not mean that the judiciary is not accountable for the act done by exceeding its scope.

The German constitutional court is independent from the executive branch. The Constitutional court is not only independent from the executive; rather it has also the power to check the constitutionality of executive acts. The court plays an important role in the protection of violations of fundamental rights and freedoms against the executive branch. If one of the fundamental rights and freedoms of citizens is violated by public authorities, individuals are entitled to file a complaint before the constitutional court.⁷⁸

In South Africa, the judiciary is not only independent and free from the influence of the legislative branch. The constitution has also devised a mechanism to recognize the independence of the judiciary from unlawful interference and pressure of the executive branch. The constitution rightly stated that, “no person or organ of the state may interfere with the function of the court.”⁷⁹ At least in principle, the constitution has designed properly in a way that helps the judiciary to be free from the influence of the executive branch. Except the regular and normal executive roles like appointment of the judiciary, the executive is totally excluded from interfering in the affairs of judicial branch. This highly helps the South African judiciary to be protected from unnecessary interference of the executive branch.

The constitution not only recognizes the independence of the judiciary from the executive branch. Rather, it has also given the power to check constitutionality of acts done by the executive branch. The existence of judicial-constitutional review in the country helps the South African constitutional court to check the constitutionality of executive acts. The constitutional court has participated in various and most contentious social, political and economic issues in the country. Up on its establishment, the court has challenged the views of

⁷⁸ Art.93 (4)(a) of the Constitution of Germany

⁷⁹ Art.165 (2) of the Constitution of South African.

political elites including President Mandela. The court has shown its commitment towards in recognition of its independence by striking down the decision of death penalty in the country.⁸⁰ Moreover, it has also rejected in its ruling the presumption that “a confession made to magistrate is voluntary and therefore admissible in court.”⁸¹ The constitutional court has contributed a lot in establishing an independent judiciary that can challenge the pressure of the executive branch of the government. In the process of challenging the ruminants of the Apartheid regime as well as the ruling party (ANC) in the country, the legitimacy of the court was in question by the public. Especially its ruling on “capital punishment and other controversial issues were so unpopular that they threaten the legitimacy of the constitutional court.”⁸² Through process, the legitimacy of the constitutional court has increased and “by the end of 1997, ordinary South Africans could point few decisions of the constitutional court that markedly improved the quality of their life.”⁸³

The Ethiopian constitution has declared that, the judiciary should be free from any influence of the executive branch. The constitution more strengthen that, judges are only accountable to the constitution and their conscience. No doubt, at least in principle, the influence of the executive branch on the independence of the judiciary is minimal or I can say almost none. The framers of the constitution have designed properly the absolute independence of the judiciary from the executive organ except the usual checking mechanisms in the appointment process.

As I have explained before, the framers of the Ethiopian constitution have chosen a non-judicial constitutional adjudicator for various reasons and the judiciary is excluded from its adjudicatory role of the constitution. Now it is HOF which is a political representative of the

⁸⁰ State v. Makhanyane and Others, 1995, Cited at James L.Gibson and Gregory A.caldeira, Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court .Cambridge University Journal of Politics, Vol,65.No.1 ,(2003),.P.7 : <http://www.jstor.org/stable/3449853> [last accessed on February 28,2012]

⁸¹ Ibid, State V. Zuma and Others, 1995.

⁸² Ibid,p.7.

⁸³ Ibid

Ethiopian NN&P that is entitled to discharge the role of constitutional adjudication. The main issue that has to be discussed at this point is the independence of the HOF from the executive organ and its capacity to exercise its task free from the influence of the executive branch.

The mainstream understanding in the constitutional adjudication process is that, the institution which is entitled to interpret or adjudicate constitutional issues has to be free from any form of political affiliation or influence. If a tribunal is not separated and independent from the executive and legislative branches of the government, the law could not be used as a means of protecting human rights and achieving individual liberty. This is also supported by the well known principle of natural justice, “*no man shall be Judge in his own cause.*” If an individual is allowed to be a judge on his or her own affairs, it is obvious that the judgment will incline on his or her own side. The Ethiopian constitutional adjudicator is a political institution. The HOF itself is the other wing of the Ethiopian parliament and this organ represents the Upper House of the parliament. Moreover, members of the HOF are the political representatives of NN&P and operating within the context of the Federal Government, currently dominated by EPRDF which controlled 499 seats of the legislature out of the total 547 seats.⁸⁴ The dominance of the ruling party is also similar in seats of the HOF. It is difficult to expect a complete independence of the HOF from the executive branch. In the same situation Professor Minase Haile rightly expressed that, “the HOF is not likely to rule against the government when adjudicating constitutional disputes.”⁸⁵ Since the HOF is a political institution under the influence of the executive branch, it is difficult to expect a fair, impartial and independent decision when the issue is concerning about a political sensitive issue.

