Chapter one: The notion of state and constitutional approaches of state : introduction to constitutional law

1.1. Theoretical views about state

There are two major views as to whether society can live without government or not

- v Many people think that government is indispensable for an orderly life
- v However, the supporters of anarchism, a political thought, argue that government is evil and unnecessary. They believe that individuals can live in peace without government as they have the capacity for rational understanding, compassion and cooperation.

Ø Concerning state and government two questions are posed

- v Do we, as human beings need government?
- v If yes what kind of government?
- v The need to consider the nature of human being is supposed to be important when we sought theories of state and government. Thomas Fleiner, asserted beyond that it is necessary to understand the nature of human being before proposing any theory.

Ø let ś examine the views of the two known political thinkers regarding these two questions, **John Lock and Thomas Hobbes;**

Ø To reach at their conclusion, they first tried to understand the nature of human being. It is on their conception to human being that they proposed certain way outs.

Ø But the question is, what are the essentials of human nature that are important for understanding the state and its authority?

- In other words, why does the human being in contrast to animals need a state and if humans are unable to survive without state, what should the state look like?
- The answers to the above questions can possibly depart from two extreme assumptions;
  - Humans are by nature good beings, all humans are angels. In this case the state would have to be seen as a negative and unnecessary construct because angels do not need a state any more.
  - Humans are by nature are evil beings; all humans are devils and cannot be forced by any state authority to obey orders or live peacefully.
  - However, no theory or philosopher basis his theory from the two extreme alternatives. Most philosophers take the middle ground and general understanding that they are neither as good as angels nor as bad as devils.

- **Thomas Hobbes**

  According to the opinion of Hobbes, the behavior of human being is determined by three motives

  - The desire for gain
  - The desire for safety and
  - The desire for reputation

These motives cause individuals to be selfish, quarrelsome and aggressive. They always look for more power and wealth advancing their interests at the expense of others.

> *Hobbes wrote; the life a man may be compared to a race that has no other goal than to be foremost.*

Hence, the egocentric human behavior leads to a perpetual violence and war in the natural conditions.

Hobbes also imagined a condition where society may live without state, the state of nature. The concept is not indicating past condition but a condition which might exist in the absence of a politically organized society.

According to him, in the state of nature life would be solitary, poor, nasty, brutish and short. Hence, under the state of nature peace, prosperity and development is impossible.

- Ø Therefore, Hobbes concluded government is necessary because life without it would be horrible.
- Ø Men are anxious about death and therefore they are inclined to seek peace and fulfill their material needs through labor for their own sake.
- Ø Mankind is a rational creature and wants to end the warlike condition of state of nature. This desire convinces all persons to come together and enter into a social contract, according to which they transfer their power to a form of government.
- Ø Hobbes pointed out that the state is a vital instrument to accomplish peace and security and a good life can only be achieved through the state.
    - v On how to reconcile individual liberty and the power of the government, Hobbes strongly supports the supremacy of the sovereign.
    - v He advocated for strong and absolute ruler vested with an omnipotent power so far as it can keep the peace and security of its people.
    - v The sovereign is not answerable to its people nor is subject to the law because repressive government is better than no government.
    - v Therefore, in Hobbes ś theory of state and government, peace and security takes the central place.
    - v This is because during his time he had experienced the English civil war where social fabric had collapsed, violence being the order of the day. So, for fear of this violence and lack of peace he supported for an absolute

ruler than respecting the rights of individuals and facing with the possibility of anarchism.

Ø **John Lock**

Lock described the state of nature as a state of perfect freedom where individuals decide on their actions, dispose of their possessions and persons as they think fit within the limits of the law of nature.

- v He assumes that human beings are rational creatures-accordingly he thought that even in a state of nature individuals can live together according to reason without a common superior authority to judge between them.
- v Members of the society, though they did not create a political society, enjoy natural rights even prior to the creation of the government which they enjoy as human beings.
- v Let ś see the response of Lock to the questions as to whether government is necessary and the kind of government most suitable for society.
- v Just like Hobbes, Lock underlines the indispensability of government as the state of nature is fraught with disadvantages, inconvenience and dangers because the full enjoyment of human rights is exposed to the encroachment of others.
- v Therefore, protection to life, liberty and property cannot be guaranteed in the pre-society order as many things would be lacking notably;
  - ü An established, settled and accepted law by the common consent
  - ü An impartial judge that would decide according to established law
  - ü An authority to execute the punishment imposed upon law breakers.
- v Therefore, to exploit the missing elements in the state of nature, lock proposes to form a political society to rule upon the consent of the majority. Political society is established on the basis of freely given consent. However, when individuals decide to form society they surrender their power of

preserving their rights or punishing wrong doers to the government but individuals did not surrender to the community all the rights but only executive power.

