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

Temesgen Sisay Beyene*

Abstract

This article sets out to evaluate whether the Ethiopian constitutional adjudicator meets standards of independence and impartiality to handle constitutional adjudicatory role. It assesses the institutional organization of the constitutional adjudicator, and how and by whom its members are elected or appointed. It considers the various elements and aspects of independence and impartiality and the factors that affect each one of them. To make a meticulous assessment of the Ethiopian constitutional adjudicator in light of those internationally accepted standards, the Article undertakes a comparative analysis with the constitutional adjudicators of two other jurisdictions, Germany and South Africa. It identifies weak sides of the Ethiopian constitutional adjudicator. Finally the Article draws conclusions.

Key terms: Constitutional Adjudication, Impartiality, Independence, Judicial Review, House of Federation, Council of Constitutional Inquiry

Introduction

After the downfall of the military regime in 1991 and a few years of transitional period, Ethiopia has adopted the Constitution of the Federal Democratic Republic of Ethiopia. The Constitution has established a Federal and Parliamentary form of government.[1] This is new to modern Ethiopia as the country had been under a unitary form of government during the military as well as the monarchical regimes.

At the federal level, the Constitution has established a two chambers parliament. The Lower Chamber of the parliament is the House of Peoples' Representatives (hereinafter HOPRs). Its members are elected through direct participation of the electorate every five years. The Upper Chamber of the Parliament is the House of Federation and it is composed of the representatives of the Ethiopian Nations, Nationalities and Peoples (herein

* LLB (Alemaya University), LLM (Central European University, Hungary); Lecturer in Law, Law School, Bahir Dar University. The author is grateful to the anonymous reviewers for their critical insights and scholarly comments on an earlier draft of this work. The author can be reached at: temesgen.sisay@yahoo.com

[1] See Arts 1 & 45 of the Federal Democratic Republic Constitution of Ethiopia (1995), hereafter the Constitution.

after NNP). This Chamber is the home of the representatives of the members of the Federation. Members of the HOF are elected by the State Councils.[2] The Constitution gives discretionary power to the State Councils 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] For the past four election periods, no single member of the HOF had been elected by the direct participation of the people. All members were elected by State Councils among the members of the Councils themselves or from other key political persons.

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 such instances these chief executives of the Federal and State governments and State law makers may be required to adjudicate over the constitutionality of their own acts. This raises question of independence and impartiality of the constitutional adjudicator.

According to the Constitution the HOF lacks the power to make law as it is the HOPR that is empowered to exercise such law-making power. The HOF is granted with the power to interpret the Constitution and to resolve all forms of constitutional disputes.[4] The HOF is the Constitutional adjudicator and courts have no power in respect of constitutional adjudication. The latter are required to refer cases 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

[2] State Councils under the Constitution are legislatures of constituent regions.

[3] Art 61(3) of the Constitution.

[4] Art 62 of the Constitution.

the fear of judicial adventurism are the important ones.[5] Since the HOF is the representative of NNP 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 the Ethiopian election system is first-past-the post[6], a political party that has the majority seat in the HOPRs will have the chance to establish government in the Federal Parliament.[7] A political party that has the highest number of seats in the HOPRs will have the same majority in the HOF, though this may not always be the case.[8] Thus there is a greater chance for members of the HOF to be from the political party that has established government. Such a possibility raises concerns of impartiality and independence of the HOF.

As members of the HOF are not legal experts, the Constitution has established the CCI as an advisory body to it. When any question of constitutionality is raised, it is the CCI which decides whether the matter bears constitutionality issue or not. If it thinks that an issue of constitutional interpretation is involved, it will refer the case with its own recommendations for final decision to the HOF. But, if it finds that there is no need for constitutional interpretation, it will remand the case to the respective court

---

[5] Assefa Fiseha, 'Constitutional Adjudication in Ethiopia: Exploring the Experience of the House of Federation', *Mizan Law Review,* Vol.1 No.1 (June 2007), PP. 11-12.

[6] Under First Past The Post (FPTP) voting takes place in single-member constituencies. Voters put a cross in a box next to their favored candidate and the candidate with the most votes in the constituency wins. All other votes count for nothing. FPTP is the second most widely used voting system in the world, after Party List-PR – For the details see*: http://www.electoral-reform.org.uk/?PageID=481#sthash.oXrf2t4P.dpufand*.

[7] Art 56 of the Constitution.

[8] In fact, this may not be always true. For example a political party that won the majority seats in Amhara and Oromiya Regional 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 may win a majority seat in the Southern Nations, Nationalities and Peoples Region may have the chance to control the majority seats in the HOF.

(whether it comes from the court or not). A party aggrieved by the decision of the CCI not to refer to the HOF has the right to appeal to the HOF.[9]

As literatures as well as experiences of other jurisdictions stand to testify, the issue of who ought to interpret a constitution is controversial. In Ethiopia, whether such power has to be assigned to the judicial organ or to an organ other than the judiciary has been the subject of debate before, during and since the enactment of the FDRE Constitution. The issue has been at the center of the debates of different political parties during the last four national election periods. The opposition parties have been arguing in favor of either a constitutional court or regular courts to serve as a constitutional adjudicator. One frontal and major reason forwarded in this regard has been associated with problems of efficiency on the part of HOF. Issues of independence and impartiality of the HOF seem to have got less attention and occupied secondary position.

Arguing merely on the propriety or otherwise of granting such a power to the HOF essentially focusing on the problem of efficiency seems to lack plausibility as it fails to address major values and related concerns such as the values of *independence* and *impartiality*. The problem of efficiency that is raised against HOF appears to be resolved with the establishment of the CCI as an advisory body. This author is of the opinion that issues of independence and impartiality should rather be the main focal areas of such debates and discourse. And it is vital to note that there is no universally accepted model in respect of which organ of a government should handle questions that involve constitutional adjudication. There are variety of approaches that differ from jurisdiction to jurisdiction depending on a number of factors and existing realities of respective jurisdictions.

This article aims to assess the Ethiopian Constitutional adjudicator, the HOF, from the perspectives of impartiality and independence. It examines the institutional organization of the HOF, and how and by whom its members are elected or appointed. To bring broader perspectives to these issues, the Article undertakes a comparative analysis with the approaches in Germany and South

[9] Art 84(3) of the Constitution.

Africa. Accordingly, it identifies crucial weak sides of the Ethiopian constitutional adjudicator in the light of those standards and the experiences of the two jurisdictions.

The Article proceeds as follows. Section 1 it offers an overview of the notion and purposes of constitutional adjudication. It also considers the various institutions established to discharge this task of constitutional adjudication. Section 2 is devoted to a comparative analysis of the independence and impartiality of the Ethiopian, German and South African constitutional adjudicators. Finally, there is conclusion.