This problem is highly increasing from time to time in the country since the introduction of the constitution in 1995. The moment the HOF is dominated by a single political party, the

⁸⁴ See. <http://www.electionethiopia.org/en/>, [last accessed on March 7, 2012]

⁸⁵ Minasse Haile, *The New Ethiopian Constitution: Its Impact upon Unity, Human Rights and Development*, 20 SUFFOLK TRANSNAT'L L. REV. 1, (1996). P.52

question of the independence of this institution will become endanger. Since members of the HOF are the representatives of NN&P, they are indirectly elected by the State Councils. When the State Councils elect members of the HOF, the representatives can be “state Chief Executives.”⁸⁶ Since members of the HOF could be Chief Executives and law makers in the state councils, they might be influenced by the executive branch. For example in the current situation, government is established in Ethiopia with a coalition of four political parties and these political parties are from four populace and politically dominant States. These four states not only controlled the HOPRs, but they have also majority seats in the FOF. This situation would create a link between members of the HOF executives of the Federal government. Having all these circumstances, it is not difficult to imagine the possibility of dependence of the HOF on the Federal Executive branch of the government.

Being as the chief executives both in the federal as well as regional level, some members of the HOF may be asked to decide on the constitutionality of their own act. In this case, it is difficult to expect a fair decision from a judge who presides on his or her own cause. The arrangement of a non-judicial constitutional adjudication in Ethiopia is clearly a violation of one of the basic principle of natural justice.

There are practical cases in Ethiopia where the HOF was not willing to decide against the executive branch of government though it was clear that the executive had violated the constitution. After the controversial 2005 Ethiopian election, the Ethiopian Prime Minister banned any kind of demonstration in the capital city, Addis Ababa.⁸⁷ At that moment, the former leading opposition political party, Coalitions for Unity and Democracy (CUD) brought a case before the Federal First Instance Court. After receiving the case, the Federal

⁸⁶ T.S. Twibell,). Ethiopian Constitutional Law: The Structure of the Ethiopian Government and the New Constitution's Ability to Overcome Ethiopia's Problems, 21 Loy. L.A. INT'L & CoMp. L. REV. (1999).P.447.

⁸⁷ Dagnachew Teklu, Court Sends Meles Zenawi's Case to Inquiry Council, THE MONITOR, June 7, 2005, at B1, available at <http://www.theafricamonitor.com/resources/55%20English%20issue%20June%207,%202005.pdf>,

First Instance court ruled that the case raised constitutional controversy and it referred the matter to the CCI.⁸⁸ Then CUD appealed the case before the Federal High Court by arguing that, the Prime Minister's ban on any kind of public demonstration has exceeded its constitutional limit and it does not require any kind of constitutional interpretation.⁸⁹ Waiting the decision of the Federal High Court, the CCI remanded the case to the Federal First Instance court, saying that since the Prime Minister did not exceed the constitutional limit of his power, no constitutional interpretation is required.⁹⁰ Finally, both the Federal First Instance and Federal High Courts rejected the case based on similar justification as given by the CCI.⁹¹ The decision given over this case shows the reluctance of the Ethiopian courts to decide over political sensitive issues since they believe that they do not have the power to interpret the constitution. Moreover, the case shows lack of independence on the side of HOF's technical experts (CCI) to decide against the ruling party.

The other evidence that shows the HOF's reluctance to rule on a political sensitive issue is the National Identity claim case of *Silte* people in Southern Ethiopia. The *Silte* people claimed that they do not want anymore considered as *Gurage* Nation.⁹² After a long period of controversy over the matter, the issue is resolved through referendum which finally resulted in the secession of *Silte's* from *Gurage* and got their identity.⁹³ But the application of the *Silte* ethnic group took a long period of time before getting its final decision. The reason that application of *Silte's* took a long period of time was the HOF's fear of similar question in the region. Only in the Southern Nations nationalities and Peoples region, there are more than 56 ethnic groups who might claim similar national identity question.⁹⁴ This case shows that, it is

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Ibid

⁹¹ Ibid

⁹² House of Federation, (2001) Decisions of the House of Federation Regarding Resolution of Claim for Identity, http://www.hofethiopia.org/pdf/CI%20Dessionion_2.pdf

⁹³ bid

⁹⁴ Supra note 5, p.22.

difficult and even problematic to handle a political sensitive question by an organ that itself has a vested interest in the political process as well as in the outcome of the case.

