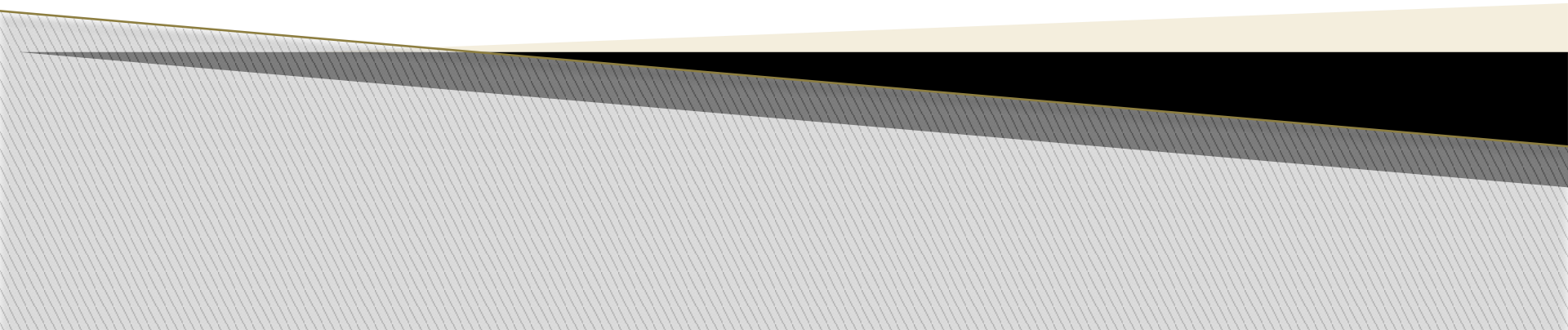


CHAPTER- 3

BY; TESHOME S.



FEDERALISM AND SECOND CHAMBER

Brainstorming Question

- ▶ What are the common character of states structured through federalism ideology?
- ▶ What are the unique character of Ethiopian federalism?
- ▶ What are the rationale behind to have such unique character?
- ▶ Which form of federalism Ethiopia practiced right now?
- ▶ Which form of federalism is best for you to determine the fate of Ethiopian?

Review of previous lesson

We have discussed as the f/f are; common character of federalism based state structure.

- ✓ **Constitutionally Division of power**
- ✓ **Supremacy of federal constitution**
- ✓ **Written constitution at central level**
- ✓ **Umpiring federation**
- ✓ **Rigid central constitution and**
- ✓ **Territorial Autonomy of the States**

We have also discussed as the f/f are unique character of Ethiopian federation/federalism

- ❖ **Recognition of nations, nationalities as building block of the federation: read preamble of the constitution.**
- ❖ **Recognition of structurally bi-cameral and functionally unicameral Legislative organ. Art.53 and 55/1/**
- ❖ **Recognition of unconditional right to self-determination including the right to secession. 39 and 93**
- ❖ **Recognition of extra-judicial interpretation of constitution. Art. 62/1/ and 83.**

3.1 Concept of Second Chamber

Notion of Bicameralism

- ▶ Second chamber is the parliament organ which represent federation at the federal level. **It is inherent feature of federalism or not?**
- ▶ Although bicameral houses can be found in unitary systems, owing to the federal idea, second chambers are more common, but not inherent in federations.
- ▶ Second chambers reflecting the entrenched representation of the states distinguishes federations from other types of polities; if the representation is for the interests of states, more specifically less populous states, as an institution that reflects the normative diversity. Again their involvement in the federal law-making process, are common in federations. In this scenario it considered as it is inherent feature of federalism.

Second chamber have different nomenclature; d/t role and responsibility; d/t manner of representation and selection as well as composition in different state; for instance;

- ▶ The USA. Second chamber is called house of senate
- ▶ The German second chamber is called Bundesrat.
- ▶ The Swiss second chamber is called; canton.
- ▶ The Ethiopian „ „ „ House of federation.

The role and responsibility; manner of representation and selection as well as composition of second chamber is discussed in next topic.