1. Constitutional Adjudication: An overview

1.1. The Notion of Constitutional Adjudication

A constitution is often the supreme law of modern national jurisdictions. Often it is found in a written form. As the supreme law, it takes precedence over any other forms of legislation in a country. It is common to find in the written constitutions national jurisdictions a provision that declares the supremacy of the respective constitution over all other primary, secondary and tertiary legislation. It is this supreme document that directs the formation of major governmental bodies and set out their defining structures and relationships. As a supreme document, a constitution in any modern country serves as a source of legitimizing the power of those in government office.

Though a constitution contains a supremacy clause and declares any legislation and acts of government officials which are contrary to any provision in the constitution null and void, in practice it is common to find such violations. When conflicts arise between a provision in a constitution and another provision in a given legislation or an act of government official (s), we need to have an organ that can efficiently solve or adjudicate such conflict. The issue of constitutional adjudication comes to the picture in such scenarios. The organ that is entitled to adjudicate such conflicts exercises its task by interpreting the provisions of the constitution and it will examine whether a provision in an alleged legislation or an act of a government official(s) is inconformity 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.[10] In this process, the very mission of interpreters of ordinary legislation is to find the reasons why the legislator intended 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."[11] One basic thing that has to be noted 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 applying and implementing the provisions of the constitution as it is.[12] And, it must not be automatically taken that such an interpretation is within the province of judicial power for it is not always courts that exercise such a power in every jurisdiction.[13] In other words, a given country's constitution may not allow courts to exercise the power of constitutional adjudication. There are constitutions that clearly exclude the judiciary from, arguably, its inherent power of adjudicating constitutional issues.[14]

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.[15] It is the power of judges to

---

[10] Farani.M, *The Interpretation of Statutes,* Lahore Law Times Publications (1977), P.32

[11] Marks T.C, *State Constitutional Law in a Nut Shell*, St. Paul Minnesota: West Publishing Company (1998), P.8

[12] Anteeau C.J, *Constitutional Construction*, London, Ocean Publications (1982), P. 3

[13] Where K.C , *Modern Constitution*, new York : Oxford University Press (1960), P.149

[14] 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; regular courts are not allowed to participate in the processes of constitutional adjudication.

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

adjudicate the constitution and rejecting all other laws and practices that are contrary to the constitution.[16] 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.[17] 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."[18]

In a nutshell, judicial review is the power where it is exercised by courts only. As one writer has pointed out, judicial review is the court's power to find disputes related to law and includes dispute settlement act of the court.[19]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 institution that is empowered to exercise this authority.

1.2. Purposes of Constitutional Adjudication

Whether in entrenched or non-entrenched constitutional systems, disputes over constitutional matters are inevitable. In the occurrence of such an event, questions of constitutional adjudication will come into the picture and the organ that is empowered to handle such matters will assume an exercise of its power.

Constitutional adjudication protects individual rights from being violated by the legislative and executive branches of government. The legislature may enact laws that violate constitutionally protected or guaranteed individual and/or group rights. The executive organ may move on to execute or implement laws in a way that is contrary to the overall essence of such constitutionally protected individual and/or group rights. In addition, the

[16]Peltsan J.W, *Corwin and Pleltson's Understanding of the Constitution*, 8th ed. New York: Holt Renehart and Winston (1979), P.27

[17] Supra note 10, P.4

[18] Ibid, P.4

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

executive branch may enact regulations or directives that may be suppressive or unconstitutional in nature. In such circumstances, it is the role of the constitutional adjudicator to adjudicate such matters and to reject a piece of legislation or a provision of such legislation that is found to be unconstitutional. It is this body that remedies unconstitutionally implemented laws and policies. This role of the constitutional adjudicator is more relevant nowadays wherein individual rights and interest are being overridden from time to time in the pretext of promoting or ensuring public rights and interests such as in the fight against terrorism and drug trafficking. When extradition agreements are signed between countries, individual rights may be put 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."[20]

Constitutional adjudication has also the purpose of implementing uniform applicability of constitutional norms throughout a country. If there is no centralized mechanism of constitutional adjudication, the same constitutional principles may be implemented differently within a country. In a system where there is a centralized institution that has the final say on constitutional matters, there is a 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."[21] But this does not mean that the same principle does not apply in other systems that entrust the power to adjudicate constitutional matters to other institutions like the French Constitutional Council or the Ethiopian HOF. This purpose of constitutional adjudication is very essential for those countries that are following the civil law legal system. In the civil

[20] 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. (1986). P. 294.

[21] Zylberberg P*, 'Problem of Majoritarianism in Constitutional Law: A Symbolic Perspective',* 37 McGill L. J. (1992), P. 61.

law legal system, there is no or limited concept of precedent and the lower courts in civil law countries are not obliged to follow the path of the higher courts. In such circumstances, the existence of centralized constitutional adjudication will help courts to have similar stands 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 powers. This is particularly to refer to Montesquieu's understanding of the principle of separation of powers.[22] It has to be clear that Montesquieu's version of separation of powers has to be separated from the Westminster's model of separation of powers.[23] If either the legislative or the executive branches of government violates this principle of separation of powers, the judiciary will help to control them through constitutional interpretation. As Alexander Hamilton said, the legislative branch is the most dangerous branch of the government and it is necessary to have a strict control by the other branches of government. As the same author pointed out, the judiciary is the least dangerous branch of government but it can properly control the dangerous power of the legislative branch via the mechanism of constitutional interpretation.[24]

---

[22] According to Montesquieu, the three branches of government must be separated personally, institutionally as well as functionally. He argues that one person should not be allowed to be a member of more than one institution or branch of government. At the same time, one branch of government should not be allowed to exercise the function of the other branch of government. To implement Montesquieuian version of separation of power, all the three branches of 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.

[23] In the Westminster's model of separation of power, we cannot find Montesquieu's version of separation of power. In Westminster's model, there is a fusion of power between the legislative and executive branches of government and at the same time a member of the executive branch of government can be a member of the legislative branch and the vice versa is also true.

[24] See Federalist Paper No. 78.

1.3. Organs Empowered to Adjudicate the Constitution

In the process of application and enforcement of either ordinary laws or the provisions of a constitution, it is inevitable that questions of constitutional interpretation would arise. When the essence of an ordinary legislation is found to be in contradiction with a provision of the constitution, the call of constitutional adjudication will come at the forefront. Moreover, since constitutional provisions are too general and often remain open-ended,[25] there is always the need to constitutional interpretation. When ordinary laws are found to be contravening a constitutional provision, such laws need to be declared as unconstitutional and should be considered as null and void. The question that immediately comes to mind at this point will be: Which governmental body is entitled to discharge this task of adjudicating constitutional issues? This question is very crucial in the process of constitutional adjudication. The difficult task in the constitutional adjudication process is finding the appropriate organ that can discharge this task properly. The most difficult task of framers of a constitution in constitutional law making process is to find a proper institution that can properly address tasks of constitutional adjudication.