2.2. *Impartiality of Constitutional Adjudicator*

2.2. 1. Overview

The right to be tried by a fair and impartial tribunal is an important right which is recognized in international as well as regional human rights instruments. The UDHR of human rights is among those instruments that has declared the importance of fair and impartial tribunal as a means of achieving the right to fair trial and it said that; “everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”⁹⁵ The declaration focuses that; the mere existence of an independent tribunal is not adequate to assure the fair trial right of peoples unless the tribunal is impartial. Moreover, the International Covenant on Civil and Political Rights (ICCPR) has also focused on the importance of impartial tribunal as a menses of recognizing once right to fair trial and declares that, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”⁹⁶

The principle of impartiality of judges declares that judges should decide cases “on the basis of facts and in accordance with the law without any restriction.”⁹⁷ Since judges are expected to decide over cases based on the existing facts, any government officials or private entities are obliged to refrain from pressuring judges to influence on their duty. In addition to international human rights instruments, regional human rights conventions and commissions have said more on the impartiality of judiciary as a basic requirement to protect and defend human rights. The Council of Europe has rightly affirmed the importance of an impartial

⁹⁵ Art.10 of UDHR

⁹⁶ Art.14(1) of ICCPR

⁹⁷ UN Basic Principles on the Independence of the Judiciary, op. cit., Principle 2.

judiciary and declares that, “judges should have unfettered freedom to decide cases importantly, in accordance with their conscience and their interpretation of facts, and in pursuance of the prevailing rule of the law.”⁹⁸

The impartiality of any tribunal is necessary and essential for the recognition of fair trial rights of the litigants. Unless the tribunal is seen as impartial by the parties or in fact be impartial, the fair trial right of the parties will be at stake. An impartial tribunal has its own manifestations and “impartiality of courts must be examined from a subjective as well as an objective perspectives.”⁹⁹ A distinction has to be made between the concepts of subjective and objective impartiality of the tribunal. The subjective impartiality of a tribunal is related to the “personal conviction” of the individual judge in a given case.¹⁰⁰ If a judge has a vested interest in the outcome of the case, which may affect the impartiality of a tribunal and that particular judge should withdraw from the case. But the objective nature of impartiality of a tribunal is related to the overall institution of the judiciary rather than one particular or more judges. In some objective standards, the institution should be presumed as impartial and “guarantees should be offered to exclude any legitimate doubts.”¹⁰¹

The European Court of Human Rights (ECtHR) has important decisions that can clearly show what an impartial tribunal and an impartial judge looks like. In its decision the court rightly said that, “successive exercise of duties as an investigating and trial judge by the same person...constitute a violation of the right to be tried by an impartial tribunal”¹⁰² The very reason of the court was that, though the particular judge is not in fact partial to a certain party, doubt may be raised on the side of applicant’s and that by itself would affect the impartiality of the tribunal.

⁹⁸ Council of Europe, Recommendation No. R (94), op. cit, Principle I.2.d

⁹⁹ International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors Practitioners’ Guide Series N°1 International Commissions of Jurists Geneva, Switzerland, 2004. P.27.

¹⁰⁰ Ibid

¹⁰¹ *Padovani v. Italy*, ECtHR judgment of 26 February 1993, Series A257-B, para. 25

¹⁰² *De Cubber v. Belgium*, ECtHR judgment of 26 October 1984, Series A86, paras 27

2.2. 2. Factors that Affect Impartiality of Tribunal

As it has been repeatedly mentioned, the existence of an impartial tribunal or for this thesis purpose, an impartial constitutional adjudicator is indispensable for the recognition of fair trial right of the parties. In this topic, I am going to discuss the principal factors that may affect the impartiality of the constitutional adjudicator. Though there are other more factors that may affect the impartiality of the constitutional adjudicator, I will discuss only on the organization of the tribunal and appointment or election mechanism of justices or members of the tribunal.