► *What are the justification/rationale behind/ for the existence of second chamber? Two basic reason are there;*

1st The need to keep sovereignty of federation;

How? The existence of second chamber is counter defense for principle of majority rule. There may be many circumstances in federations in which majority rule is qualified, the point here is that federal arrangements ***by providing second chambers*** based on a different organizing principle from the lower house, can **limit majority rule**.

The distribution of seats in federal second chambers in terms of units may appear to ***counter*** the democratic majoritarian principle' in favor of an equally important value in federations, the promotion of diversity.

- ▶ The people are represented as whole and as parts; thus the federal parliament in a federation is expected to reflect the unity of the country in the lower house (elected by a popular vote) on the one hand and the diversity of the country in an upper house representing the states or some other regional interest, on the other.
- ▶ Accordingly; the people are taken as both united and as diverse. *The dual existence of unity and diversity is inherent in the federal principle.*
- ▶ *To summarize presence of second chamber protect sovereignty of federation through two ways;*

1st through restricting federal derogation and the overstepping of delegated authority, and the impairment of the interests of one or more of the units.

2nd by decreasing fear of more densely populated states. In fact smaller and more sparsely populated units feel potentially threatened by more densely populated states. To against this they have representation in second chamber. Accordingly; second chamber is the room of minority group.

- Representation by territories and representation by size of population as distinct principles, operate in federations. This is the reason to defend existence of

2nd the need to solve political deadlock by independent organ: We have discussed as constitutionally entrenched division of power is the hallmark of federations. However, the division of powers between the federal government and the states cannot be delineated in such a way as to avoid all conflicts. Why? Division of power is artificial, imperfect and a generalized skeletal thing and Political life cannot be perfectly or permanently compartmentalized by its nature. To solve this problem; there should exist an organ independent of both the federal and regional governments which has a final say on matters involving constitutional interpretation and other constitutional disputes, such scenario is called concept of umpiring federation.

Accordingly; different organ are empowered and different model are practiced in different countries; for instance; (you can get the detail concept of this at the middle of this chapter)

- ▶ Judicial review, USA
- ▶ Specialized constitutional court, Germany, South Africa
- ▶ Special consultative organ or quasi judicial, Finland
- ▶ Legislature the interpreter of the constitution Sweden

What is the experiences of federalism based state structure to achieve these two objective? (roles in the law-making process, power, composition, and selection)

3.2 Role of second chamber in the law-making process

- ▶ **The United States Constitution** clearly makes the Senate an integral part of the legislature. It states, '**All legislative powers herein granted shall be vested in a Congress** of the United States, which shall consist of a Senate and House of Representatives. It also state that congress has two chambers, the House of Representatives and the Senate; which have **equal powers**.'
- ▶ **The Swiss Constitution** is even more explicit in guaranteeing the Cantons' participation not only in the law-making but also in other federal affairs. The guarantee of the Cantons' role in law-making is even more specifically stated as follows: 'Subject to the rights of the people and the Cantons, the Federal Parliament is the highest authority of the Confederation.'

- ▶ **The German Basic Law** likewise guarantees the Bundestag participation in the law-making and administration of federal law.
- ▶ What is common to all is the fact that the upper chamber is considered an important component of the federal law-making process

The Ethiopian second chamber;

- ▶ The 1995 Ethiopian Constitution stands in sharp contrast in this regard. It fulfills the minimum requirement of having a second chamber but with a totally different function.
- ▶ Although the Constitution guarantees the various nationalities 'equitable representation' in the federal government, close observation of Articles 39(3) and 62 reveals that the right to equitable representation in federal government only ensures the various nationalities in the federal executive, in the mostly non-legislative House of the second chamber and perhaps in other federal agents, but not in the federal legislature.

- ▶ Even though Art.53 states that ‘there shall be two federal houses, namely the House of Peoples Representatives [HPR] and the House of Federation [HoF]’ in the sense of having two chambers, the legislative power of the latter is very much contested. According to Article 55(2), the HPR remains the **sole and highest law-making authority** of the federal government. The consent of the HOF is not a precondition for the effectiveness of federal legislation.

