



# **THE PRINCIPLE OF JUDICIAL INDEPENDENCE AND SOMALILAND COURTS**

**BY**

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## 1. The Independence of the Judiciary

Judicial independence is widely considered to be a foundation for the rule of law<sup>2</sup>, because the principal role of an independent judiciary is to uphold the rule of law and to ensure the supremacy of the law. If the judiciary is to exercise a truly impartial and independent adjudicative function, it must have special powers to allow it to “keep its distance” from other governmental institutions, political organizations, and other non-governmental influences, and to be free of repercussions from such outside influences<sup>3</sup>.

### 1.1. Definition: Independence of the Judiciary?

There is no agreed definition of “Judicial Independence”. However, it is agreed that independence of the judiciary and rule of law are inseparable or in other words if there is no independence of the judiciary there will be no rule of law. The exact meaning of the judiciary independence is that any judge or judiciary staff has independence to decide on the issue before him 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.<sup>4</sup> Additionally, the institution of the judiciary as a whole must also be independent by being separate from government and other concentrations of power.<sup>5</sup>

The history of the judiciary around the world demonstrates that the greatest danger of interference comes from other government institutions or political parties<sup>6</sup>. An independent judiciary must not only *be* independent of these and other influences, but also it must *appear* to be independent<sup>7</sup>. This is so because a court can only be truly accepted as a just one if it has the confidence of the public that it is just and fair<sup>8</sup>. However, while we affirm our faith and belief in judicial independence, we have to appreciate that the independence is not an end in itself<sup>9</sup>.

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<sup>2</sup> Council of Europe 1998; United Nations 1985.

<sup>3</sup> Justice F. B. William Kelly, **An Independent Judiciary: The Core of the Rule of Law**, available at [www.ruleoflawus.info/Judiciary/An\\_Independent\\_Judiciary.pdf](http://www.ruleoflawus.info/Judiciary/An_Independent_Judiciary.pdf) accessed on 20th Dec, 2014.

<sup>4</sup> Article 2 of the United Nations **Basic Principles on the Independence of the Judiciary** adopted at Milan 1985.

<sup>5</sup> Justice F. B. William Kelly, (Ibid, footnote 2).

<sup>6</sup> Ibid

<sup>7</sup> Ibid

<sup>8</sup> Ibid

<sup>9</sup> Hon. Chief Justice Ernest L. Sakala, **The Accountability of the Judiciary: Accountable to who? Is there such a mechanism?** A paper presented at the Southern Africa Judges Commission Meeting held at Windhoek, Namibia from 11<sup>th</sup> to 14<sup>th</sup> August, 2005.

It exists to protect the public<sup>10</sup>. Chief Justice Frazer of Alberta, Canada, once said: *“We have judicial independence for a reason – to protect the constitutional rights of our citizen.”* Thus, the independence of the judiciary is protected by the constitutions of the most of the countries, international instruments, statutes and court decisions.

The concept of judicial independence has many elements, but generally they fall under the headings of security of tenure and pay, and individual and institutional freedom from unwarranted interference with the judicial process.<sup>11</sup>

## 1.2. Basic Principles of the Independence of the Judiciary

The United Nations has endorsed the basic principles of the independence of the judiciary<sup>12</sup> by these General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. There are 20 principles which can be summarized but are not limited to as following:

- 1) **Independence of the Judiciary; institutionally and individually:** The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. 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. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law. 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 and it is the duty of the State to provide adequate resources to enable the judiciary to properly perform its functions.

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<sup>10</sup> Ibid

<sup>11</sup> Justice F. B. William Kelly, (Ibid, footnote 2).

<sup>12</sup> Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of the Offenders held at Milan from 26 August to 6 September 1985.