There is no clear-cut answer for the question: which governmental institution ought to interpret a constitution authoritatively? 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. Germany, Italy, Austria and Hungary are best examples in this regard.[26] On the other hand, some countries like the United States, Canada, Australia and Japan have granted this power to their respective regular courts. In some other jurisdictions, a hybrid system which combines both constitutional courts and regular courts is established.[27] In addition to constitutional or regular courts or hybrid system as organs of constitutional

[25]Norman, Dorsen et al. *Comparative Constitutionalism: Cases and Materials*, 2nd edition, West (2010), P.139

[26]Ibid, pp.151-152.

[27]Basson. Deon, *South Africa's Interim Constitution*: Text and Notes (Revised edition.), Kenwyn: Juta & Co. (1995), p.148.

interpreters, some countries have established political institutions as the proper institutions to handle constitutional adjudication matters. The Ethiopian House of Federation and the French Constitutional Council (*Conseil Constitutionnel*) can be cited as best examples of such a different model.

As the preceding discussion would suggest, there is no specific formula to assign such constitutional interpretation task for an identified governmental body. Every country chooses its own institution which it thinks is proper to assume such a responsibility. But it is generally accepted that major underlying issues that underpin the selection of one or the other constitutional adjudicatory body remain to be similar. These are issues of *impartiality* and of *independence* to adjudicate constitutional controversies. Taking these issues as central values, national jurisdictions choose their own institutions which they think are appropriate to achieve their respective goals and interests. The next sub-section is devoted to the examination of various models of constitutional adjudication by different governmental bodies.

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 nowadays. The rationale for empowering regular courts to have a role of constitutional adjudication is the presumption that a constitution is a form of law like other laws "which courts ordinarily interpret and apply."[28] Constitution is considered as a legal document and in this case it is only regular courts that are entitled to exercise such legal matter. As a constitution is believed to be the fundamental and higher law of a country, it prevails over any other laws or government orders in case of conflict. A constitution is the "vehicle through which the people establish their future government."[29] The supreme and fundamental nature of a constitution would

[28]Robert, P, *Theories of Constitutional Interpretation. Representations*, No.30, Special Issue: Law and the order of Culture, University of California Press (1990), P.15

[29]Ibid.

be maintained if courts are granted with 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 in the USA, Argentina, Brazil, Canada and Japan, the power of judicial review is shared among different levels of courts in the respective countries and ultimate decision is given by the Supreme Court of that country. 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 such system is known as the decentralized system.[30] 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 this function. All levels of courts do participate in the work of constitutional interpretation for it is assumed that "interpreting laws and applying them in concrete cases"[31] is the function of the judiciary.

In the United States, though the constitution does not designate an authoritative interpreter,[32] all levels of courts are entitled to decide over any question of constitutional adjudication which is concrete. Moreover, any judge can decide over a case where the existing legislative norm is found to contradict the constitution. In such an instance the judge disregards the contradictory legislative norm and declares the applicability of the constitution.[33] Sometimes, disregarding existing legislative norms by courts create inconsistency as there may be different modes of constitutional interpretation. To minimize such risk of inconsistency, the system has devised the concept of doctrine of *stare decisis.*[34] This doctrine obliges the US courts

[30]Danielle E.Frinck, 'Judicial Review: The US Supreme Court versus the German Constitutional Court',. *International and Comparative Law Review,* Vol. 20 (1997) P.126.

[31] Ibid, p.126

[32]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 US Constitution. The constitution states, "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."

[33]Supra note 31, p.132.

[34] Ibid, p.132

to follow their former decision on similar issues. It also obliges courts to follow the precedent of higher court's decision in the same jurisdiction. Moreover, the existence of a single Federal Supreme Court helps solving problems of inconsistency of decisions.

1.3.1.2. Adjudication by Constitutional Courts

Adjudication of constitutional disputes through the use of a centralized constitutional court is common in the majority of member countries of the European Union.[35] Though the concept of constitutional court originated in Europe, it court is not limited to Europe. This centralized constitutional court has 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 a constitutional court as a means of constitutional adjudication excludes all levels of courts, including a supreme court from disregarding statutes on their own authority.[36] The role of the constitutional court is not only limited to nullifying unconstitutional statutes and unconstitutional acts of government officials. As Victor F. Comella asserts:

> *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*.[37]

It is possible to classify constitutional courts into three categories based on the role they play. These categories are pure constitutional courts, middle constitutional courts and constitutional courts with so many jurisdictions. The

[35]*See* supra note 26, 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.

[36]Ibid, p.155

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

first category of pure constitutional courts is only limited with the task of reviewing the constitutionality of laws. Beyond their normal function of reviewing the constitutionality of laws, they do not have any jurisdiction to participate in any tasks. The constitutional courts in Belgium and Luxemburg are best examples.[38] The second category of constitutional courts is empowered to exercise some additional tasks beyond their regular activity of legislative review. Constitutional courts of Italy and Portugal are best examples.[39] The third category of constitutional courts has so many jurisdictions beyond their role of legislative review as their day to day function. The constitutional courts of Austria, Germany and Spain are best examples.[40]

The German Constitutional Court manifests distinctive constitutional jurisdiction. Different from the rest of German courts, the constitutional court serves as a watchdog of the German Federal system. This Constitutional Court does not involve itself in ordinary settlement of disputes unless the case involves a constitutional question.

1.3.2. Constitutional Adjudication by Special Political Council

Constitutional interpretation may also be exercised by other organs different from both constitutional and regular courts. A political institution may be empowered to adjudicate constitutional disputes. The introduction of a political organ as a constitutional adjudicator is highly influenced by the pre-World Wars European parliamentary traditions. This tradition of parliamentary supremacy has highly influenced the position of the judiciary in many European countries.[41] 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.

---

[38]Ibid.

[39]Ibid.

[40]Ibid

[41]Yves M and Andrew K , *Government and Politics in Western Europe*, 3rd edition, Oxford University Press (1998), P.317

In the last years of the monarchical regime, the 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 powers was strictly applied in the country in order to get executive immunity from political interference.[42] Moreover, the 1791 French Constitution clearly prohibited any judicial power to criticize laws on account of unconstitutionality. 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."[43] As per this provision the judiciary was totally excluded from checking the legislative and executive branches of the government. The system lost trust on the judicial branch of government as a guardian of fundamental rights and freedoms.

The 1958 Constitution is another significant document in the French constitutional history. The Constitution has granted the executive organ some powers traditionally considered as legislative function. It has established a Constitutional Council as a means of political control of any parliamentary reclaim of these functions. Now, the French Constitutional Council is considered as the guardian of the Constitution. The Council has the role of controlling the constitutionality of legislation and other international treaties signed by the executive. The decision of the French Constitutional Council is not subject to appeal; its decision is final.