To generalize

While Hobbes was in favor of absolute government, lock was interested in limiting power of government. According to the later, the only justification for the existence of state is its ability to protect individual rights better than individuals could do their own in pre-political society.

- The thinking of the two political philosophers is influenced by the conditions of the time where they were living.
- During Hobbes time, peace and stability was central political thought but during lock ś time the emphasis shifted to protecting liberty and controlling despotism (dictatorship).
- Both thinkers agree the fact that individuals entered in to a compact to form political community to end the uncertainty in the state of nature. However, the thinkers differ significantly on the nature of government to be established.
- Regarding Hobbes he argued individuals by entering in to the social contract (compact) agree to subordinate themselves to the authority of an absolute sovereign.
- But lock maintained that individuals still retain their inalienable natural rights even under government. According to him, the supreme ruler cannot take away from any man any part of his property without his consent. But if it deals arbitrarily and improperly it violates the essential conditions of the social compact and the trust under which it holds power.

Ø Lock further proposed the legislature be separated from the executive to protect the rights of citizens. If the legislature and executive become absolute and enslave the people, the people are entitled to replace it with another government.

1.2. The notion of constitution and principles and theories of constitutional law

Constitution, constitutionalism, democracy, rule of law, separation of power, checks and balances, sovereignty……

1.2.1. Constitution, constitutional law and constitutionalism

Nature, meaning, and/or function of Constitution:

General definition:

In general, Constitution is understood to be the fundamental and organic law of a nation or state establishing the conception, character and organs of its government as well as prescribing the extent and the manner of its exercise.

®Constitution is a devise of a plan of legitimate rule and endowed it with legal force before rulers were called to power and authorized to rule according to the legal framework. The normative statement that claims constitution comes prior to government, not the vice versa started to have a force of law under the emergence of modern constitutions. In light with this, Bradley and Wade define a constitution as something *antecedent* to a government; government being merely the creation of a constitution. A constitution is not the act of a government, but of a people constituting a government.

® In order for the constitutional plan of legitimate rule to work, the constitution had to be distinguished from ordinary law. As an act that constituted legitimate public power in the first place, the constitution could not emanate from the ruler himself. It needed a different source. Thus, the source of legitimate political power was found in the people who had decided to form a polity and to whom the constituent power was ascribed. So , the second basic foundation modern constitutions is the entrenchment and commitment towards the will of the people as source of legitimate public/political power . This is one the reasons /factors that make constitution to be to be a higher law

® MODERN constitutions, then, changed the essence of internal sovereignty. Instead of monarchical or parliamentarian sovereignty, the legitimating principle of the modern constitution was made to be popular sovereignty. But unlike the sovereign monarch or the sovereign parliament the people were incapable of ruling themselves. They needed representatives to govern in their name. Democratic government is government by mandate and as such stands in need of being organize, hence, popular sovereignty is largely to be exercise through representatives.

® However, the mandate was not conferred upon the representatives unconditionally. In contrast to the unlimited power of the British Parliament and the French King, the revolutionaries wanted to establish a limited government, limited in substance and limited in form. The first was a decision in favor of individual freedom that gained primacy over the raison d ́etat and found legal expression in catalogues of fundamental rights. The second followed from the conviction that freedom could best be secured if governmental power was not concentrated in one hand but distributed among various branches of government. The limits in scope and time as well as the separation of powers also required determination in the form of legal rules……

®Therefore, constitutions constitute representative democracy+ limitation of power, guarantying fundamental rights that would have primacy over public power/democratic decision, Separation of power to further secure liberty/fundamental rights+ rules of law /legal rules and independent judiciary and constitutional review institution that will help for actual determination. … .constitutions is committed to ensure a limited government both in substance and in form; this entails to be constitutionalism.