- 2) **Freedom of expression and association:** In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.
- 3) **Qualifications, selection and training:** Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.
- 4) **Conditions of service and tenure:** The term of office of judges, their independence, security, adequate remuneration, and conditions of service, pensions and the age of retirement shall be adequately secured by law. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
- 5) **Professional secrecy and immunity:** The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.
- 6) **Discipline, suspension and removal:** A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed

expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings

### 1.3. The Independence of the Somaliland Judiciary

As stipulated in Article 37 paragraph 2 of the Constitution<sup>13</sup> of the Republic of Somaliland *“The structure of the state shall consist of three branches which are: the legislative, the executive and the judiciary. The separation of the powers of these branches shall be as set out in the Constitution. Each branch shall exercise independently the exclusive powers accorded to it under the Constitution.”*

In the discussion of the independence of the Somaliland judiciary, I can take it into two parts namely; *the independence of the Somaliland Judiciary as a branch of the State and the individual independence of judiciary personnel.*

#### *The Independence of the Somaliland Judiciary as a Branch of the State*

Somaliland had its own judicial system headed by High Court at Hargeisa until 1960<sup>14</sup>. The 1960 Somaliland Constitution re-confirmed the existing judicial system but suspended the appeals to the East African Appeal Court<sup>15</sup>. On the reassertion of its independence in 1991, Somaliland re-built its judicial system fairly soon with the Somaliland 1993 Charter (Article 21) setting up the Somaliland Supreme Court as the highest court of the land. The court structure which existed prior to the military rule of 1969 and based on the Organization of the Judiciary Law 1962 (Legislative Decree No 3 of 12 June 1962) was re-established and confirmed by the Somaliland Organization of the Judiciary Law 1993 (Law No: 41 of 18 August

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<sup>13</sup> Translated with extended annotations and explanatory notes by Ibrahim Hashi Jama LL.B, LL.M. (Updated Translation April 2005).

<sup>14</sup> Ibrahim Hashi Jama, **Somaliland Judicial System**, [www.somalilandlaw.com](http://www.somalilandlaw.com) accessed on 21<sup>st</sup> Dec 2014

<sup>15</sup> Ibid

1993)<sup>16</sup>. The court structure was re-confirmed in the 1997 Interim Constitution and is now set out in CHAPTER FOUR of the current Somaliland Constitution<sup>17</sup>. A new Organization of the Judiciary Law (Law No: 24/2003) was enacted in 2008.

Article 97 paragraph 2 of the Constitution of the Republic of Somaliland provides that judiciary branch fulfills its duties in accordance with Constitution, and shall be independent of the other branches of the state.

Similarly, Article 2 of the Somaliland Organization of the Judiciary Law spelt out that judiciary authorities are independent from the other legislative and executive branches of the State<sup>18</sup>.

If a court or an individual judge is subject to, or even appears to be subject to, inappropriate pressure or interference by the executive or administrative arm of government, which is considered to be an inappropriate interference with judicial independence,<sup>19</sup> and the impartiality of the court or the individual judge would be impeded and thus cannot relay justice.

The Constitution of Somaliland created a Judicial Commission, which is the body which directs the administration of the judiciary and which is composed of the Chief Justice who is the Chairman, 2 highest seniority Supreme Court Judges, Attorney General, DG of the Ministry of Justice, Chairman of the Civil Servant Commission and 4 other members appointed by the two Houses of Parliament. This commission is responsible for the appointment, removal of office, promotion, demotion, transfer and discipline of the judges of the lower courts (the Appeal, Regional and District Courts), and the Deputy Attorney Generals. Furthermore, the Constitution states that the other personnel who work in the judiciary shall come under the provisions of the Civil Service Law.

On the contrary, Article 3 of the organic law of the Ministry of Justice – Law No. 81/96 provides that the Ministry of Justice has the power to administer all the courts except for the Supreme Court which has independence for the Management of its budget and administration. However, this is made null and void by the fact that this organic law was enacted before the referendum of the Constitution and it directly contravenes to one of the principles and aspirations enshrined in the

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<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> Article 2(1) Law No. 24/2003

<sup>19</sup> Justice F. B. William Kelly, (Ibid, footnote 2).

Constitution – the independence of the judiciary, and this also constrains the effectiveness of the judiciary services.

The Ministry of Justice exercises the power of the administration of the lower court's staff in accordance with the Organization of the Judiciary Law (49 Articles version) which states that Minister of Justice, after he consulted with the concerned Chairman of the Appeal Court, he will submit a list to the Civil Service Commission who will make the selection in accordance with the Civil Service Law. Even though, Article 31(2) of the other version<sup>20</sup> of this disputed law gives the Chief Justice the power of the recruitment, promotion, demotion and transfer of the Staff of the lower courts.