Outside Europe, constitutional interpretations by political organ exist in other countries. The 1995 Ethiopian Constitution has established a political institution as a constitutional adjudicator. The HOF, the Upper Chamber of the parliament, is granted with such power. Compared to other models, the choice made by the framers of the Ethiopian Constitution looks unique and

[42]Ibid, p.319

[43]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].

peculiar. As mentioned above, having a peculiar institution as a constitutional interpreter by itself is not a problem. For that matter, countries are encouraged to design a system that can work for them. The main issue that has to be considered at this juncture rather is whether the institutional organization of such a unique constitutional adjudicator enables it to resolve disputes in an impartial and independent manner. Preferring a new model by itself is not a problem so long as a country has designed its own constitutional adjudicator that works in an independent and impartial manner.

2. Independence and Impartiality of Ethiopian, Germany and South African Constitutional Adjudicators: Comparative Analysis

2.1. Independence of Constitutional Adjudicator

2.1. 1. Overview

The independence of a constitutional adjudicator as well as the judiciary depends on various factors. Various political, social, economic, cultural, legal and other factors in individual countries affect the state of independence of such institutions. 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 enjoy more independence compared to their civil law counter parts.[44]

2.1. 2. Elements of Judicial Independence and its Standards

Judicial independence is essential and it is one of the building blocks of rule of law.[45] The concept of judicial independence is included in different international and regional instruments. The UN Principles on the Independence of the Judiciary provides that, "the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or

[44]Supra note 37, P.165

[45]John Bridge, 'Constitutional Guarantees of the Independence of the Judiciary', Vol.11.3 *Electronic Journal of Comparative Law* (2007).

the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary."[46] The independence of the judiciary is recognized in various regional instruments such as the Council of Europe's Recommendation on the Independence of Judges[47], the African Commission on Human and People's Rights[48] and the Beijing Statement of Principles of the Independence of the Judiciary.[49]

The overall aim of making the judiciary independent is to enable the institution to discharge its main functions without the influence of either the legislative or executive branches of the government or any other body. Making the judiciary independent also helps it to be free from the influence of economic, political other interest groups.

Judicial independence is considered as an "institutional safeguard of the judiciary, and it is not a privilege or a right that is given for the individual judge."[50] It aims to minimize the influence of the legislative and executive branches of the government on the judicial branch. As has been rightly observed by Burbank, the overall aim of judicial independence is proving that judges are the authors of their decisions, and that they are free from any inappropriate influence coming from the other branches of the government.[51] Sometimes it looks that there is an overlap between the concepts of judicial

[46]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.

[47]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).

[48]See African Commission on Human and People's Rights' Adoption in April 1996 at the 19th Session.

[49]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.

[50]Supra note 44

[51]See Burbank, SB (ed.). *Judicial Independence At The Crossroads: An Interdisciplinary Approach*, New York: Sage Publishers, 2002 pp. 46–49.

independence and judicial impartiality. Various explanations and court decisions are given that help us differentiate between the two concepts.[52]

Commonly, judicial independence is evaluated based on the following elements: substantive independence, structural independence and personal independence. These elements and aspects of the notion of judicial independence are well recognized in international, regional as well as domestic legislation of many modern countries.

This sub-section focuses on those elements that are helpful in measuring the independence of the constitutional adjudicator in the three jurisdictions under consideration. It will not attempt to address every element that has some relevance to the concept of judicial independence

2.1. 2.1. Substantive Independence

The concept of an independent judiciary is derived from the well-established principle of separation of powers. The principle of separation of powers is among the basic components of rule of law. As the executive, legislative and the judiciary are separate branches of government, one organ should not influence the other organ in the process of discharging its function. Particularly, since the judicial branch is a protectorate of a constitution of a country, its independence from the legislative and executive branches should be scrupulously observed. But, this does not mean that, the judicial branch of the government has to be left unchecked by the other branches. The next sub-section discusses the substantive independence of constitutional adjudicator from the legislative and executive branches of the government.

[52]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.

A. Independence from the Legislative Body

The existence of a separate and independent judicial organ different from the legislative branch of the government is essential for a fair administration of justice and the realization of the values of rule of law. In one of its decision, the European Court of Human Rights has opined:

> *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.*[53]

The above decision of the court shows that, the independence of the judiciary must be protected against the interference of the legislature. Apart from its legislative competence, the legislature must be prevented from committing abuses and should not be allowed to intervene on matters that fall within the jurisdiction of the judiciary. The legislative organ must be constrained from passing legislation that retroactively affect and reverse the decision of the judiciary.[54] There has to be a law that closes such opportunities 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 government. Though this Constitution recognizes judicial independence, the judiciary is not relieved from its duty to comply with the laws.[55] The institutional independence of the judiciary deters the legislature from interfering in the activities of the judiciary by enacting case specific laws.[56] Moreover, the principle prohibits the German legislature from

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

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

[55]Art. 97(1) of the Constitution of Germany

[56]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

adopting decisions which may influence a judge either to decide or not to decide on a certain case in a specific manner.[57] 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 Constitutional Court is the final adjudicator of the Constitution and the legislature is duty bound to accept the decision of the Court.[58]

The Constitution not only protects the Constitutional Court against the interference of the legislative organ, but also gives the power to control the constitutionality of laws enacted by the legislature. The Constitutional Court has the power to decide on the compatibility between the laws enacted by the legislative organ of the government and the basic law.[59] 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 basic law 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 organ.

Likewise, 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…"[60] Moreover, it affirms that "no person or organ of the government may interfere with the function of the courts."[61] From these provisions it can be observed that the judiciary is only regulated by the law and other branches of the government including the legislature organ are prohibited from interfering on the jurisdiction of the judiciary.

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]

[57] Ibid, Rn.12.

[58] Art.93(1) of the Constitution of Germany.

[59] Art.93(1(2)) of the Constitution of Germany.

[60] Art 165(2) of the Constitution of South Africa.

[61] Art 165(3) of the Constitution of South Africa.

The South African Constitutional Court is not only protected from the unnecessary interference of the legislative branch. It also has the power to annul the work of the legislature if it is contrary to the Constitution. The Constitutional Court has power to "decide on the constitutionality of any parliamentary or provincial bills"[62] 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 levels are given constitutional protection to be free from any interference or influence of any governmental body, government official or from any other source. Judges are required to exercise their functions in full independence and are directed solely by the law.[63] 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.

As already mentioned, the arrangement of the Ethiopian constitutional adjudicator is quite different and unique. The framers of the Constitution have preferred to grant the power of reviewing constitutionality of laws to a non-judicial body. What is followed by the Ethiopian Constitution is different from that which is followed in Germany and South Africa. In Germany and South Africa, the power to review the constitutionality of legislative acts is given to the judicial branch of government, 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.[64]

The Ethiopian constitutional adjudicator (HOF) 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

[62] Art 167(4) (b) of the Constitution of South Africa.

[63] Art 79(3) of the Constitution of Ethiopia.