2.2.2.1. Organization of the Tribunal

The organization of the institution highly matters on the impartiality of the tribunal. An institution which stands by itself will have less tendency of being dependent on the other institution. If an institution is dependent, it has high probability of being partial towards the institution itself is dependent. But it does not absolutely true that an independent institution is always impartial. But as I have mentioned earlier, if the judiciary organ (constitutional interpreter) is dependent on the executive or the legislative branch, it is undeniable fact that the adjudicator cannot be impartial. The organizational structure of the institution has its own effect on the impartiality of the institution. If we want to make the constitutional adjudicator to exercise its task in an impartial manner, emphasis has to be given for the organization of the institution.

The German constitutional court is organized within the structure of the judicial branch of government and the constitution has made it as the supreme judicial authority.¹⁰³ Moreover, the constitutional court is divided in to two “Senates” with different jurisdictions and

¹⁰³ Art.93 of the constitution of Germany

different members of each senate. The independent structure of the constitutional court from the other branches of the government would have its own contribution to recognize the impartiality of the institution. This independent structure has helped the court to be seen by others as an impartial institution. Since it is institutionally independent and separated from the executive and legislative branches, someone may presume that the influence of the other branches will be less and its impartiality may not be affected.

On the same condition, the constitutional court of South Africa is organized within the structure of the judiciary branch and it is also the highest court in all constitutional matters.¹⁰⁴ Any issue involving the interpretation, protection and enforcement of the constitution is a constitutional matter and the constitutional court has an absolute authority on it. The constitutional court of South Africa was established through a high political tension and conflict between different actors during the process. The reason for this political tension and conflict was that “all actors were able to foresee the power and importance of the court in South African politics.”¹⁰⁵ The conflict concerning the constitutional court’s structure between different actors has later contributed for the understanding of the legitimacy of the court by the public.¹⁰⁶ Structurally, the South African constitutional court is organized in a way that can avoid the incident of objective impartiality of the institution towards either for the legislative or executive branches of the government.

The organization of the Ethiopian constitutional adjudicator (HOF) is absolutely different from the German and South African constitutional courts’ organization. As I have repeatedly mentioned earlier, the Ethiopian HOF is not within the structure of the judiciary branch and it is not also made as the supreme judicial authority in the country.

¹⁰⁴ Art.167(3)(a) of the constitution of South Africa

¹⁰⁵ James L.Gibson and Gregory A.Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court* .Cambridge University Journal of Politics, Vol. 65.No.1, (2003)P.6 : <http://www.jstor.org/stable/3449853> [last accessed on February 28,2012]

¹⁰⁶ Ibid

Here I want to make an emphasis that, the peculiar nature of the Ethiopian constitution for establishing a non-judicial constitutional adjudicator by itself is not a problem. In addition, the unique nature Ethiopian constitutional adjudicator by itself is not a problem and I am not even condemning the framers of the constitution for their refrain from adopting either German's or USA's model. The effort made to find a domestic solution for a domestic problem by the framers was an interesting idea. But the main thing that has to be seen behind the arrangement is that the practical challenges that may happen due to their choice. If their choice could avoid doubts like the question of impartiality and independence of the HOF, that would have been a more fantastic task. It has to be evaluated not by the facial structure whether it is copied from some other best models or not. A best model and practice that is properly working in the US may not work in Ethiopia or in some other countries.

When we come to the organization of the HOF, the constitution clearly said that it is within the structure of the legislative branch and serve as the Upper House of the parliament.¹⁰⁷ The constitution by itself declares that the power to adjudicate any form of constitutional dispute is beyond the scope of the judiciary. But there are writers who do not agree that the structure of the HOF is within the legislative branch only and there are also writers who do not agree that the HOF is within the structure of the legislative branch. For example, Takele Soboka argues that, "the HOF is a political body –an executive cum legislative hybrid- that is more of the proverbial priest than a prophet."¹⁰⁸ He further argues that, the Ethiopian constitutional adjudicator is a political body that lacks independence and impartiality.¹⁰⁹ On the other hand, Professor Minase Haile also argues that, though the constitution declares the HOF as a legislative body for unclear reasons, it is not in fact a legislative chamber that shares law

¹⁰⁷ Art.53 of the constitution of Ethiopia

¹⁰⁸ Takele Soboka, Judicial Referral of Constitutional Disputes in Ethiopia: From Practical to Theory, *African Journal of International and Comparative Law*, Vol. 19, No. 1 (2011), P.121. Available at SSRN: <http://ssrn.com/abstract=1485939>

¹⁰⁹ Ibid

making power with the HOPRs.¹¹⁰ Minase further argues that, had the HOF been part of the legislative branch, it would have had at least law making role like other Upper Chambers in the US.