In respect of these abovementioned facts, we can say the judiciary branch is not administratively and financially independent because they can neither recruit, promote and/or demote their staff at will nor they can manage their budget freely.

A workshop report on the Judiciary System in Somaliland was written by Hargeisa based Academy for Peace and Development (APD) in 2002, a participant who is Former Deputy Speaker of the House of Representatives Hon. Abdiqadir Jirde explained that according to Somaliland government system, the judiciary is the weakest of the three branches of the state: "Our system is based on three separate branches of government. The three branches of government are supposed to place some constitutional and practical checks on one another, and to have the resources (for each one) to fulfill its constitutional role. Unfortunately the judiciary is the weakest of the three. They have no say directly in the budget process, and no one speaks on their behalf. At least we, in the parliament, when we are endorsing the budget, we can demand more for ourselves. In another words, the judiciary is an orphan. It has no power and it has few resources in comparison to the other two branches of government. It is a political problem, and it will require a political decision to upgrade the status of the judiciary."

The topic of the independence of the judiciary was a public debate in the last decades and the conflict on this issue is repetitively emerged between the branches of the state. The extent to which the practice of Somaliland executive branch is not compatible with the concept of separation of powers or in particular to the independence of the judiciary can be understood from the relationship between the Ministry of Justice and Judicial Commission. According to Article 106 of the Constitution, the Ministry of Justice is responsible for fulfilling the administrative

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<sup>20</sup> Law No. 24/2003 (60 Articles Version)

decisions of the Judicial Commission and the working relationship of the Ministry of Justice and Judicial Organ is required to set out in a special law.

The law required by this article of the constitution has not enacted yet and the fact that Ministry of Justice administers the budget, salaries and staff of the courts, except for the Supreme Court, may be considered that one order of government is subordinating the other, thereby undermining a fundamental constitutional principle<sup>21</sup>. One participant of the abovementioned workshop believes the same idea and argued that the relationship of the Ministry of Justice and judiciary is unconstitutional. It is designed to create a role for the Ministry and to provide a degree of control over the Judiciary and that The Ministry is supposed to support the Attorney General Office, helping the government to enforce the law, instead it is managing the salaries and budget of the judiciary. All courts should fall administratively under the Chief Justice, or have an independent administration.

The presidential interference of the judicial commission is sometimes the cause of inter-branch conflict. The late President Egal intervened in late 1999 by directing the President of the Supreme Court to relinquish the chairmanship of the Justice Committee to the Minister of Justice, in violation of the Constitution. The President of Supreme Court did relinquish the chairmanship, but the President subsequently retracted his decision under pressure from Parliament.

The President Egal's numerous appointments and dismissals of the Chief Justice were a matter of considerable concern to the Parliament<sup>22</sup>. The Parliament has tried to exercise their constitutional power of balancing the powers of the executive branch several times from 2001 up to 2005. The President dismissed Mohamed Said Aw Abdi as the Chairman of the Supreme Court and the candidate for the post of Chief Justice was rejected and eventually set aside<sup>23</sup> in 2001, but he was serving and the President was re-appointing him every three months until 2002.

The House of Representatives attached to the approval of the 2002 budget a recommendation urging the President not to allow the Ministry of Justice to administer allocations for the judiciary. However this advisory was not binding and has so far not been acted upon<sup>24</sup>.

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<sup>21</sup> APD, the Judicial System in Somaliland, Workshop Report (2002), Hargeisa.

<sup>22</sup> APD, 8

<sup>23</sup> Ibid

<sup>24</sup> Ibid

### *The Individual Independence of the Judiciary Personnel*

Article 99 (2) of the Constitution is the most important article that is guaranteeing the individual independence of the judiciary personnel, and it provides that *“The judges and the members of the Procuracy are independent when exercising their judicial functions and shall be guided only by the law.”*

Even though this article makes clear the independence of the Judges and other judiciary personnel when exercising their judicial functions, nevertheless neither the Constitution nor any other law is identified how for example a Judge is functionally, financially and politically becoming free for performing his judicial duties and responsibilities. However, paragraph 3 of Article 98 of the Constitution states that *“The proper status of judges shall be determined by the law”*, the Parliament has not enacted this law and there is no special law which is determining the proper status of the judicial officers such as their salaries and allowances, pensions and benefits, and security or physical protection.

