THE IMPORTANCE OF INDEPENDENT COMMISSIONS FOR RULE OF LAW IN SOMALIA

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I. Role of independent commissions for ROL

As of the last decade, Somalia shows a sign of improvements towards ROL. Most prominent examples that show the improvements are establishing independent legal based commissions (or other alternative word, institutions) and offices that are at the core of rule of law since they facilitate and take party in developing of ROL.

Generally, the independent commissions such as human rights commission and judicial service commission and so on are essential and necessary pillars and supporters for the existence of rule of law and exercising of good governance as well as the effectiveness of the government. Somali provisional constitution of 2012 recognizes the importance and the needs for the independent commissions and the role they can take in forming good government and as a result, it establishes a number of independent commissions including The Judicial Service Commission, The Human Rights Commission, The Anti-Corruption Commission, Inter-state Commission, National Independent Electoral Commission, and some other. These commissions have been established under chapter ten of Somali provisional constitution of the constitution[1]. Not only these but there are also independent offices created by the constitutions such as the Attorney General, the Auditor General and the Federal Central Bank[2].

These independent commissions and offices take part in forming and structuring the system of good governance and government. They have their own role in establishing ROL in respect of their legal duties. The statutory functions to be perfumed by the commissions and offices should promote and improve good governance that will enhance and maintenance of ROL since the independent commissions and offices are effective mechanisms for creating, maintaining and lasting rule of law. Independent institutions are the bases or the foundations of democracy and of states. The existence of independence institutions contributes to the creation of culture of ROL. Federal Bar Association, USA, said "Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary must be free of undue influence from the executive and legislative branches and must remain committed to the preservation of the rule of law and the protection of individual rights and liberties[3]". As in this paper, respect for rule of law and preservation of independent judiciary are the most important

principles upon which states are founded[4]. Also according to the paper, the creation of public confidence in constitutional institutions leads to the stability of the state. To have the public confidence in public institutions is important for the state's democracy[5]. The independent commission plays a significant role in creating the confidence of the public in the institutions.

As per article 110 of Somali provisional constitution, the independent commissions shall operate within the scope of their mandate, and shall perfume their functions without the directions or the control of any institution or person in power[6]. They, both the independent commissions and offices are not subject to any institutional or personal power whenever they are perfuming their functions. They must only perfume their duty on the spirit of transparency and human rights as well as democracy[7]. The independence granted to them makes them and allows to enjoy and perfume their function without feeling the fear of interference from any person or institution so they are free to be impacted. Respect for human rights and democracy and perfuming functions on the bases of transparency are essential and bases for the maintenance of rule of law. The commissions are therefore, a part of the ROL establishment and its maintenance.

During this assignment, I will focus on judicial service commission, human rights commission since it is not possible to focus on all the commissions and offices established by the constitution.

II. The Judicial Service Commission

As I have mentioned above, Somali provisional constitution of 2012, establishes and creates Judicial Service Commission. Its alternative term is GOLAHA ADEEGGA GARSOOR. This commission has been established with the aim of increasing and securing judicial independence, which is amongst prominent pillars that uphold rule of law. (Prefontaine & Lee, 1998), the independence of the judiciary is the pillar that upholds rule of law in a free society. This independence takes many forms and include the independence to exercise their functions as protectors of the constitution without any pressure or interference from any institution[8]. This commission has been established to ensure the independence of the judiciary that has a meaning full sense. As it has been appointed by Andrew Jackson, 1822 said: "All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary[9]". At this modern time, independent judiciary is necessary at any cost for good governance, democracy as well as rule of law. For the sake of

promotion of judiciary's independence, judicial service commission has been formulated and given authority and power to perfume its functions and realize the independence of the judiciary.

In Somalia, the provisional constitution has taken seriously the importance of the existence of this kind of commission and as a result, it orders the establishment of the judicial service commission. As the constitution has considered the necessity for existence of independent judiciary, it has granted to the commission independence from persons or institutions. According to article 111A (2), The Judicial Service Commission has to be independent, neutral, non-partisan and shall ensure the independence of the judiciary[10]. Also according to establishing act of law NO. 28. Of 2014, its article two writes that the judicial service commission when perfuming its functions shall be free from the authorities or powers of the institutions of legislative and executive and any other institution. The commission will only follow and obey the constitution and other laws of the country[11]. Such independences allow the commission to play its role in realizing and advancing the rule of law in the society since a functioning independent commission brings independent judiciary that will perfume its duties as it was intended already. An independent judiciary contributes significantly to the establishment of rule of law. Independent judiciary is not only contributor to rule of law but also it is one of the first or essential elements that upholds rule of law. Delaware judiciary writes that a fair and independent judicial branch is a cornerstone of our democratic system of government. An independent judicial branch is not an end in itself, but a means of ensuring the rule of law, since only by being free from outside influences can judges decide cases on the law and facts alone. (Annual report of Delaware judiciary, 2007).[12]