[64] Art 53 of the Constitution of Ethiopia.

principle of judicial independence can be applicable for the protection of the independence of the Constitutional Courts. In Ethiopia, it is the HOF that is empowered to interpret the Constitution. The HOF is part of the legislative branch of the government.[65] The basic question that has to be raised here is: What are the rationales for the framers of the Ethiopian Constitution to devise a non-judicial mechanism of constitutional adjudication? Why did they avoid establishing a constitutional court as a constitutional adjudicator?

Different views are forwarded by different writers on these questions. One reason is related to the nature of the Ethiopian Constitution itself and the role played by the Nations, Nationalities and Peoples (NNP) of Ethiopia as the sovereign power holder.[66] The Ethiopian Federal system is the coming together type and the Constitution is considered as a political contract signed between the different Nations, Nationalities and Peoples of the country. As it is a political document and the signatories are NNPs, the Constitution has to be interpreted, it is argued, by those political representatives of NNP. Each NNP of Ethiopia is represented at least by one member and additional one representation is also given for every one million population.[67]

The second reason for establishing a political institution as a constitutional interpreter and excluding the judiciary from exercising such power is related to fear of "judicial activism".[68] There is fear that the judiciary would usurp the power of the NNP in the name of constitutional interpretation. Some argue that the Ethiopian judiciary historically lacks the trust of the public. During the monarchical and military regimes, the judiciary was treated as an instrument of suppression and a means of achieving the policy of the reigning regimes. Though there may be some grain of truth, the argument that the judiciary lacks public trust and confidence seems to lack concrete evidence. It is questionable, to say the least, if a comprehensive research has been

[65]See Art 53 of the Ethiopian constitution, "There shall be two Federal Houses: The House of Peoples' Representatives and the House of the Federation."

[66]Assefa Fiseha, 'Federalism and the Adjudication of Constitutional Issues: The Ethiopian Experience', 52 *the Netherlands International Law Review*. (2005) .p.7.

[67] Art.61(2).

[68] Supra note 5

conducted addressing this point. It is also open to doubt if the Ethiopian people were asked to tell out there preference- if they prefer a judicial or non-judicial constitutional review or any other institution. Maybe this argument can be related to the socialist ideology of the ruling party. Before 1991, the current ruling party (the Ethiopian People's Revolutionary Democratic Front /EPRDF) was officially a pro-Marxist –Leninist front. Perhaps the Marxist-Lenninist political ideology e influenced the choice finally made out. It is asserted that "Marxist political system generally vests the power of constitutional review in parliamentary bodies while purposefully weakening the judiciary."[69] Marxist regimes do not want to see a strong judiciary for there is a fear that the judicial organ would be an obstacle to an exercise of unlimited legislative and executive powers.

The other justification given for the establishment of a non-judicial constitutional review in Ethiopia is related to the framers' assumption of the efficiency of the Ethiopian judiciary to handle such constitutionality matters. 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.[70] This justification does not seem sound and it despises the institution of the judiciary as whole. The framers also appear to have reached such a decision based on political reasons rather than on the basis of proper legal justifications.

The other basic issue that has to be discussed here is the question of the independence of the 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.[71] When we look the members of the HOF, they are the representatives of NNP and they are accountable to the State Councils' as well as the NNP. Even there

[69]Zdenek Khun, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', *52 AM. J. COMP, L. (2004), PP. 539-540.*

[70] 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 (2008), p.268.

[71]Ibid.

is no clear stipulation that members of the HOF be 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 interests of the party that establishes a government in the state level or in the Federal government. Thus members of the HOF will be under the influence of the legislative branch of the government and there is less potential to challenge unconstitutional legislation, let alone to declare such legislation null and void.

Since EPRDF took power, more than 893 proclamations and 391 regulations have been enacted and totally more than 1284 proclamations and regulations have been enacted so far in the country.[72] But, no law or regulation was ever rejected by the HOF for its incompatibility with the Constitution. Yet, there are some laws in Ethiopia which many, if not all, opposition political parties, human rights groups[73] and civic societies in the country allege that they contain unconstitutional provisions. It is difficult to expect the HOF to exercise its controlling role as a guardian of the Constitution against the Federal legislative organ as it stands to be another wing of the same branch of government.

As things stand now, it is difficult to envisage the independence of HOF 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

---

[72] http://www.abyssinialaw.com/index.php/law-information [Last accessed on March 5,2012]

[73] 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, 12 2012]

to state councils, the latter (state councils) are entitled to remove representatives if they lose confidence on them. There is also a strong bondage between the Federal legislature and state legislatures which in turn will put some pressure on the HOF. For all these reasons, the HOF will be indirectly under the influence of the Federal legislature and its independence will be affected.

B. Independence from the Executive

The right to fair trial is relatively an absolute right that is not subject to any form of bargaining or compromise in the relationship between the government and citizens. An independent judiciary is essential to realize this right. Since the executive branch of the government controls the day to day functioning of the government, the influence of this organ over the judiciary is real and immense. There is high probability for this institution to affect the independence of the judiciary. The principle of separation of powers obliges the executive to refrain from interfering in the activities of the judiciary and it is in fact one of the basic pillars of the principle of separation of powers and functions. As the UN Special Rapporteur on the independence of the judiciary has maintained "separation of powers and executive respect for such separation is a *sine qua non* for an independent and impartial judiciary to function effectively."[74]

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 should come from the executive regarding how to manage court cases. The judicial branch should not be "advised" by the executive "as how an

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

individual case is to be solved."[75] If such acts take place, it would be an evil thing 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 manner and enacting administrative regulation with the purpose of influencing the judiciary is highly prohibited.[76] 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 to the existing governing law if they exceed their power granted by the Constitution. Judicial independence does not mean that the judiciary is not accountable for the act done by exceeding the limits of its power.

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.[77] The court plays an important role in the protection 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 independent and free from the influence of the legislative organ. The Constitution has also devised a mechanism to recognize the independence of the judiciary from unlawful interference and pressure from the executive branch. The Constitution stipulates that "no

[75]Michal Bobek, 'The Fortress of Judicial Independence and the Mental of the Central European Judiciaries', *European Public Law*,Vol.,Issue.1-(2008) .P.3.

[76]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.

[77] Art 93 (4)(a) of the Constitution of Germany

[78]Ibid.

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 the judicial branch. Hence, the South African judiciary is protected from unnecessary interference of the executive branch.

The Constitution does not only recognize the independence of the judiciary from the executive branch but it also grants the judiciary with the power to check constitutionality of acts done by the executive organ. The existence of judicial-constitutional review in the country helps the South African Constitutional Court to check the constitutionality of executive tasks. Thus the Constitutional Court is participating in various and most contentious social, political and economic issues in the country. Up on its establishment, the court has challenged the views of political elites including President Mandela. The Court has shown commitment towards recognition of its independence by striking out 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 that may come from the executive branch of the government. In challenging some relics of the Apartheid regime as well as certain actions of the ruling party (ANC) in the country, there were some challenges against the Court threatening its independence. 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

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

[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.