Lack of special laws or provisions protecting the independence of the judiciary officers dissuades impartiality of the judiciary and even the Chief of Justice who is the highest rank position of the judiciary branch is mostly terrified the President’s power to dismiss him at any time without justification. In giving free hand to the president to appoint and dismiss at will all the justices of the Supreme Court, except for the Chief of Justice, is one of the areas in which the provisions of the current constitution do not match the [our] aspirations and constitutional principles.

In his article on the Somaliland Supreme Court, Ibrahim Hashi Jama, the editor of the [somalilandlaw.com](http://somalilandlaw.com) website indicated that the Somaliland Forum were seriously concerned about the apparent ease that the Somaliland Supreme Court Chairman and Judges can be removed from office, and he wrote that its formal comments were included:

*“We also believe that security of tenure is the cornerstone of the independence of judges. It is a matter of serious concern that justices of the Supreme Court and other judges can be removed from office so easily. Judges (especially senior ones) are normally appointed (where they are not elected) to secure positions and are only removed either for mental and physical incapacity or misbehavior, or if they have reached their retirement age. [...] An*

*example of a modern Constitutional provision in Africa is section 98 of the Constitution of Zambia, which sets out a retirement age for Supreme Court and High Court judges of 65 years and notes that he or she may only be removed from office, but after a tribunal investigation, only for inability to perform the functions of the office, whether arising from infirmity of body or mind, incompetence or misbehavior. Even the Somalian Constitution included an article (96(3)) which made it clear that judges “shall not be removed or transferred except in the cases specified by law.”*

An illustration of this question is that Article 124(4) of the Indian Constitution provided that the appointment of Judges in the Supreme Court would be by the President, it was also keeping with the method that the Constitution also prescribed that such Judges would be removed from the office by executive after addressing each house. In its own words:

*“A Judge of the Supreme Court shall not be removed from his office except by an order of the president passed after an address by each House of the Parliament supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity.”*

According to Article 108 of the Constitution, the Judicial Commission has the mandate of the appointment, removal, promotion, demotion and the discipline of the Judges of the lower courts and Deputy Attorney. The Organization of the Judiciary Law provides that any person who is a candidate to be appointed as a judge or a deputy Attorney General, shall have a bachelor degree of laws and should have been trained an internship of an one year period. This was being applying in last two years for the first time, when Judicial Commission have nominated a groups of qualified law graduates after they have been taken a judiciary training of a 10 months duration.

To have a superior judiciary, it is obvious that greatest care must be taken at the initial stage, the selection or appointment process<sup>25</sup>. The judicial function is not

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<sup>25</sup> Justice F. B. William Kelly, (Ibid, footnote 2).

wholly, and in fact rarely, automatic. Rather the judicial function is a creative one and thus it is necessary to recruit highly trained, competent, ethical and intelligent men and women, reflective of the society they serve, and to pay them substantial salaries<sup>26</sup>.

A good academic background is the main factor ensuring the judicial system with continuity in the application of official legal codes, as well as the system's ability to meet with the challenges and changes of the modern world<sup>27</sup>. In other words, the academic background of judges can secure the survival of the system and its capacity to renew itself.

The other important step forwarded issue by the Judicial Commission is making Code of Conduct and Disciplinary Rule for Judges and Prosecutors (CoC) in August 2012. This is the only ethical and professional guidance or code of conduct for the judiciary officers and it is derived from the Constitutional power of the Judicial Commission to discipline judges of the lower courts and deputy Attorney Generals. The provisions of the Organization of the Judiciary Law makes clear that Judges cannot be removed from the office unless:

1. The judge/prosecutor has resigned himself.
2. The judge/prosecutor has reached the age of retirement and he can be renewed the term of office one to five more years.
3. After an illness problem verified by a National Health Committee, a judge/prosecutors is dismissed for office and
4. The Judicial Commission removed a judge/prosecutor for the office after he committed a judicial misconduct or misbehavior.