III. Principles of judicial independence

As it is common, judicial independence is necessary for ensuring Rule of law. It is important to know that there are principles contained in our enacted laws. There are five major principles of judicial independence and they are as follows:

1. Institutional independence

In general, institutional independence means that the judiciary would not be under the direction of any authority. It should be free from the interference of any institution or person. The institutional independence allows the judiciary to be treated as a separate branch of the government.

(International Rule of law Symposium, 2007), the institutional independence recognizes the judiciary as co-equal branch that has its own particular responsibility and functions in which the main function is administering of justice without influence from the other branches[13]. The provisional constitution of Somalia grants to the judiciary institutional independence and recognizes equal branch as others. It reads "the judiciary is independent of the legislative and executive branches of government whilst fulfilling its judicial functions. Members of the judiciary shall be subject only to the law"[14]. It has to be respected such institutional independence at all levels and by all other institutions and persons in power. The independence is meaningless unless showed it has been respected by the other institutions either governmental and non-governmental institution which type they are. Human rights commissioner of UN says "It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary[15]". Not only the constitution that grants institutional independence but also the judicial service commission establishment act grants to the judiciary the right to institutional independence[16]. The judicial service commission cannot ensure the independence of the judiciary unless it is first an independent so it has been equipped with such independence. The judicial service commission is responsible for ensuring the independence and impartiality of the judiciary[17]. Institutional independence is necessary for the existence and function of the judiciary because it ensures to the judges to conduct proceedings through fair and impartial process that leads to the rights of the parties be respected[18]. As UN, Human rights writes "The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected[19]". Realizing the independence of the judiciary is the responsibility and function of the judicial commission.

2. Decisional independence

Decisional independence is the principle that judges should decide cases solely based on the law and facts without concern about being penalized for their decisions[20]. Decisional independence is the thing that allows judges to decide matter(s) before them in accordance or pursuant to the rules and regulations in force. They are only subject to the existing laws in force. The provisional constitution writes "Members of the judiciary shall be subject only to the law[21]". The judiciary should not be subject to any institutional or personal influence. There can be no decisional independence unless there is institutional independence and this has been ensured. Institutional

independence is what allows the judges to decide the cases independently. If the judiciary is not enjoying such right, it may not perfume its duty properly. UN Human rights says "The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason[22]". Decisional independence is essential for ensuring the right for the people to get fair and impartial judiciary. It is a part of realizing rule of law.

3. Qualified and competent judges

For ensuring the judicial independence, it must be employed well qualified and competent judges. The availability of qualified judges is essentially significant for the proper functioning of the judiciary in the common sense. The judicial service commission of Somalia is invested with the power to select competent judges. It is the body that is responsible for the examining the quality of the judges[23]. And also it has the function to qualify and control the quality of the judges at the judiciary[24]. Qualified judges are important for realizing justice. The qualified judges play and take undeniable role in advancing rule of law.

4. Availability of Adequate sources

In the common sense, no duty can be perfumed by an institution unless supported with sources. Particular budget for each institution plays important role in facilitating the functions of the institution(s)[25]. The same as other institutions, the judiciary requires its own sources to perfume its function properly. UN, says "It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions"[26] The adequate sources help the judiciary in the equipment of the judiciary, security and so on[27]. The judicial service commission of Somalia holds the responsibility of preparing the adequate budget of the judiciary. The commission is free to prepare budget required to the continuation of the function of the judiciary. The commission has been authorized with such power under the establishment act of the commission[28]. The judiciary will fulfil its obligations properly if it is provided the necessary sources. It is a part of judicial independence.