®To be specific is a fundamental law and set of principles which:

1. consists of framework of principles prescribing the structure and purpose of a political community

2. Is a Charter of Governments which authorizes and to govern and sketches how to govern
3. Establishes fundamental institutions and offices of the state and defines the powers and functions off the fundamental governmental agencies and offices of the state; and defines the relationship between the fundamental organs of the state and the governed.
4. Allocates governmental functions among the three government organs (horizontal division of power) government and units (vertical division of power) in federal systems.
5. Is power **map, or a basis and plan of legitimate rule/power,** which derives its whole authority from the governed /the people.
6. **Constitution as Covenant, Symbol and Aspiration**
7. The constitution in the modern sense is a set of legal norms, not a philosophical construct. The norms emanate from a political decision rather than having their source in a pre-established truth**.**
8. It consists of constitutional norms that regulate the establishment and the exercise of public power. ⋯.Regulation implies limitation
9. It lays down the procedure how public officials come to power and held accountable for their misdeeds.
10. It provides the tool to resolve conflicts arising between power holders and citizens on the other hand.
11. A constitution provides a consensual basis for persons and groups with different opinions and interests to resolve their disputes in a civilized manner and enables peaceful transition of power.
12. It shall also limit substantive scope of power of the government and need provide the fundamental human and democratic rights-as a limit to the government in power. Hence, **it would serve to ensure constitutionalism and be a Guardian of Fundamental Rights of Citizens.**
13. Under favorable conditions the constitution can even contribute to the integration of society.

The above indicated characters and functions show that constitutions have both constraining and enabling principles and devices. The fundamental essence of a constitution is to prevent both tyranny/despotism and anarchy.

The need to avoid tyranny is the ultimate concern of constitutionalism. The limitation of power both in substance in form /structure is there to prevent abuse of power and tyranny to the worst. Despotism is the highest manifestation of abuse of power/corruption. In despotic states "a single person directs everything by his own will and caprice". Without laws to check him, and with no need to attend to anyone who does not agree with him, a despot can do whatever he likes, however ill-advised or reprehensible. , and he can dispose anything as he sees fit.

Constitution, however, also aims to avoid anarchy. To achieve this, it must sufficiently empower the government to enable it to be strong whilst imposing reasonable restraints that do not make it too weak and create the risk of anarchy.

A constitution ̓s basic features which differentiate them from other law are:

1. Its primacy nature:
   -A constitution establishes the system of government-thus it comes prior to the system of government.
   - It is not a part of government and its rules cannot derive from government. - The legitimacy of the power and its manner of exercise depends on a constitutional basis and justification
   - While .Constitution precedes public power and government, other laws are made by the government, government precedes other laws. .

2. Constitutional is higher supreme law. .

   What are the manifestations of constitutional supremacy?
   - It originates from an authority higher than the legislature which makes ordinary laws. A constitution owes its origin to an authority outside and above the government it establishes. Constitutional law finds its origin with the people as the only legitimate source of power.
   - It enjoys primacy of all other laws and legal acts emanating from government. Acts incompatible with the constitution cannot claim legal validity.

- Special making procedure and authority. The distinction between constituent and the constituted power is essential to the constitution.

-special amendment and interpretation procedure and institutions

3. A constitution is made, amended and interpreted in a different way than ordinary laws. Its making and amendment is usually more stringent while the organ which interprets the constitution is sometimes different from the organ interprets other laws.
   - ® In some ordinary courts
   - ® In others constitutional courts
   - ® Referendum
   - ® Political organs etc/

4. Constitution is general than other laws. Because:

-It is concerned with general principles and rules not details. A constitution being a framework of governmental structure-establishes the principal state institutions leaving the detailed institutional structures for legislative enactments.

5. Permanence/stability

The need to make a living document.

What constitutes Constitutional law?

As we have seen it above, constitution is the fundamental and organic law of a nation or state establishing the conception, character and organ of its government as well as prescribing the extent and the manner of its exercise." Constitutional law is however, beyond that.

Constitutional law refers to "the body of law deriving from ⋯the constitutional text and the basic principles and rules that deal primarily with governmental powers, civil rights and civil liberties but which may not found in the constitutional document. Hence, the concept of constitutional law is broader than constitution. While the later refers to the document of the constitution the former refers and includes not only the constitutional document but also basic principles and rules not found in such document. A part form the constitution, conventions and customs, practices of the other government organs can be sources of constitutional law. – For example judicial review is part of the American constitutional law and yet no provision in the constitution clearly recognizes it. The doctrine emerged by judicial practice. Other examples include working principles and procedures of the fundamental organs of the state but not the state written in the constitution. For example presidential /royal assent of laws , vote of no confidence, working rules and procedures of parliament, principles and rules of constitutional interpretation⋯. These are conventional principles deemed to be part of constitutional law.

In short not all constitutional principles are found in the constitutional documents. Thus, constitution is lower in scope than constitutional law.