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

[82] Ibid, p.7.

"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 organ. It further provides that judges are only accountable to the Constitution and their conscience. Thus it is obvious that, as things appear on the paper, the influence of the executive branch on the independence of the judiciary is minimal, almost none. The framers of the Constitution have designed properly the independence of the judiciary from the executive organ except instances of check and balance such as in the appointment process.

The mainstream understanding in constitutional adjudication is that the institution which is empowered to interpret or adjudicate constitutional issues has to be free from any form of political or other affiliation or influence. If a tribunal is not separated and independent from the executive and legislative branches of the government, the law is unlikely to serve as a means of protecting human rights and achieving individual liberty. The principle of natural justice demands that "n*o man shall be Judge in her own cause."* If an individual is allowed to be a judge in his/her own affairs, it is obvious that there is always the tendency to incline to one's own side. The Ethiopian constitutional adjudicator is a political institution. The HOF by itself is another wing of the Ethiopian parliament and it represents the Upper House of the parliament. Members of the HOF are the political representatives of NNP and operate within the context of the Federal Government, currently dominated by EPRDF which controls 499 seats of the legislature out of the total 547 seats.[84] The ruling party also has the same seats in the HOF. It is obvious that it dominates both houses. In such situations, it is very difficult to expect the HOF to have reasonable independence from the executive branch. Professor Minase Haile rightly observed that "the HOF is not likely to rule

[83] Ibid

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

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 issues involving some sensitive political matters.

This problem has become a big concern in the country since the advent of the Constitution in 1995. The moment the HOF is dominated by a single political party, the question of the independence of this institution has become endangered. As members of the HOF are representatives of NNP, they are directly or indirectly elected by state councils and state councils may elect "state Chief Executives".[86] Since members of the HOF could be chief executives and law makers in the state councils, the influence by the executive branch would be too obvious to require any elaboration. As the current situation stands to demonstrate, 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 control the HOPR, but they also have majority seats in the HOF. This situation would create a link between members of the HOF and executives of the Federal government. Being chief executives either at the federal or regional level, some members of the HOF may be asked to decide on the constitutionality of their own acts. In light of all these prevailing circumstances, it is difficult to imagine the possibility of independence of the HOF. It is difficult to expect fair decisions from a judge who presides on his/her own case. This author is of the opinion that the existing non-judicial constitutional adjudication in Ethiopia is against the basic principle of natural justice.

There have been practical cases in Ethiopia where the HOF was found not willing to decide against the executive branch of government though there were clear instances proving the violation of the Constitution by the executive.

---

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

[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.

After the controversial 2005 Ethiopian election, the late Ethiopian Prime Minister banned any kind of public demonstration in the capital city, Addis Ababa.[87] At the time, the former leading opposition political party, Coalitions for Unity and Democracy (CUD) brought a case before the Federal First Instance Court against the Premier's ban. The Federal First Instance Court ruled that the case raised issue of constitutional controversy and it referred the matter to the CCI.[88] Then CUD appealed the case before the Federal High Court arguing that the Prime Minister's ban exceeded constitutional limits. It further argued that the matter did not require any kind of constitutional interpretation.[89] While the appellant was waiting for the decision of the Federal High Court, the CCI remanded the case to the Federal First Instance Court ruling that the Prime Minister did not exceed the constitutional limit and that there was no need to require constitutional interpretation.[90] Finally, both the Federal First Instance and Federal High Courts rejected the case based on similar justification as given by the CCI.[91] As this decision shows, Ethiopian courts are reluctant to decide over politically sensitive issues for there is a widespread belief that regular courts do not have the power to interpret the Constitution. The above case is also a clear testimony of lack of independence of the HOF's technical experts (CCI) to decide against the ruling party.

Another occasion that proved the HOF's reluctance to rule against politically sensitive issues has been the *Silte* People National Identity Claim case in Southern part of Ethiopia. The *Silte* People claimed that they do not want any more to be considered as *Gurage* Nation.[92] After a long period of controversy over the matter, the issue was resolved through referendum

[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,

[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%20Dessiontion_2.pdf

resulting in the declaration of the separate identity of the *Silte* people from the *Gurage* nation. [93] This case took a long period of time before getting its final decision. The reason was the HOF's fear of similar questions in the Region as there are more than 56 ethnic groups who might claim similar national identity questions in the Southern Nations, Nationalities and Peoples Regional State.[94] Such instances prove how problematic it would be for the HOF to handle politically sensitive questions in an independent and fair manner.

2.2. Impartiality of Constitutional Adjudicator

2.2. 1. Overview

The right to obtain a fair and impartial tribunal is an important right which is recognized in international as well as regional human rights instruments. The UN Universal Declaration of Human Rights (1948) is among those instruments that recognize right. It stipulates 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] As clearly provided in this Declaration, mere existence of an independent tribunal is not adequate to assure the fair trial right of peoples unless the tribunal is impartial. The International Covenant on Civil and Political Rights (ICCPR) also underline the importance this right to fair trial and impartial trial. It provides 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 requires that judges decide cases "on the basis of facts and in accordance with the law without any restriction."[97] For judges to decide over cases based on the existing facts, government officials or private entities should refrain from pressuring judges to influence on their functions. In addition to international human rights instruments, regional

[93] Ibid.
[94] Supra note 5, P.22.
[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.

human rights conventions and commissions have stipulated more on the requirement of impartiality as a basic requirement to protect and defend human rights. In affirming the importance of an impartial judiciary the Council of Europe asserted 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 is a necessary and essential element for the realization of fair trial rights of litigants. Unless the tribunal is in fact impartial or seen to be impartial, fair trial right of parties will be at stake. And, "impartiality of courts must be examined from a subjective as well as objective perspective."[99] A distinction has to be made between the concepts of subjective and objective impartiality. 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 rendered various important decisions that underline what an impartial tribunal and an impartial judge looks like. In one of its decisions the Court, for example, maintained 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] Though a particular judge is not partial to one of the parties in

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

[99]International Principles on the Indeopendence and Accountablity of Judges, Lawyers and Prosecutors Practioners' 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.

fact, the other party to the dispute may have such doubts and this would affect the impartiality of the tribunal.

2.2. 2. Factors that Affect Impartiality of Tribunal

As has been mentioned repeatedly, the existence of an impartial tribunal, and for our purpose now, an impartial constitutional adjudicator, is indispensable to ensure fair trial right of parties. And, under this sub-section we focus on 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, we shall consider only two factors: the organization of the tribunal, and the appointment or election mechanism of justices or members of the tribunal.

A. Organization of the Tribunal

The organization of the institution significantly affects the impartiality of the tribunal. An institution which stands by itself will be independent of other institutions. It is not necessarily true that an independent institution is always impartial. As mentioned earlier, if the judicial organ (constitutional interpreter) is dependent on the executive or the legislative branch the adjudicator cannot be impartial. The organizational structure of the institution has its own effect on the impartiality of the institution. For the constitutional adjudicator to exercise its task in an impartial manner, it is necessary that sufficient attention is given to the very organization of the institution.