5. System of accountability

Judicial accountability has been described as the view that judges should be held accountable in some way for their work[30]. In order to ensure the effectiveness of rule of law, it is necessary to emphasize the existence of a system of accountability for the judges. International rule of law symposium writes "there must be a system of accountability for the judges including a judicial code of ethics as well as a process for citizens to file a complaint against judges for illegal or unethical conduct and an impartial disciplinary system that allows for a range of sanctions and removal of errant judges. Judicial accountability also requires a transparent system that provides for public and media access to court proceedings and legal decisions."[31]

As pursuant to article 17 of the judicial service establishment act, every person has the right to bring a claim against a judge at the judiciary in which the decision of the case must be issued with sixty (60) days[32]. This does not contradict with the constitution that says "No civil or criminal proceedings shall be instituted against a judge in respect of the exercising of any judicial function[33]". This article of the constitution protects the judges against any claim, either civil or criminal that arises due to exercising judicial function. While article 17 of the judicial service establishment act talks about when the judge does unethical or illegal action, for example when the judge does not exercise duty of care. However, the proceedings against judges must satisfy the requirements which have been laid down in article seventeen of the establishment act of the judicial service commission.

This system of accountability creates trust of the public on the judiciary. It is an important issue for establishing rule of law. This step is an opportunity to the creation of independent judiciary and establishing of rule of law and its maintenance.

IV. Functions of the commission

The functions of the commission have been listed in article 5 of the establishing act. The commission has to perfume the following functions:

1. Nominating, promoting, discipline, substituting, resignation of any member of the judiciary at federal level and of the constitutional court. These have been mentioned by the constitution in its article 111A
2. Deciding and determination of the salary and rights to pensions of the judges and other workers of the judiciary at federal level and of the constitutional court.

3. To lay down work follow and qualifying conditions of the work of the judiciary at federal level and of the constitutional court.
4. To provide advisory opinion about legal issues to the federal government….
5. To perfume and fulfil any other obligation under the constitution and other laws
6. And other functions which have been listed in the establishing act[34].

These functions of the commission facilitate and participate in the improvements of the ROL. If this commission would start its work, it would be beneficial to the state and would play a major role in the developing of the ROL. Minister of justice, Abdul Qadir Mohamed Jama said: "This commission being backbone for country justice to have this" while continuing his words, the minster appointed that injustice was a major disaster happened to the country and it had affected many sides like the security and policy[35].

The Judicial Service Commission would construct reliable judiciary system that would have done justice genuinely-Although now justice is done, yet it is not at the required standard. A fair and independent judiciary requires not only the freedom for judges to make case decisions without outside influence, but also the recognition of the judicial branch as a co- equal branch of government, separate from the legislative and executive branches within a system of checks and balances, responsible for governing itself and accountable to the public. (Annual report of Delaware judiciary, 2007)[36]

(RENE KHAN, 2014), writes that when rule of law does not operate properly, inequality increases[37]. In Somalia, the ROL does not exist properly. In general, whenever the rule of law is low, the injustice is high. The establishment of such commission would participate in the proper functioning of rule of law since the commission is responsible for proper function of the judiciary branch which guides good governance. The judicial service commission is accountable for enforcing the ethical conduct of its members and judges; ensuring the fairness of judicial decisions through the appellate process, and managing court operations as effectively as possible. These initiatives have major impact on the ability of the courts to provide service to the public. This demonstrates that the Judiciary fully appreciates its responsibilities as a separate branch of government. (Annual report of Delaware judiciary, 2007)[38]. The functions to be perfumed by the commission reflect the way to create an independent judiciary and then rule of law.

V. Members of the commission

I have talked about the functions of the commission. Now, it is important to know the members of this commission.

The members of the commission are listed under article two of the establishing act and plus article 109A of the constitution. However, there is a contradiction between the constitution, especially Somali language version and establishing act. The contradiction is as follows:

Article 109A (2/C) of the provisional constitution writes that GARYAQAANKA GUUD would be a member of the commission[160]. The contradiction is that the establishing act writes in its article 6 (1/C) that XEER-ILAALIYAHA GUUD would be a member of the commission[39]. Generally, it is well known that the two offices are different and have different functions since their mandates are different and the heads of these offices have different roles. Why this happened?

Analyzing the answering:

It seems that the contradiction caused by the two versions of the constitution, Somali and English versions. The English version writes in its article 109A (2/C) that THE ATTORNEY GENERAL would be a member of the commission. While the Somali version uses GARYAQAANKA GUUD. The contradiction was created by a matter of the translation. Those who translate the English version into Somalian version thought that attorney general is the same meaning as solicitor general. and the both terms are different and of different importance. This is how the contradiction came into existence. When writing the establishing act, it was selected that the attorney general would be a member of the commission by considering the English version.