Constitutionalism:

Constitutionalism combines the idea of a government limited in its action and the mechanisms to ensure a rule of law and accuntable government. Thus, the ideal of constitutionalism requires constitutions to provide a definition and limitation of the powers of government, commitment to adherence to the rule of law and protection of fundamental rights.

In a net shell, concept of constitutionalism rests on two pillars:

1. The existence of certain limitations imposed on the state particularly in its relationships with citizens based on certain clearly defined set of core values.

2. The existence of clearly defined mechanisms for ensuring that the limitations on the government are legally enforceable.

In relation to the second pillar, constitutionalism has certain core, irreducible and possibly minimum contents of values with a well defined process and procedural mechanisms to hold government accountable.

The essential core elements/principles of constitutionalism include:

- § The recognition and protection of fundamental rights and freedoms
- § The separation of powers
- § Check and balance
- § An independent judiciary
- § Rule of law
- § The review of the constitutionality of laws and
- § The control of the amendment of the constitution

The achievement of constitutionalism depends on the presence of the above principles in the respective constitution. Constitutions with the incorporation of the constitutionalism as such rule out any absolute or arbitrary power of man over man. By submitting all government action to reestablished rules and processes, constitution helps to avoid, or to minimize tyranny and arbitrariness. It makes the use of public power predictable and enables the governed to anticipate government behavior vis-à-vis themselves and allows them to face government agents without fear.

The achievement of Constitutionalism = authoritative constitutions

Constitutionalism aspires for the constitutional values and requirements to be practically operational. The philosophy behind modern constitutionalism is the need to design constitutions that are not merely programmatic; shames or ornamental documents that could be easily manipulated by politicians but rather documents that could promote respect for the rule of law and democracy. An authoritative and functional constitution could be a reflection a consensual society establish as such , or need to build a consensual basis for persons and groups with different opinions and interests to resolve their disputes in a civilized manner and enables peaceful transition of power..

Democracy and constitutionalism

Though democracy in its ideal sense refers to rule by the people, in reality rule by the people signifies rule by majority rule .Because every one cannot agree on every issue. So, democracy refers to majority politics, and it largely function on representative basis.

To this end, Democracy needs primarily to observe and fulfill the following elements;

1. Institutions where the representatives can govern.
2. Popular election of representatives-in universal adult suffrage-in districts of general population (approximately)
3. Free entry of citizens to candidacy for electoral office
4. Freedom of political communication and association.
5. Alternative source of information
6. principle of political equality
7. Principle of open /transparent decision making process/openness and publicity.

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Through this process, it is to enable the people to freely choosing representative and make its representative be politically accountable. It also helps to ensure legitimacy and public trust in a way people will obey laws and decision and in the sense that people are more likely to accept decisions they have made themselves

N.B. But direct Democracy can also be exercised to the extent possible even modern times. Referendum and the participation made at kebelle lebel to govern and administer them at that level are manifestations of direct democracy

The relationship between democracy and constitutionalism: Tension and harmony

Tension:

The central normative principle in both constitutionalism and democracy the need to respect for the human worth and dignity. With this ideal commitment there is no different between democracy and constitutionalism. But -constitutionalists tend to be more pessimistic about human nature, fearing that people are sufficiently clever to oppress others without hurting themselves. Constitutionalism is an institutional response for republican concerns. Republicanism advocate for constitutional Democracy that quests for a rationalized government which is circumscribed with various mechanisms to ensure a rational government that gears to work for the benefit of all members of the political community ,with equal respect and concern to their dignity and freedom. As it is expounded by Aldler, republicanism as the very condition and requirement of democracy and rule of law is committed to three essential ideas and values of modern constitutional democracy. Republicanism in it first order requirement is committed to the idea that the state exist for the benefit of all members of the community as free and equal citizens ; it dictates that rulers do not have rights of their own(other than as a citizen) but only duties to the community. Secondly, Republicanism is concerned is to ensure that no single person or group within the community can dominate others; this implies the need to be watchful about private vested interests and democratic majorities , as much as to the governmental bodies that need to have a separated powers and functions(Principle of separation of power) . Thirdly, Republicanism stresses that it is not enough that rulers in fact rule wisely and benevolently, affording citizens considerable freedom and not abusing their power.

All limits on the rulers- in the interests of dignity, equality and freedom- must be secured by law so that the ruler s cannot abuse his /her power.