In fact, the issue of the appropriate position of the HOF among the three branches of government structures was one of the basic questions by the members of the Constitutional commission and several questions were raised by the participants.¹¹¹ Now the basic question that has to be addressed at this point is that, does the organization of the HOF have an impact on the impartiality the institution?

As it has been mentioned earlier, if the constitutional adjudicator is not separately established from the other branches of the government, there is high probability of being dependent on the other branches. If the constitutional adjudicator is not independent, there is high probability of being partial to the institution itself has a connection. When we look the nature of the HOF, though there is no consensus on it, the constitution has made it part of the Federal House. It is clear from the constitution that, the HOF has no actual and significant law making role. In addition to its crucial power of interpreting the constitution, the HOF is given a power to recommend the enactment civil laws that can help for the establishment of single economic community. Here we can conclude that, though the HOF has no any role in making laws, it has a crucial role and also the right to recommend on the enactment of civil laws by the HOPRs.

Here the probability of questioning the impartiality of the HOF is very high. For example once the civil law recommended by the HOF is enacted by the HOPRs, the issue of

¹¹⁰ Supra note 84, P.9

¹¹¹ For example, one representative from Region 3 asked the Constitutional commission's experts to answer him about the exact position of the HOF among the three branches of the government. But adequate answer was not given by the experts and they were trying to glorify the political position of the HOF than answering the question. Surprisingly, one expert was trying to answer the question and said that "though there are three branches of government in Western model, it is possible to reshape this model in our context and that is why the HOF is designed in such way." See minute of the constitutional commission, Vol.7.Dec, 1-4, 1994.P7-13.

constitutionality of that specific legislation might be raised by any interested party who is affected by the legislation. In this case, it is the HOF which is entitled to give a final decision on the constitutionality of the law itself has already recommended for the enactment. In this case, the impartiality of the HOF will be at stake. Though the HOF might not be partial in addressing the issue, applicants may not assume the impartiality of the institution because, the HOF is acting as a judge on its own case. The arrangement or structure of the HOF within the legislative branch by itself would ignite doubts on the parties who are trying to challenge the acts of the legislative branch.

2.2.2.2. Appointment and Composition of Members of the Tribunal

The appointment or selection process of members of the constitutional adjudicator is an important factor that determines about the partiality or impartiality of the institution. In addition, the composition of persons who are appointed as a judge is also an important aspect that determines the impartiality of the institution. In Federal form of government, the participation of both the central government and State members is essential to have a trust on the institution that discharges the function of constitutional adjudication. In most countries that have adopted a system judicial-constitutional review of legislations, the role played by the Central government is more important when it is compared with the role played by States.¹¹² The system tries to magnify the role of the Central government in the appointment process of arbiters. It is unimaginable to exclude the Central government from having its own say in the appointment process of members of the constitutional court or the Federal Supreme court. They believe that, the role of the Central government is more significant to keep the unity and strength of the overall system in the country.

¹¹² Supra note 110, P.11.

In Federal Republic of Germany for example, both the Federal government as well as the *Lander* have participation in the process of appointing judges of the constitutional court. The constitutional court is composed of sixteen judges among whom “half being elected by the *Bundestag* and half by the *Bundesrat*”¹¹³ It is known that, the *Bundesrat* is the Upper House of the German parliament in which *Lander* are represented. By electing constitutional court judges by both the *Bundesrat* and the *Bundestag*, the constitution has tried to accommodate the interest of both the Federal and *Lander* governments. Though the election process is highly politicized, judges of German Constitutional Court do not represent the interest of any political party in the country.¹¹⁴ It is undeniable fact that, politicians may endeavor to appoint judges who could support their own policy and ideology. But the constitution has designed an appropriate system that can avoid the problem of lack of public trust and confidence on the constitutional court. In doing so, the German constitution has tried to protect the impartiality of the constitutional court.