The Judicial Service Commission consists of nine (9) member selected who come from different area. These members have been listed under article 109A and article 2 of the establishing act. The second paragraph of article 109A reads:

The Judicial Service Commission shall be comprised of nine (9) members, which shall be as follows:

1. The Chief Judge of the Constitutional Court
2. The Chief Judge of the High Court
3. The Attorney General

4. Two (2) people who are members of the Somali Bar, appointed by the Somali Law Society for a four (4) year term
5. The Chair of the Human Rights Commission
6. Three (3) people of high reputation within Somali society, proposed by the Council of Ministers[40].

These members only can constitute the judicial service commission and no other person can join. Article 2 of the establishing act lists the same members. Any commission made up of members that are not those mentioned in the laws would be deemed to be illegal and will perfume no work.

The commission will elect a chair person and vice-chair person amongst the members of the commission[41]. The judicial service commission will hold the office a term of five years and it can be renewed only once again[42]. Meaning that once the commission holds the office for two terms, the members of the commission cannot be reappointed whatever comes. The limitation of the term provides chance to the rest of the community and an opportunity to be a member of the commission.

Members are of two kinds. One kind is ex officio, Latin term meaning from office. Due to offices they hold, they become members of the judicial service commission such as the attorney general and The Chief Judge of the High Court. The other kind do not come from office. they come from the society. three persons with high reputation in the society and two members from Somali Bar Association. The last second kind- those not coming from the office- is prohibited form and not allowed to join or hold a position in the executive and legislative branches of the government. The same also applies to political parties. They cannot be heads of any political party. They are legally prohibited to be executive administration of political party. Not only these positions but also they cannot hold any position that may damage the independence of the judicial service commission[43]. This prohibition increases the credibility and the efficiency of the commission and brings the public to have trust on them since it enhances the impartiality of the commission as well as the independence. It is a step taken towards the improvement of rule of law.

VI. Requirements (criteria) to be appointed

In order to maintain the quality of this commission, it is necessary to lay down criteria for the selection and appointment of the members. The constitution is silent on the requirements of the

appointment but the establishing act clarifies. Article 8 of the establishing act lists the main conditions to be a member and they are as follows:

1. That the person is of Somali citizen
2. Not greater than of 65 years
3. Have good wealth and is well being
4. To have a recognized university degree in the fields of Islamic sharia or the law
5. To have experience in the area of judiciary or in the areas of public administration in general
6. To be a person of high reputation and of highest personality
7. Not to be convicted of final judgment.[44]

These criteria play important role in the efficiency of the work of the commission. The most influential criterion is that the member should have a university degree in the fields of sharia and law. The commission will operate in the area of justice realization so experts in sharia and law is deemed essential. The knowledge to sharia and law is what matters when aimed doing justice.

(Porter, 2020), Somalia has made progress in the protection of human rights and it has improved its rule of law under difficult challenges[45]. However, this commission is opportunity and proper supporter of the establishing of rule of law in Somalia. The judicial service commission is intended to be a mechanism for the enhancement of rule of law in Somalia. If such commission is established in accordance with the constitution and the other laws, it would play a tangible role in gaining an imperial and independent judiciary and Somalis would be thankful to it.

VII. Challenges

As a common knowledge, the three branches of the government are different and each branch has its own administration. The executive is administered by the prime minister. He has control over such branch and legislature branch is administered by the house speaker. The judiciary's administration is hold by the judicial service commission. The commission holds the responsibility to admin, discipline, examine and control the judiciary i.e. judges and other workers as well as the functions of the judiciary[46]. The absence of the judicial service commission is the absence or non-existence of the administration of the judiciary branch of the government. So the judiciary is not administered by the body which was to administer. This situation is like perfuming a function

without under any administration or control. Function which has been done without a supervision has its own danger. Judiciary without judicial service commission has its own danger to justice and rule of law.

The rule of law in Somalia is challenged by complicated issues including absence of important commissions that are the backbone for the existence and maintenance of ROL such as the judicial service commission. Legal Action Worldwide, shortened as LAW writes that complex challenges include insecurity, lack of resources and political instability[47]

The challenges specially relating to establishing and maintenance of ROL are the establishing of important commission. The absence of judicial service commission is the biggest challenge which the rule of law in Somalia faces. The establishment of such commission is a challenge to itself before any other challenge. The provisional constitution obligates the Chief Judge of the Constitutional Court should be a member of judicial service commission. He is one of those who come due to ex officio. And at the same time, the judicial service commission would appoint or nominate judges of the constitutional court whom amongst themselves will elect chief judge and deputy chief judge[48]. The commission cannot be established because of the absence of chief judge of the constitutional court and the constitutional court cannot be established because the commission that would appoint does not exist.