The German Constitutional Court is organized within the structure of the judicial branch of the government and the Constitution has made it the supreme judicial authority.[103] This Court is divided into two "Senates" with different jurisdictions and different members from each senate. The independent structure of the Court from the other branches of the government would have its own contributions to achieve impartiality. This independent structure has helped the Court to be seen as an impartial institution. Since it is

[103] Art 93 of the constitution of Germany.

institutionally independent and separated from the executive and legislative branches, influence of the other branches will be assumed to be less.

Likewise, the Constitutional Court of South Africa is organized within the structure of the judicial branch and it is the highest court in all constitutional matters.[104] Any issue involving interpretation, protection and enforcement of the Constitution is a constitutional matter and the Constitutional Court has an absolute authority on such matter. The Constitutional Court of South Africa has been established in an environment of intense political tensions and conflicts as between the various actors since "all actors were able to foresee the power and importance of the court in South African politics."[105] Conflicts that arose during the process regarding the Court's structure have later contributed for earning its legitimacy by the public.[106] Structurally this Court has been organized in a way that ensures its objective impartiality towards the legislative and executive branches.

The organization of the Ethiopian constitutional adjudicator (the HOF) is absolutely different from that of the German and South African. As already mentioned, the Ethiopian HOF is not within the structure of the judicial branch and it is not the supreme judicial authority in the country.

It is important to note that the peculiar nature of the Ethiopian Constitution in establishing a non-judicial constitutional adjudicator is not a problem in itself. A best model and practice that may be working in the US well may not work in Ethiopia or in another country. The effort made to find domestic solutions for domestic problems is thus an idea worth praising. Yet it is vital to pay particular attention to issues of impartiality and independence.

When we come to the organization of the HOF, the Constitution clearly stipulates that it is within the structure of the legislative branch and as such it serves as the Upper House of the parliament[107]and according to the

[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 .

[106] Ibid.

[107] Art.53 of the Constitution of Ethiopia.

Constitution, 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 notes that the Ethiopian constitutional adjudicator is a political body that lacks independence and impartiality.[109] For Professor Minase Haile the HOF is, though the Constitution declares the HOF as a legislative body for unclear reasons, not in fact a legislative chamber that shares law making power with the HOPR; 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. [110]

The issue of the appropriate position of the HOF, among the three branches of government, was one of the questions raised by members of the Constitutional Commission.[111] The basic issue that has to be addressed is whether the very organization of the HOF has an impact on its impartiality and independence.

As it has been mentioned, if the constitutional adjudicator is not separately established from the other branches of government, there is high probability of being dependent on other branches. If the constitutional adjudicator is not

---

[108] Takele Soboka, 'Judicial Referal of Constitutional Dispuetes in Ethiopia: From Practical to Theory', *African Journal of International and Comparative Law, Vol. 19, No. 1 (2011)*, p.121.

[109] Ibid.

[110] Supra note 86, 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.

independent, there is high probability of being partial to the institution it has connection. Arguably, the Constitution made the HOF part and parcel of the Federal House. It is clear from the Constitution that the HOF has no actual and significant law making role. Apart from its constitutional interpretation power of, the HOF is given a power to recommend the enactment of civil laws that could help establishing a single economic community. Though it has no any role in the actual making of laws, it has a crucial role and responsibility to initiate the enactment of civil laws by the HOPR.

Given such organization, the impartiality of the HOF is questionable. In case a civil law is recommended by the HOF and the HOPRs enact such a law, the issue of constitutionality of that specific legislation might be raised by any interested party who is affected by the legislation. In such a case, it is the HOF which is entitled to give a final decision on the constitutionality of the law that it has initiated. The impartiality of the HOF will be questioned in such cases. Though the HOF might not be partial in fact in considering such issues, parties may not feel that it will act in an impartial manner. That the HOF is within the legislative branch of government by itself would ignite doubts.

B. 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 the impartiality or otherwise of the institution. In addition, the composition of persons who are appointed to the position is another important factor that determines the impartiality or otherwise of the institution.

In federal forms 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 federal countries that have a system of judicial-constitutional review of legislation, the role played by the Central government is more important when it is compared with the role played by states.[112] The system magnifies the role of

[112] Supra note 108, P.11.

the central government in the appointment process of adjudicators. Of course, it is hard to imagine the exclusion of the central government from having its own says in the appointment process of members of a constitutional court or a federal supreme court. The role of the central government is desirable to keep the unity and strength of the overall system in a country.

In Federal Republic of Germany the federal government and *Landers*[113] participate in the appointment of judges of the Constitutional Court. The Constitutional Court is composed of sixteen judges among whom "half being elected by the *Bundestag*[114] and half by the *Bundesrat*"[115] The *Bundesrat*[116] is the Upper House of the German parliament in which *Landers* are represented. The *Bundesrat* and the *Bundestag* participate in the appointment of judges of the Constitutional Court. This accommodates the interests of the Federal as well as *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.[117] Unavoidably, politicians may attempt 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 this Court. The Constitution has guaranteed the impartiality of the 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.[118] The President of the Constitutional Court is appointed by the President of the country in consultation with his/her Cabinet and the Chief Justice.[119] The President of the nation is also entitled to appoint four other

---

[113] *Lander* is the name of the members of the Federation in the Federal Republic of Germany. There are 16 *landers* that are established the German Federation.

[114] It is the lower House of the Parliament in Germany.

[115] Supra note 112, P.21

[116] It is the Upper House of the Parliament in Germany and *Landers* are represented on it.

[117] Ibid, P.22

[118] Heinz Klug, *The constitution of South Africa: a contextual analysis*, Oxford; Portland, Ore.: Hart (2010), P.233

[119] Ibid.

judges in consultation with his/her Cabinet and the Chief Justice of the country.[120] These four judges of the Constitutional Court are expected to be drawn from the judges of the Supreme Court. And this helps to get experienced judges. The remaining six judges are also appointed by the President among the list of judges submitted by the Judicial Service Commission (JSC).[121] In the process of appointment of these six judges, the President of the country is expected to consult the President of the Constitutional Court. All this process is assumed to help to accommodate the interests of various interest groups in the country. In doing so, the system has tried to minimize the probability of recruiting partial judges. The Constitution has also strived to create and maintain the trust and confidence of the public in its 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. As it is the case in respect of the organization of the HOF, the Ethiopian Constitution has chosen its own peculiar way of electing constitutional interpreters.

In the USA, the Supreme Court is the ultimate interpreter of the Constitution. 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 of rejecting the nomination of the President. This shows that both the Federal government (on behalf of the President) and states (on behalf of the Senate) have important roles in the appointment of judges of the Federal Supreme Court. In Federal Republic of Germany, both the *Bundesrat* (which is the representative of *Lander* governments) and the *Bundestag* have important roles in the appointment process of the judges of the Constitutional Court.