The constitutional court of South Africa is composed of eleven judges who are appointed in three distinct processes by the president of the country.¹¹⁵ The president of the constitutional court is appointed by the president of the country in consultation with his/her Cabinet and the Chief Justice.¹¹⁶ In addition, the president is also entitled to appoint four other judges in consultation with his/her Cabinet and the Chief Justice of the country.¹¹⁷ These four judges of the constitutional court are expected to be from the existing judges of the Supreme Court. Appointing from the existing judges of the Supreme Court has a purpose of getting experienced judges for the constitutional court. The remaining six judges are also appointed by the president among list of judges who are submitted by the Judicial Service

¹¹³Supra note 114, P.21

¹¹⁴ Ibid, P.22

¹¹⁵ Heinz Klug, The constitution of South Africa: a contextual analysis Oxford; Portland, Ore.: Hart,2010, P.233

¹¹⁶ Ibid

¹¹⁷ Ibid

Commission (JSC).¹¹⁸ In the process of appointing these six judges, the president of the country is expected to consult the President of the constitutional court. This long process of appointing judges for the constitutional court is intended to accommodate the interest of various interest groups in the country. In doing so, the system has tried to minimize the probability of being partial on the side of judges and also the constitution has strived to establish public trust and confidence on the constitutional court.

Members of the Ethiopian constitutional adjudicator are elected without any participation and role of the Federal government. It is only the State Councils that have a direct or indirect role in the election of members of the HOF. Like its organization, the Ethiopian constitution has chosen a peculiar way of electing constitutional interpreters compared to other Federal systems. In USA, the Supreme Court is the ultimate interpreter of the constitution and both the President and the Senate have an important role in the appointment process of the Federal Supreme Court judges. The President has the power to nominate judges and the Senate (which is the representatives of the States) has the power to approve the nomination of the President. The power of the Senate is extended to the extent rejecting the nomination of the President. This shows us that, both the Federal government (on behalf of the President) and States (on behalf of the Senate) have an important role in the appointment of the Supreme Court judges. In Federal Republic of Germany, both the *Bundesrat* (which is the representative of *Lander* governments) and the *Bundestag* have an important role in appointment process the constitutional court judges. In doing so, the constitution of Germany has tried to accommodate both interest of the Federal government and *Lander's* interest.

When we come to the election process of the Ethiopian constitutional interpreter (HOF), the process is wholly dominated by the State Councils and the Federal government is totally excluded from the process. The constitution has given State Councils discretionary power

¹¹⁸ Ibid

how to elect members of the HOF. State councils can elect members of the HOF by themselves or they can hold an election to have representatives directly elected by the people.¹¹⁹ When the State Councils elect members of the HOF by themselves, they may elect these representatives among the members themselves or among the Chief Executives of the States. In this case, State Legislators and Chief Executives will have the chance to be represented in HOF. As it is rightly mentioned by Takele Soboka, the Ethiopian Constitutional adjudicator will be “more executive minded than those of any constitutional interpreting body in the centralized or mixed system of judicial review elsewhere”¹²⁰

The basic issue that has to be addressed at this point is the question of impartiality of the HOF while exercising its role of constitutional interpretation. Will members of the HOF be impartial when the issue of constitutional interpretation is related to political matter?

I believe that the impartiality of the HOF as a constitutional adjudicator might not be trusted for various reasons. Primarily, it is difficult to expect an impartial and genuine judgment from an organ that itself has an interest in the outcome of the case. Particularly, when the dispute is related to political matter, the problem will be more exacerbated. As one writer rightly expressed that, “members of the HOF are politicians, most of them representing the executive branches of the regional States and their role as a constitutional arbiter would be clouded by a reasonable suspicions of partiality.”¹²¹ Though the HOF may not be practically partial, the institution by itself is exposed for suspicions of partiality and there may not be public trust and confidence on it.

Secondly, the HOF may become partial to the interest of the States in which members themselves are represented and the interest of the Federal government would be compromised. As members are representing the NN&P, they may always strive to accommodate the interest of the electorate or otherwise they may be re-called if the

¹¹⁹ Art.61(3) of the constitution of Ethiopia

¹²⁰ Supra note 108, P.122.

¹²¹ Ibid

electorates lack a confidence on them.¹²² In this case, to satisfy the interest whom they are representing, they may compromise on the interest of the Federal government. This by itself would affect the national unity and integrity of the country.