The application of this code of conduct has importance for the public confidence and accountability of the judiciary officers as well. On the other hand, it maintains the judicial independence since it prevents the arbitrary dismissal of the judiciary officers. The proper application of this disciplinary rules for the removal of the judges/prosecutors for office will eliminate without notice dismissals existed in the judiciary system of the country.

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<sup>26</sup> Ibid

<sup>27</sup>Federico Battered and Alessandro Campo (2001) "**The Evolution and Integration of Different Legal Systems in the Horn of Africa: the Case of Somaliland**", [\*Global Jurist Topics: Vol. 1: No. 1, Article 4.\*](#)

According to APD, In Somaliland, the judiciary is the most neglected and under-funded of the three orders of government and other constraints that jeopardize the capacity of judges to reach impartial decisions exist. It reported that:

*“Unlike other senior government officials, judges do not enjoy physical protection (e.g. security guards) and are thus vulnerable to harassment by members of the public. People have easy access to judges -both at their residents and offices - to discuss with them their cases, to threaten them or to offer them bribes. Other pressures come from clans, because a judgment against an individual is usually seen as an action against a clan.”*

APD comments on how judiciary has suffered a low public confidence and it pointed out that many people believe, rightly or wrongly, that the law best serves the rich: a case is won by the side that has paid the most. The reports added that this is partly because they can afford the best legal advice money can buy, but it is also because many people attempt to buy the judges, encouraging dishonesty and corruption in the system. In this workshop report, one participant stated that:

*"The people aim for the judge, exercising different means to influence him: money, clan-relations and so on. Moreover, each side produces about ten or fifteen witnesses, and there is no means to verify them. So the public does not actually want justice to prevail and undermines it consistently."*

Constitutional amendment for securing the tenure of the Supreme Court judges, transparent selection and Recruitments system for the appointments of the judges/prosecutors that is based on their legal knowledge and experience, and the proper application of CoC for the dismissals of the judiciary officers are the most important issues for the individual independence of the judiciary. Other steps are needed to be taken forward such as providing physical security for the judiciary officers and paying better salary to attract young legal academics.

#### 1.4. Challenges of the Independence of the Somaliland Judiciary

There are many challenges faced against Independence of the Somaliland Judiciary, however, it can be summarized into the following issues which are explained below:

- 1) **Lack of transparent appointment and recruitment processes:** Although, Somaliland has made a development for the appointment and recruitment process of the Judges and Prosecutors in the last two years and fresh law graduates entered into the profession, there is no specific guidelines for the recruitment or appointment of the judiciary officers. The application of the Organization of the Judiciary Law which obliges that judgeship candidates are required to be a law graduates is very weak and according to APD the structure of the judicial system is adequate, but it suffers from a lack of qualified judges. Apart from those graduates who were appointed in the last two years, most of the other judges were court clerks, unqualified lawyers, teachers of sharia schools or those who learned sharia law. A clear, transparent and consistence process of appointments is needed to be developed by the Judicial Commission. This will prevent to appoint judiciary officers based on their clan or bias. According to APD 2002 report firing a judge is very difficult, even if he is known to be corrupt or incompetent, because of interference from his clan.
- 2) **The improper status of the judiciary:** The judiciary is the most neglected and under-funded branch of the state, the Parliament has not enacted yet a law for the proper status of the judiciary officers as specified by Article 98 of the constitution. Salaries and allowances of the judiciary officers are still lower than that of other high ranking political appointees or members of the Parliament. There is no security guard for the judges and prosecutors. Even most of the courts do not have security guards assigned for their security. Those problems are some of the causes of the vulnerability of the judiciary members and thus a challenge of the independence of the judiciary.
- 3) **The Constitution:** Giving the President for the power of appointing and discharging Chief of Justice and all the judges of the Supreme Court is one of the challenges against independence of the judiciary. According to the constitution, the President may discharge all the judges of the Supreme Court even the Chief of Justice at his will and there are no grounds of their dismissal required by the law. This gives the President free in hand for making vulnerable to the highest organ of the judiciary. In addition to that, the President has the power to appoint and discharge six of the members of the Judicial Commission – The highest organ of the judiciary. This contradicts with the principle of the judicial independence which is protected by the constitution itself. At least, there should be a fixed non-renewable term of

office for the members of the judicial commission and they should only be removed for office for resignation, death, mental infirmity, incompetency of the duties or if committed of an act against constitution. Ibrahim Hashi, the editor of the somalilandlaw.com website has illustrated this challenge what he called the “boomerang” appointments of Mr. Osman Hussein Khayre (Shunu).