If so we can conclude as the Ethiopian second chamber cannot participate in any legislative activity totally? NO:- because of the following; according to;

- ▶ Article 62(7) it have power to determine the ‘**division of revenues** derived from joint Federal and State tax sources and the subsidies that the Federal Government may provide to the states’.

- ▶ Art. 99 HoF has concurrent power with the HPR in the determination of residual powers over taxation. In essence this provision refers to reserve powers regarding unspecified future tax bases.
- ▶ In both cases, it appears that there is a role to be played by the HoF, but it is far from clear whether this role is legislative or otherwise.
- ▶ Art.105:- Amendment of the Constitution.

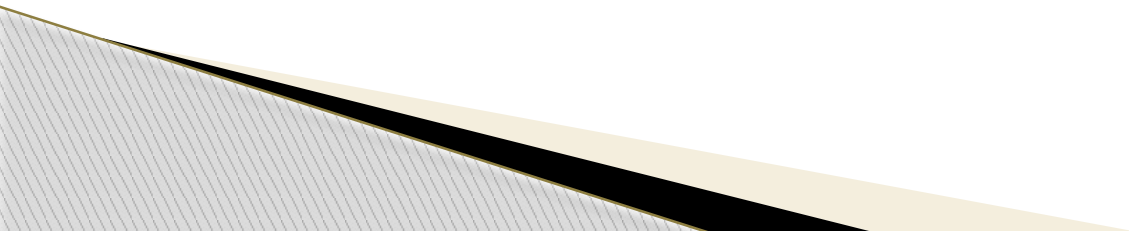
3.3 Power of second chamber

- ▶ **In USA and Switzerland:** the two chambers are co-equal in power and directly elected by the people. For instance on;
 - ❖ It has equal powers in all bills.
 - ❖ approval of treaties concluded by the President (2/3)
 - ❖ role in the appointment of ambassadors, or other ministers, consuls, and judges of the Supreme Court.
- ▶ **The German Bundesrat;** has the participatory role as well as the protection function. Again it also has absolute veto over all federal legislation involving administration.

ETHIOPIA;

- ▶ HoF does not have a legislative function.
- ▶ Some of the important powers conferred to the House under Article 62 include constitutional interpretation and organizing the Council of Constitutional Inquiry
- ▶ The ground to empower is as the f/f'
 - ✓ Constitutional interpretation is considered as a political rather than a judicial function; Explanations can be inferred from Articles 8 and 61. Article 8 stipulates, 'All sovereign power resides in the nations, nationalities and peoples of Ethiopia.'
 - ✓ the owner of the constitution is nation, nationality, and peoples; And Article 61(1) provides the fact that the House is composed of such diverse nationalities. By inference it can be concluded that, if sovereignty is placed on the nationalities and because the nationalities are sources of sovereignty, the house, which reflects their sovereignty, must interpret the constitution.

- ▶ Criticism on this area;
- ▶ Recommendation;



More on interpretation of constitution

- ▶ It is similar to constitutional review or adjudication or constitutional litigation. Constitutional review mean reviewing or revising the constitutionality of special laws, government action and its decision.

Why we need to interpretation of constitution?

- ▶ Upholding, preserving, ensuring constitutional supremacy.
- ▶ To Give forces to constitution's provisions.
- ▶ Protect constitution from being violated.
- ▶ To ensure continued existence of constitution