[120] Ibid.
[121] Ibid.

When we come to the election process of the Ethiopian constitutional interpreters (members of the HOF), it is wholly dominated by state councils and the Federal government is totally excluded from the process. The Constitution has given state councils discretionary power regarding the election of members of the HOF. State councils may elect members by themselves or they can hold election to get members directly elected by the people.[122] When state councils elect members of the HOF by themselves, they may elect one among the members themselves or among the Chief Executives of the states. It means that state legislators and chief executives have the chance to be represented in the HOF. As Takele Soboka noted the Ethiopian constitutional adjudicator is "more executive minded than those of any constitutional interpreting body in the centralized or mixed system of judicial review elsewhere"[123]Given all these circumstances, could members of the HOF be impartial on issues that involve political matters if constitutional interpretation is sought?

The impartiality of the HOF as a constitutional adjudicator is questionable for a number of reasons. First, it is difficult to expect an impartial and genuine judgment from an organ that itself has an interest in the outcome of the case. This is especially true if the dispute is related to political matters. One writer rightly observed that "members of the HOF are politicians, most of them representing the executive branches of the regional states and their roles as a constitutional arbiter would be clouded by a reasonable suspicions of partiality."[124] Even if the HOF may not be partial in fact, the institution by itself is exposed for suspicion for partiality and it thus may not enjoy public trust and confidence.

Secondly, the HOF may favor the interests of states and interests of the Federal government may be compromised. As members are representing the NNP, they may always strive to accommodate the interests of the electorate

[122] Art 61(3) of the constitution of Ethiopia.
[123] Supra note 110, P.122.
[124]Ibid.

for otherwise they may be re-called by the electorates for lack a confidence.[125] Hence they may compromise the interests of the Federal government and favor their own states. This has a potential to affect national unity and integrity of the country.

Such form of arrangement is not common in federal forms of government and in most federal states constitutions try to establish a strong central government. Unless the central government is strong, the unity and integrity of that country as a whole will be endangered. If there is no strong central government, it is more akin to confederation rather than federation. In the name of constitutional interpretation, the Ethiopian Constitution, it can be argued, has established a system of strong state governments, which is the opposite of the experience of other federal countries.

The literal reading of the Constitution creates an impression that it establishes a strong central government. A critical close reading however shows that the state members are stronger than the federal government. This is a danger for the federal arrangement. If the Federal government is not strong, the states may leave the Federation at any time. The Constitution has given states the right to self-determination including secession and thus any state may exercise this right at any time it wants.[126]

There is also another problem that could arise as between the two different wings of the same branch of government in Ethiopia, i.e., HOPRs and HOF, though it is not common to hear such tensions. Political tensions often arise in cases where there are two competing political parties in the legislative and/or executive branches of government. When the legislative and executive

[125] 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 NNP whom they are representing, they may compromise over the interest of the Federal government.

[126] Art 39(1). Of course there are counter arguments. According to Art 39 (1), it is the Nations, Nationalities and Peoples (not states as such) that are granted with this right to self-determination including the right to secession. And this latter right could only be realized by undergoing all the stringent procedures provided under Art 39 (4).

branches are controlled by two competing political parties, it would be a challenge for the executive branch to discharge its day to day activities. The nature of political tension that is discussed here is different. Tensions that could be envisaged between the HOPRs and HOF are different ones.

In Ethiopia, there are more than 80 nations, nationalities and peoples. Among these more than 60 percent are found in the SNNP Regional State and a political party that has a possibility of winning the majority votes in this State may have the a chance to control more seats in the HOF.[127] On the other hand, members of the HOPRs are directly elected by the Ethiopian people and a political party that wins elections in Amhara and Oromiya regions has a chance of establishing government across the country.[128] The vote that is obtained in these two regional states may be adequate to take the majority seats in the legislative organ. The presence of two different party dominations in the HOPR as well as in the HOF thus may create tensions between the two houses.

When the 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 functions without securing the consent of the HOF. A law enacted by the governing political party may be rejected by the HOF if the latter is not persuaded with policy and program of the government. Such political tensions could be very dangerous and may lead into chaos.

---

[127] 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 SNNP Regional State could get the coalition, for example other Regional States, it would control the majority in the HOF.

[128] See http://www.ethemb.se/ee_eth_election2010.htm [last accessed on March 13, 2012]. In the 2010 Ethiopian elections out of 547 seats in the parliament, Oromiya (178) and Amhara (138) regional states comprised of 316 seats and this is more than enough to establish a government.

Conclusion

Constitutional adjudication is a proper way of settling disputes. It is important to balance power between different branches of government. It helps to control the legislative and executive branches of government. There are different models of constitutional adjudication in different countries and there is no specific model that is uniformly applicable throughout all constitutional systems. Centralized, decentralized, hybrid and special political council models of constitutional adjudication are among the varieties. Constitutional adjudication may not achieve its best objectives unless adjudicators are free from the influence of legislative and executive branches of government. To attain or meet the objectives of constitutional adjudication it is necessary that to ensure the independence and impartiality of constitutional adjudicators.

In this piece, an attempt is made to compare the arrangement of the constitutional adjudicators of three federal jurisdictions focusing on issues of independence and impartiality. Compared to German and South African constitutional adjudicators, the Ethiopian constitutional adjudicator (the HOF) is not established in a way that ensures independence and impartiality from both the legislative and executive branches of government. Not only its organization as the Upper House of the parliament, the way the members of the HOF are elected defies the internationally accepted standards values of independence and impartiality. For the last four election periods, no single member of the HOF has been elected directly by the people. State councils sent their representatives either from the members of state councils or among the chief executives of states. State councils could also elect representatives among chief executives of the Federal government (from the members of Council of Ministers).

The independence of the HOF will be questionable if its members are elected from both the Federal and regional states' official figures. Officials may intend to achieve the political ends and interests of their own government. As shown in detail, the HOF could be under the indirect influence of both the executive and legislative branches of the government.

The election of members of the HOF from the Federal and state government politicians would further impair the perception of the public. The public may assume that the HOF is a partial body and it may not have trust and confidence in its activities. The active participation of the Federal and state government politicians in the floor of the HOF could further weaken its image as an impartial actor particularly when politically sensitive issues are under discussion.

The principle of natural justice would not have a place if representatives of the HOF could decide on cases in which they have a vested interest. Attaining fair and impartial trial in such circumstances is very much questionable. Further, as members of the HOF are political representatives of the different Ethiopian nations, nationalities and peoples, it will be difficult to handle politically sensitive questions in an impartial and independent manner.

The possibility for political tensions is also there if the Upper and the Lower Houses of the parliament are controlled by two different competing political parties. In such an event, it would be difficult for a government to exercise its day to day activities and to enact laws.