*“Osman Shunu served as Chairman of the Supreme Court until 1998 when the President decided to dismiss him without getting the approval of the Standing Committees of the two House as the Constitution demanded, at that time. The President then proposed to nominate Osman Shunu to the office of Attorney General, but the House of Representatives which needed to confirm the appointment within 3 months under Article 114 of the then Interim Constitution refused to do so. Later in December 2000, the President decided to dismiss the then Chairman of the Supreme Court, Mr Mohamad Haji Said Aw Abdi (allegedly because of the Courts ruling on the case concerning some TOTAL ex-employees), again without the approval of the two standing committees, and re-appointed Osman Shunu in January 2001 to the office of Supreme Court Chairman. The appointment was never ratified by the two Houses, but Osman Shunu remained acting Chairman for well over a year until 26 January 2002. The appointment was repeatedly renewed by the President every three months.”*

- 4) **Unlawful process for the dismissals of the judiciary officers:** The dismissals of the judiciary officers were mostly groundless and without foundations of law. However, recently Judicial Committee has enacted a code of conduct and disciplinary rules for the judges and prosecutors. This should be followed and enforced properly when disciplining judiciary officers. A judge is not independent as long as he fears that he can be dismissed at any time without notice. The removal of the judges for office should be made in accordance of the code of the conduct and disciplinary rules and it should be based on their personal performance records and virtuous investigations conducted by the office of the Judicial Commission giving them the right of defense against any allegations.
- 5) **Administrative and financial challenge:** Both administratively and financially, judiciary has no independence. All courts except for the Supreme

Court, administratively comes under the Ministry of Justice - it has the power of hiring courts staff and clerks, managing the budgets of the courts and paying the remuneration of the judges and other staff. Courts are neglected and resources are very poor and it was the responsibility of the Ministry of Justice to fundraise or make available enough budget to rebuild courts. Judiciary has neither enough buildings nor sufficient budget to effectively perform its role and this can only be possible when it has independence to manage its budget freely.

## 2. The Accountability of Judiciary

Accountability is important as the insurance of the independence and impartiality of the judiciary is important. The independence of the judiciary is also important for the impartiality of the judiciary to enable guaranteeing of the human rights, maintenance of the rule of law and to make decisions based on facts and in accordance of law only. The accountability of the judiciary is important for the judiciary officers to be accountable only for their performance and professional conduct so as to they do not arbitrary use the law, and that they can only be promoted or demoted based on their performance or professional conduct.

### 2.1. Definition: What is the “accountability”?

Accountability is that a person be monitored or evaluated for his performance of a designated work, office or task. Accountability results either a reward or penalty. When a person is being accountable, his better performance will be discovered or his low performance will be exposed. Then, he will either be promoted to higher position as a reward or he will be demoted to lower position as penalty.

In the view of Justice Ernest L. Sakala of Namibia, the accountability of judiciary should be understood that there cannot be an independent judiciary in absolute terms in any country. He once said:

*“Judges are constrained by, and follow existing laws, procedures and practices. They do not act as they please; otherwise one good, namely, justice would be sacrificed on the altar of another, namely, independence. Judges are therefore not free to act perversely or for ulterior motives. Inevitably, they find themselves under controls of either a judicial or an administrative nature.”*

For example, Article 99(2) of the Somaliland Constitution provides that provides that *“The judges and the members of the Procuracy are independent when exercising their judicial functions”* but the Article does not make this independence an absolute and instead of saying *“and shall be guided only by the law.”*

Judiciary members are accountable for their actions and decisions. In order to get an effective accountability of the judiciary, it is necessary that these following matters be available:

- 1) **Data Recording System:** There should be data recording system, in which all actions, decisions or judgments of the judges are recorded or maintained such as the cases assigned to every judge/prosecutor, criticisms against him if any, trainings he was provided, improvements he made, performance appraisal, his professional conduct and etc.
- 2) **Independent Disciplinary Council:** There should be an independent disciplinary council for the accountability of the judiciary such as a special committee for monitoring and researches on the judiciary functions. This council should have its own office, staff and finance to effectively carry out this duties.
- 3) **Regulations:** There should be a regulations establishing how judiciary members will be accountable, such as disciplinary standards for judges and prosecutors, disciplinary measures, ways of investigating complainants against judiciary officers, ways of making decisions on the investigations for the public complainants concerning about judiciary performance and etc. These regulations are also the protection of the dignity and integrity of the judiciary by giving a right for every person to be familiar for his collected or investigated data, and also the right of defense for everyone against complainants and allegations.

## 2.2. Accountability of the Somaliland Judiciary?

In Somaliland, the accountability of the judiciary is very weak as the independence of the judiciary is very feeble. According to Organization of the Judiciary Law, the judge should only be dismissed by a disciplinary decision or by resignation or retirement. However, this was not properly applied by the Judicial Commission in respect of the dismissals of the judges they have made so far. Judges were discharged by the Judicial Commission without stating any grounds, and judges

themselves for being unaccountable, may use the law as they wish. Nevertheless, Judicial Commission has made a code of conduct and disciplinary rules for the judges and prosecutors, but its implementation has not widely been popular yet.

The Organization of the Judiciary Law provides that judges and prosecutors can only be removed for office if they reach the retirement age (65 years old), resign for the office before the retirement, lawful disciplinary decision is removed for the office, there is mental illness or incompetency in which the person may not able to perform his duties<sup>28</sup>. If there is not accountability, disciplinary decisions may not be justifiable, and the competency or performance of the person cannot be revealed.

The Code of Conduct of the judiciary is a regulation which is approved by the Judicial Commission in August 2012, and it is objectives is that judiciary members be accountable. This regulation defines the proper conduct and professional responsibilities of the judiciary members, and the procedures and measures of disciplining judges and prosecutors acted against these proper conduct and professional responsibilities.<sup>29</sup> If this Conduct of Conduct is enforced well, it is certain that the judiciary performance will have more public confidence than as its today.

### 2.3. Challenges of the Accountability of the Somaliland Judiciary

There are challenges against accountability of the judiciary members, the most important of these challenges are:

- 1) **Lack of knowledge:** In order to enforce the Code of Conduct successfully, the Judicial Commission should have the capacity of properly investigating the complaints against judiciary, a monitoring and evaluation system of the judiciary performance, and a data recording systems to find out the performance of every member of the judiciary. For example, the Judicial Commission should have the knowledge of reviewing how members of the judiciary have improved their performance after trainings? Does the previous reported mistakes being corrected or do they still repeated it? Does the cases in the appeal stage were held without reasoning? Did the judges

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<sup>28</sup> Article 26 of Law No: 24/2003

<sup>29</sup>Article 2 of the Code of Conduct of the Judiciary Officers, 2012

used the applicable provisions of law or did they simply reached judgments?  
And etc.

- 2) **Lack of required offices and staff:** Two or four persons only cannot be the monitors who can put their eyes on the performance of two up to three hundreds judges and prosecutors who are working in a six different regions. At least, the Judicial Commission should have one office in every region to keep track of the performance of the judiciary officers in every region. Accountability is not to wait the public complainants only, it is to constantly monitor and evaluate on the judiciary decisions and actions. This requires permanent offices and a staff trained on this work.
- 3) **Bias and nepotism:** bias, nepotism and tribalism becomes a part of the social life, and the judiciary organ is not an exception of this but it is a part of the society. The accountability will not be successful unless those bad influences in the public administration are eradicated. The heaviest challenges of an effective accountability of public administration are tribalism, nepotism and bias.
- 4) **Lack of annual reports:** Much of the judiciary business is conducted behind the closed door, there should be annual reports from all the main institutions of the judicial system. These include the annual reports from the Supreme Court, annual reports from all Courts, annual report from Judicial Commission and annual reports from the Office of the Attorney General. Judicial Commission and Chief of Justice in particular should appear before the parliament by delivering speeches and reports or to answer any questions relating to the exercise of their constitutional powers.