- ▶ It need because of that fact constitution is general, vague, ambiguous and uncertain which need clarification for its continuity or long lasting and enforcement. Moreover, it is needed to give meaning to the term of constitution and to monitor compliance of any law and decision to the constitution.
 - ▶ Constitutional enforcement mechanism vary from country to country.
 - ▶ **Generally, there are countries follow centralized model of constitutional review, decentralized model of constitutional review, legislative review and countries no constitutional review.**
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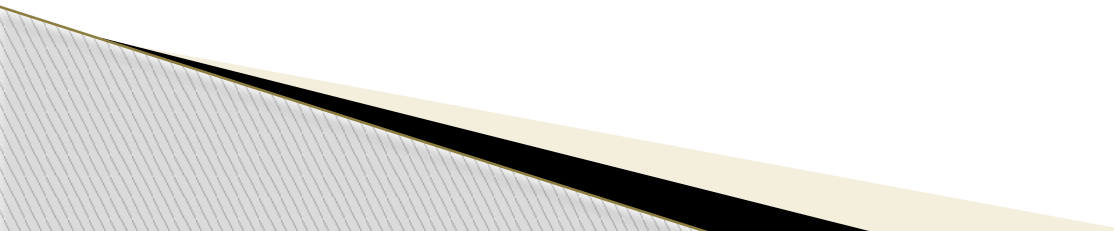
A) LEGISLATIVE REVIEW

- It is review by purely political organ which is not independent of politics; legislative member b/c of the f/f rationales;

1st **Doctrine of political question** Those countries follow such model believe as courts weather it is either special or ordinary courts; unsuitable to give political judgments; by giving meaning for abstract principle enshrined in the constitution. They believe as ***Constitution is a political document which solve political problem and need political decision.*** According to this doctrine review by Ordinary court is considered as obstacle to economic and social progress. Socialist states such as China and Cuba, Ethiopia During Derge regime follow this approach.

2nd The need to avoid judicial activism:

3rd Absence of political control on judiciary: legislative are answerable/accountable by next election unlike judge. Judges which it self is not accountable. So there is absence of political control on judiciary.



B) Centralized or Concentrated Model

It is the model in which special court conduct constitutional review; and it have the following feature:

1. The constitutional court is formally detached from both the judiciary and legislature.
2. The constitutional court review constitutionality of legislation before and after its implementation. i'e **both abstract, concrete review is applicable.**

Abstract review; is review of legislation in the absence of litigation or real case. it is review of the constitutionality of proposed or enacted legislation without regard to the application of that legislation to any concrete set of facts. It apply to draft law, adopted law, promulgated law but not yet applied or enforced or executed.

Concrete review; refers examining the constitutionality of issues incidental to an ongoing Judicial proceeding. This happen when the party to the case raise constitutional objection and the court refer the case to constitutional court. It is initiated by Judiciary in the course of litigation. Therefore it also called review of pending case.

3. Constitutional court is restricted to the resolution of constitutional question only. Hence non-constitutional issue remain under the competence of ordinary court.

4. The decision of constitutional court on constitutionality of specific law or other legislators activity is final.

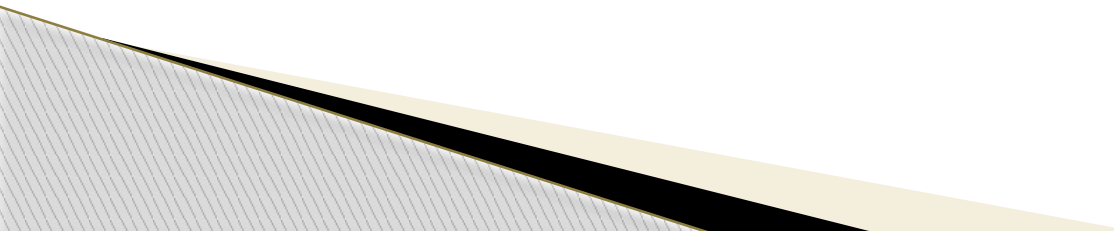
5. Constitutional court have exclusive Jurisdiction or monopoly power over constitutional issue.

► **Why Centralized or Concentrated Model?**

- a. **Doctrine of parliamentary supremacy**:- state that enabling ordinary court to review constitutionality of legislation violate or jeopardy sovereignty and dignity of parliament. Decentralized model reject parliamentary sovereignty. Since it make judiciary equal with parliament and enable to override legislation enacted by legitimate organ.
- b. **Checking the statute is not ordinary task**. So the ordinary court should not make law rather it shall stick to the letter of law.