Actually, this form of arrangement is not common in a Federal form of government structure and in most common Federal states constitutions try to establish a strong Central government. Unless the Central government is strong, the unity and integrity of the country as a whole will be in danger. If there is no strong Central government, it is Confederation rather than being Federation. In the name of constitutional interpretation, the Ethiopian constitution has established strong State governments than a strong Central government.

Though the literal reading of the constitution seems that there is strong Central government, in reality the State members are stronger than the Federal government. In the name of constitution interpretation, the constitution has established stronger State governments and this is a danger for the overall existence of the country. If the Federal government is not strong, the States may leave the Federation at any time. In fact the Ethiopian constitution has given the States the right to self determination including the right to secession and they can exercise this right at any time they want.¹²³ Absence of strong Central government coupled with the right to self determination including the right to secession of States would be a great danger to have a strong and united Central government.

The other problem that might occur due to the political nature of the HOF is the possible occurrence of political tension in the country between the same branch of government, HOPRs and HOF. It looks unusual to here the possibility of political tension that might be occurred within the same branch of government. In fact the concept of political tension will be occurred where there are two competing political parties in the legislative and executive

¹²² Art. 12 of the Ethiopian constitution declare that, “in case of loss of confidence the people may recall the elected representatives.” If the people or state councils lose a confidence on members of the HOF, they may recall them. To satisfy the interest of the state council or the NN&P whom they are representing, they may compromise over the interest of the Federal government.

¹²³ Art.39(1) of the constitution of Ethiopia

branches of the government. When the legislative and executive branches are controlled by two competing political parties, it would be a challenge for the executive branch to discharge its day to day activity.

The nature of political tension that I am talking about here is different from the above mentioned understanding. The tension that I am talking about is between the HOPRs and HOF which is between the same branches of government. As I have mentioned repeatedly earlier, the HOF is the representative of NN&P. In Ethiopia, there are more than 80 NN&P and among these more than 60 percent of NN&P are existed in the Sothern Nations Nationality and Peoples (SNN&P) State and a political party that has a possibility of winning the majority votes in this State will have the a chance to control more seats in the HOF.¹²⁴ On the other hand, members of the HOPRs are directly elected by the Ethiopian people and a political party that wins the election in Amhara and Oromiya Regions has a chance of establishing government in the country.¹²⁵ The vote that is obtained in these two States or Regions is adequate to take the majority sits in the legislative organ.

When HOF and the HOPRs are controlled by two different political parties, it would be very difficult for the political party that has established a government to exercise its day to day function unless it agrees with the HOF. In the name of constitutional interpretation, the HOF would create obstacles on the government. The governing political party may not enact laws as they will be rejected by the HOF if it does not agree on the policy and program of the government. This by itself would create a high political tension between the two Houses and the proper and regular activity of the government may be endangered.

¹²⁴ See <http://www.hofethiopia.gov.et/web/guest/nation-nationality>. [Last accessed on March 13, 2012]. The number of representatives that the SNN&P Regional State has is greater than the sum of the two populace Regional States (Amhara and Oromiya) have. By the 2010 election, SNN&P Region has been represented by 51 representatives out of a total of 137 seats, but those two populace Regions are represented by 48 members (both of them by equal 24 representatives). If the SNN&P Regional State could get the coalition, for example other Regional States, it would control the majority in the HOF.

¹²⁵ See http://www.ethemb.se/ee_eth_election2010.htm. [last accessed on March 13, 2012] In the 2010 Ethiopian election out of 547 seats in the parliament, Oromiya (178) and Amhara (138) Regional States comprises of 316 sets and this is in fact more than enough to establish a government

Chapter Three: Conclusion and Recommendations

3.1. Conclusion

Constitutional adjudication is a proper way of settling dispute in those constitutional democracies who have adopted entrenched form of constitution. It is also important to balance power between different branches of government and helps to implement control on the legislative and executive branches of government.

Constitutional adjudication may not achieve its best objectives unless adjudicators are free from the influence of legislative and executive branches of the government. This means, unless constitutional adjudicators are independent and impartial, constitutional adjudication would not attain or meet its objectives.

There are different models of constitutional adjudication in different countries and there is no specific model that is uniformly applicable throughout all constitutional systems. Among the various models of constitutional adjudication, centralized and decentralized models of constitutional adjudication are common. In decentralized constitutional adjudication model, all levels of courts in the country are allowed to adjudicate constitutional issues. In this model though all levels of courts are allowed to see constitutional issues, the ultimate or final power to decide on constitutional issues is on the hands of the Supreme Court. To protect the problem of inconsistency while in the application of laws, this model has devised the concept of doctrine of *stare decisis* and this doctrine obliges the lower courts to follow former decisions of the higher courts in similar issues.