### 3. Conclusions and Recommendations

The key link to fostering and establishing the rule of law is ensuring an independent judiciary, and providing the environment of a fair and equitable legal system where an independent judiciary can flourish, safeguarded from outside influences<sup>30</sup>. A society where people know their rights are guaranteed by fair laws which apply in

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<sup>30</sup> Justice F. B. William Kelly, (Ibid, footnote 2).

the same way to all citizens equally, and are applied in an open and public way by an independent and impartial judiciary, is always a secure and stable society<sup>31</sup>.

Justice Ernest L. Sakala of Namibia, in his speech *the Accountability of the Judiciary: Accountable to who? Is there such a mechanism?* Which he presented at the Southern Africa Judges Commission Meeting held at Windhoek, Namibia from 11<sup>th</sup> to 14<sup>th</sup> August 2005, once said:

*“The need for judicial accountability without eroding judicial independence has now been recognized in most democracies. It is found in both international instruments and national statutes. At the international level, I find **2002 Bangalore Principles of Judicial Conduct** instructive. The first principle is that ‘impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.’ The second principle is that ‘integrity is essential to the discharge of the judicial office.’ The fourth principle is that ‘ensuring the equality of treatment to all before the court is essential to the due performance of judicial office.’ And the fifth principle is that ‘competence and diligence are the prerequisites to the due performance of judicial office.’”*

The following are the key recommendations for strengthening and improving the independence and accountability of the Somaliland judiciary.

### **Government of Somaliland – the executive branch**

- Strengthening rule of law by effectively enforcing all statutory laws
- The president should not have the sole authority to dismiss the Chief of Justice and other Justices in the Supreme Court.
- The Administration of the budget of the lower courts should be transferred to the Judiciary Branch.
- Promoting legal publications and journals and the public gazettes.
- Judges should be paid an equal salaries for the higher political appointees and parliamentary members.

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<sup>31</sup> Ibid

- The government should provide enough security guards for the courts and the required office equipment and buildings for the judiciary service.
- Providing and supporting capacity building programs of the judiciary officers.
- Encouraging and supporting legal education programs such as universities.
- Executing judiciary orders and decisions without delay.
- The government should support the judiciary to effectively perform their duties and responsibilities.

### **Legislative Branch**

- Amending the constitution and Judicial Commission should be excluded members from the Executive Branch, namely, the Attorney General, DG of the Ministry of Justice and Chairman of the Civil Servant Commission.
- The budget and the staff of the lower courts should be under the administration of the Judiciary branch.
- Enacting enabling statutes of the Constitutional and Supreme Courts and organic law of the Judicial Commission.
- Enacting the law for the proper status of the judges as required by Article 98(3) of the Constitution.
- The parliament should also have a power for the appointments and dismissals of the Supreme Court judges and Chief of Justice in particular.
- Legalizing that Courts should be required to recruit supporting staff in accordance with employment rules and guidelines established by the Civil Service Commission.

### **Judiciary Branch**

- There should be data collection system for the performance of the judiciary officers.
- Apply properly to the Code of Conduct and Disciplinary Rules for the Judges and Prosecutor for disciplining judiciary officers.
- A professional bar association and judges association with regulatory authority should be established.
- Performance of judges and prosecutors should be constantly evaluated and monitored.

- Judges should be provided with a degree of protection from the public Opportunities for the International Community.
- Judges should be required to hold at least a law degree and should fulfil specific qualifications and Judges should have at least six months training or apprenticeship on the bench prior to employment as a judge.
- Lower courts such as the appeals, region and the district should be administratively under the jurisdiction of the Supreme Court
- Harmonizing these three parallel legal system into single unified legal system.
- Organizing and conducting the judiciary conference every year to assess their challenges and achievements as well and
- Improving the performance of the judiciary system by upholding the rule of law and protecting constitutional rights of the citizen and the internationally recognized human rights.