It has been tried to establish this commission but ended in failure. Former president of Somalia, 8th president said at a TV program that judicial service commission cannot be established unless the constitutional court exists and the constitutional court cannot exist unless created by the commission. He also appointed that this is due to the constitution because they are many contradictions in it. the constitution was not prepared in thoughtful manner. He had also appointed that he was not able to build this commission due to this contradiction. He told that the legislative branch informed him to complete the members of the commission but he said that he had told them that it is impossible to complete the commission because of the absence of two members who are ex officio, the Chair of the Human Rights Commission and The Chief Judge of the Constitutional Court[49]. A former judge of appellate court said "The president would have appointed the chief judge of the constitutional court on the bases of the proposal made by the judicial service commission but this commission is absent and does not exist[50]".

The absence of such commission negatively impact the independence of the judiciary. Not only it impacts the independence of judiciary but it impacts the credibility and trust the public to have on it. A former senior judge said and appointed that the absence of the judicial service commission had made the judiciary become destroyed that everything can easily be done (corrupted). The judge while continuing his words said that when the judicial service commission is not existing, it should have been employed judges who are not or don't have quality and qualification required. And as a result, the judiciary have tuned into a mixed {extra hands present at the judiciary}. As the judge appointed, the problem and the challenge the judiciary faces relates to non-existence of such commission[51]. The minister of justice, a time he was addressing to the lower house of the parliament had described the absence of the judicial service commission from the country as unfortunate. He had termed that injustice had been problem to the country. He, at the same time stated that the establishment of the judicial service commission would be a backbone to the justice of the country[52].

Finally, it is not discussable that the absence of the judicial service commission has been and is till been the biggest challenge the rule of law faces in Somalia.

VIII. Human rights commission

Human rights commissioner of UN describes that National human rights commission or other words national human rights institution are state body founded by the state with constitutional and /or legislative mandate to protect and promote human rights[53]. The provisional constitution of Somalia creates human rights commission in its article 111B[54]. human rights commission establishment act has been enacted by Somali parliament, law No.16, and signed by the president in 2016. The institution of national human rights is not a branch of the government. They are not controlled or directed by either the executive, legislative and judiciary. The constitution, article 110 reads "An Independent Commission must not be subject to the direction or control of any person or institution"[57].

The human rights commission is considered as a part of rule of law. The commission is very important to the rule of law because it ensures {in Somalia} three main functions. These functions have been listed by the constitution as follows:

(a) Promote respect of human rights, and the culture of human rights;

(b) Promote the protection, development, and attainment of human rights; and

(c) Monitor and assess the observance of the conduct of human rights in the Federal Republic of Somalia[58].

These functions and other additional function laid down in the establishment act support the creation and maintenance of rule of law in Somalia.

Human rights commissioner of UN, "National human rights institutions have a strong voice and role in promoting respect for the rule of law in the following areas, all of which are central to promoting and protecting human rights:

1. Ensuring that the State complies with its own laws and other legal instruments, as well as with relevant international norms;
2. Promoting the development of administrative accountability systems;
3. Ensuring that the administration of justice conforms to human rights standards and provides effective remedies, particularly to minorities and to the most vulnerable groups in society;
4. Proposing and commenting on legislative reform so that national laws are brought into line with the international human rights instruments that the State has ratified or acceded to"[59].

Human rights commission also plays a major role in the justice. This is because it is a part of justice administration. Administration of justice genuinely is very necessary for the existence of rule of law.

Effective function of this commission is helpful to good governance, respect for human rights and realizing of rule of law. "National human rights institutions are not only central elements of a strong national human rights system: they also "bridge" civil society and Governments; they link the responsibilities of the State to the rights of citizens and they connect national laws to regional and international human rights systems."[60] also it writes that the commission of human rights play an important role in peace building. "an institution's efforts to build peace are likely to involve at least: (a) efforts to promote dialogue between combatants; (b) efforts to promote peacebuilding mechanisms among representative communities; and (c) efforts to encourage acceptable and necessary accommodations to deal with underlying human rights issues that may be at the root of the conflict"[61].

Non-existence or Improper function of this commission is not only a disaster to the rule of law in the country but also human rights condition and good governance. It is also a problem in justice administration. the proper functioning of this commission creates a new face for the creating the culture of rule of law in Somalia. The effectiveness of human rights commission is an opportunity and supporter for rule of law.

IX. Conclusion

In conclusion, independent commissions play very critical role in the realizing rule of law. Their absence negatively impacts the citizens in several ways. An effective independent commission is absolutely necessary for enhancing rule of law in Somalia.

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