In centralized judicial-constitutional review, there is only one specialized constitutional court established for this specific purpose. This model is also known as the European model because it is originated in Europe and applicable in the majority of EU member countries. In this model, all levels of courts, including the Supreme Court, are excluded from adjudicating constitutional issues and all powers related to constitutional adjudication are reserved to the

constitutional court. Some Constitutional Courts have further jurisdictions in addition to their regular power of constitutional adjudication like approving election results.

Constitutions can be also adjudicated by a special political council established for this specific purpose. The introduction of a political organ as a constitutional adjudicator is originated in the pre-world wars experience of European's strong parliamentary tradition. For example, the French constitutional council (*Conseil Constitutionnel*) was established as apolitical control of French parliament and protecting the newly emerging executive power against the legislative branch.

The nature of constitutional adjudicator established in Ethiopia looks the third (special political council) model. Ethiopian and French constitutional adjudicators have some similarities. Both of them exclude the judicial branch from the process of constitutional adjudication.

As we can infer from the above three models, there is no uniform or single model that is applicable throughout all countries. One model which is properly working in one country may not work in some others. As long as the institution overcomes those problems related to constitutional adjudication, a country can adopt its own model.

In this thesis I have tried to compare the independence and impartiality of Ethiopian, Germany and South African constitutional adjudicators. According to my finding, compared to German and South African constitutional adjudicators, Ethiopian constitutional adjudicator (HOF) is not established in a way that keeps its independence and impartiality from both legislative and executive branches of government. The problem of the independence and impartiality of HOF is related to its organization as the Upper House of the parliament and the way its members are elected. Members of the HOF are elected by the State Councils and it is the discretionary power of them either to elect representatives by themselves or by the direct participation of the people.

In the past four Ethiopian elections, no member of the HOF is elected directly by the people. Rather, State Councils themselves send representatives either from the members of State Councils themselves or among Chief Executives of States. State Councils may also elect representatives among Chief Executives of the Federal government (from the members of Council of Ministers).

When representatives to the HOF are elected from both Federal and States' figures, its independence will be compromised. Officials will try to achieve their political interest and the institution will be under the indirect influence of both the executive and legislative branches of the government.

Election of representatives to the HOF from both Federal and State government politicians would make the institution to be considered as partial by the public and it will loss public trust and confidence. Moreover, active participation of both Federal and State government politicians in the HOF will make it to be partial when issues are related to political matter in which either the Federal or State governments are a party on it.

When representatives of the HOF decide on cases in which they themselves have a vested interest on it, the principle of natural justice would be affected and the fair trial right of the other party would be at stake. In addition, since members of the HOF are political representatives of Ethiopian NN&P, it will be difficult and even problematic to handle a political sensitive question by an organ that itself has a vested interest in the political process as well as in the outcome of the case.

The political nature of the HOF as a constitutional adjudicator would create a political tension in the country if the Upper and the Lower Houses of the parliament are controlled by two competing political parties. It would be difficult for a government to exercise its day to day activities and enacting legislations unless there is an agreement with the HOF.

3.2. Recommendations

Having considered the above problems of the Ethiopian constitutional adjudicator, the writer would like to recommend the following points as a solution.

- The constitutional adjudicator should be free from any kind of political influence. The political affiliation of the institution will affect its task to serve as an independent adjudicator and parties will not expect an impartial judgment from such kind of institution.
- In order to protect this problem, the power to adjudicate the constitution should be taken from the HOF and a strong, impartial and independent adjudicator should be established. Ethiopia should design a new constitutional adjudicator that best serves for its own interest and considering all existing realities in the country.
- Research has to be done to find the best model of constitutional adjudication that can best work for the Ethiopian reality and Peoples should be consulted in the process.
- The newly established constitutional adjudicator and its members should be accountable to no one but to the constitution and their conscience.
- In the newly established constitutional adjudicator, politicians should not be admitted as a member.
- The absence of the role of the Federal government in the election process of constitutional adjudicators will endanger the interest of the federal government. When constitutional adjudicators or interpreters are elected, there should be an equal participation of both the Federal and State governments in the process.

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