Generally; The monopoly power of the Constitutional Court or the HoF in many parliamentary federations is justified by the respect for the legislature. Not every court should be allowed to disregard the will of parliament.

C) Decentralized/Diffused Model

- ❖ It give power to court of all level to check or review constitutionality of legislation and gov't action.
 - ❖ Supreme court have final decision.
 - ❖ the courts have jurisdiction on constitutional and non constitutional matter.
 - ❖ Only concrete review is applicable; review after application of law.
- 

Rationale to prefer this model is as the f/f;

1st Interpretation of law the essence of judicial duty Interpretation of law is the proper place and peculiar provinces of the courts.

function of court is to interpret law and apply them to a case and in the event conflict between legislation and constitution, it must apply constitution by disregarding the legislation why because the constitution (expression of will of people) is supreme than legislation which enacted by people's agent. A constitution is in fact and must be considered as fundamental law. Therefore it belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.

2nd Judicial review is counter defense for majoritarian tyranny; Constitution should not be conceptualized just as a majoritarian document but as a document curbing the excess of majority decision making.

Constitution is meant to protect minorities and individuals from the potential of majority tyranny. The relative inability of minority groups to participate in or be represented by the political process justifies judicial review.

3rd Empowering political organ to review constitutionality of government action is not less than making one a judge on his own case. The judiciary is also **impartial** unlike

4th Judge are too accountable even its manner or procedure of accountability is not similar with politician.

Judge accountable in the following way:

- ▶ By providing reason to its decision
- ▶ By citing specific law applicable to the decision in deciding the case.
- ▶ Decision is reviewed by higher court on appeal-revision by appellate court
- ▶ The court proceeding is transparent as they are open to the public and media scrutiny.
- ▶ Judge is accountable or liable for breach of disciplinary rules

Activity-1 Under which model Ethiopia belongs and which model is more favorable to you?

What do you understand if you read art.37, 79, 48, 62, and 83 of the FDRE-constitution?

Art. 37; Everyone has the right to bring a **justiciable matter** to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power. The decision or judgment may also be sought by: Any association representing the Collective or individual interest of its

members; or Any group or person who is a member of, or represents a group with similar interests.

The justiciability of matter/cases are determined by presence of controversy, adversity, mootness, ripeness and standing. This is what you have discussed under procedural law.

- ▶ *Gaaleen; “Qaama biroo kan aangoon abbaa seerummaa seeraan kennameef... (any other competent body with judicial power) jedhu maal agarsiisa?* dhimmichi kan murtiidhaan murtaayuu qabu ta’us qaama birootiif yoo kenname MM dhimma kana ilaaluuf aangoo hin qabu jechuudha.
- ▶ Accordingly; we can conclude as doctrine of political question is included in the FDRE-constitution since the constitution empower HOF- to interpret the constitution under art.62/1/ and 83- to review the constitution, art. 48 to resolve dispute among federation.
- ▶ Therefore it seems as Ethiopia follow legislative model of constitutional review. ***Do you criticize this model by take into***

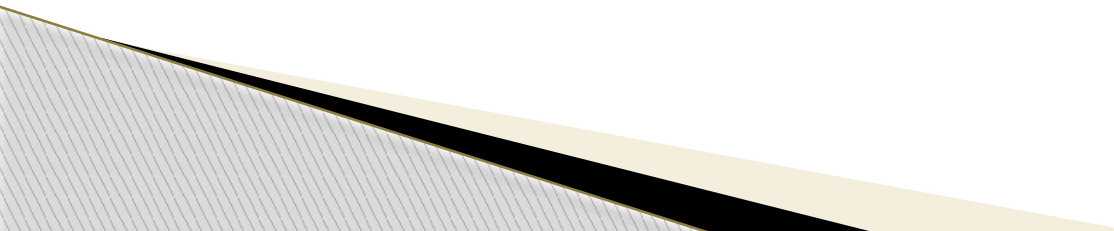
3.4 COMPOSITION OF SECOND CHAMBER

- ▶ **In the United States**, the Senate embodying *the principle of equal representation of the states, notwithstanding disparities in their population*, was the price that the larger states had to pay for the participation of the smaller states in the federation. Federal power is not permanently controlled by the few more populous states.
- ▶ The same principle is adopted under the **Swiss** Constitution.
- ▶ **The German federation** represents a different principle that tries to balance the interests of the most populous states on the one hand and those of the less populous ones on the other.

- ▶ The Basic Law stipulates: The Bundesrat consists of members of state governments which can appoint and recall them ...' and in another section it provides, (Article 51)
 - ❖ Each Land has at least three votes;
 - ❖ Länder with a population between two to six million inhabitants have four,
 - ❖ Länder with more than six million inhabitants five, and
 - ❖ Länder with more than seven million inhabitants six votes.'
- ▶ As can be seen from the provision of the Basic Law, the Bundesrat's seats are allocated on a weighted basis giving some advantage to the less populated Länder but falling short of the principle of equal representation of states

Ethiopia

- ▶ Article 61(2) of the 1995 Constitution stipulates 'each Nation, Nationality and People shall be represented in the House of Federation by **at least one member**
- ▶ Each Nation or Nationality shall be represented by one additional representative for each one million of its population.'
- ▶ Accordingly, the organizational principle of the HoF is the same with the HPR except that there is a significant difference in the number of constituencies, 100,000 for the former and one million for the latter.
- ▶ The provision does not even apply any rational upper limits like the German one.
- ▶ According to this arithmetic, the population or ethnic group with the largest number will have as many seats as its size may allow in the HoF, as in the Lower House.

- ▶ More populated nationalities have more seats and that there is as such no upper limit to the number of seats.
 - ▶ The composition of the upper chambers varies significantly, from the nearly majoritarian House of Federation in Ethiopia to that of minority protection in the US and Switzerland, with the German and Indian Houses balancing the tension between territorial and citizen equality.
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3.5 SELECTION OF MEMBER

- ▶ Similar variations exist among the federations in the manner in which the members of the upper house are brought to office.
- ▶ **United States** originally members of the Senate were **indirectly** elected by the state legislatures. This was a remnant of the federal legislature dependency upon the government of the states.
- ▶ **The Swiss Constitution** follows the same principle of direct election of members of the Senate.
- ▶ In both federations the citizens of the states directly elect the members of the second chamber

- ▶ **In Germany**, by virtue of Article 51 of the Basic Law the members of the Bundesrat are delegates of their Land cabinets. (in direct election)
- ▶ Each Land Government sends members of its cabinet to represent the interests of the Land in the Bundesrat. It appears that they represent the Land government, and more specifically the regionally governing party and ***recalled by the Land government.***
- ▶ **In the Ethiopian** situation Article 61(3) envisages two possibilities. Members of the House of Federation may be elected **indirectly** by the state legislatures or the state legislature may decide the members to be elected **directly** by the people. So far experience indicates that all members are indirectly elected (by the states)

- ▶ Article 61(1) of the Ethiopian Constitution provides that the HoF is composed of representatives of nations, nationalities and peoples.
- ▶ Membership in the HoF appears to be not based on the principle of territoriality but on what the Constitution defines namely nations, nationalities, and peoples.
- ▶ But the net effect as such may not be significantly different, because the Constitution defines the states in terms of ethno-linguistic identities.

- ▶ **The f/f are points of summarization; on Ethiopian second chamber;**
- ▶ The HPR is the sole and highest law-making authority of the federal government and the consent of the HOF is not a precondition for the effectiveness of federal legislation.
- ▶ Power of interpretation of the constitution is reserved for HOF.
- ▶ In terms of composition;
 - Rule of minimum representation and
 - Rule of additional representation is applicable.
 - Rule of optimum representation and
 - Principle of equal representation is in effective