Democracy is taken as essentially referring to govern by duly elected officials (representatives) of which the group which secured the majority becomes the ruling party and where in decisions are made by majority vote. So, the question of republicanism and constitutionalists is "can majority rule guarantee the security and wellbeing of the minority and the individual "this question is not properly add leased by democracy and the theories of democracy. So, this is one of the basic flaws of democracy which constitutionalism tries to rectify. In this respect constitutionalism puts mechanisms to control the majority so as to respect the rights of the minority and the individual, to protect or overt POSSIBLE the tyranny of the majority.

Hence, constitutionalism is mainly the antithesis of wide and arbitrary power. So, it is concerned with the presence of checks and limitations on governmental power as well as their observation practice. It is noted that all states have constitutions but not all of them observe constitutionalism.

HARMONY:

Though democracy and constitutionalism seems to have certain contradiction, in modern days the concept of democracy and constitutionalism can easily be reconciled. For a democracy to be stable and function properly it needs a constitutional framework: for constitutionalism to thrive, it needs democratic pedigree. Therefore, democracy can be taken as on essential pre-requisite for constitutionalism. Because on the basis of democracy, constitutionalism tries to rectify its flows and ultimately both benefits the majority, the individual and the minority. Constitutionalism puts a limit on democracy for the benefit of the individual and the minority, and thereby for all.

Rule of law : Definition

A first step in defining Rule is to ask what the purpose of law is? Although there is some philosophical disagreement about why we have law, there is widespread acceptance that the law has essentially three purposes:

- Law is should protect against anarchy and the Habbesian was of all against all
- Law should allow people to plan their affairs with reasonable confidence that they can know in advance the legal consequences of various actions.
- Law should guarantee against at least some types of official arbitrariness.

To put comprehensively, the purpose of law is to provide a government of security, predictability and reason.

According to prof. Fallon, the purpose of law is served by five "elements of the rule of law"

1. Capacity of legal rules to guide people in the conduct of their affairs
2. People should be ruled by the law and abbey it
3. Stability (to facilitate planning law should be stable)
4. Supremacy of legal rules – the law should rule officials as well as ordinary citizens
5. Courts should be available to enforce the law and should employ fair procedure.

Rule of law is interrelated with a number of constitutional values such as:

- Supremacy of the con-
- Fundamental rights
- Judicial independence and
- Separation of powers

Each of these values helps to contribute for the realization of rule of law.

Rule of law means "a government of laws not of men"

Rule of men is the opposite of the concept which is open to power abuse manifested by arbitrary, Unreasonable and discriminatory practices.

According to A.V. Dicey rule of law denotes the following specific principles:

1. Principle of "Legality "No one should be punished except for breach of law, A person should not be punishable except for a clear violation of law established in the ordinary legal procedure before the ordinary courts.
   - A law issued in advance and publicized
   - No retroactive law, No secret and arbitrary law
   - Fair hearing and access to justice
2. The rule of law demands, what dicey called, equal subjection to the law i.e. equal treatment to all. The law should not discriminate against people on grounds of race, sex, religion, social back ground and soon. No one should be above the law, every indivtrion what ever his social position must be subject to the ordinary law of the country and a merable to the ordinary court.
3. When the law is broken there must be a certainty of punishment. The law can only rule. If it is applied in all times and circumstances, not selectively.
4. When rights are violated citizens should be able to seck remedy through the courts, inseparable form this is judicial independence. The capacity of courts to protect rights of citizens depends on their independence from outside pressure.
5. Finally, legal rules must be clearly defined to avoid uncertainty.

The rule of law demands the principle of "legality". In this respect, so long as these are a legal rule permitting the taking of an action, the requirement of legality is observed.

But, are legal rules sufficient to meet the test of rule of law?

- Some see rule of law as a principle much more than legal rules. Natural law theariste in particular contend that the law s̓ authority derives form the principle of natural law and the state law must conform o those principles.
- On the other hand, postiatuist thinkers argue that the law is valid, whether good or gad. It may be criticized for its content, nevertheless, it remain binding unless legally altered.
- Some critics of positivists argue that, according to positivist rule of law observed in Nazi Germany and the souiet union simply because repression was carried out in accordance with the letter of the law.

Naturalists argue further that a law in addition to being predictable, accessible and universally applicable, it requi4es a just legal system, not more adherence to the law. It must encompass equality and human rights without unjustifiable discrimination among groups of people.

Constitutional supremacy, constitutional rerriew and independent ourersight bodies (ex-office of ombudsman) play a vital role to bring about the prevalence of rule of law.

Constitutions normally contain supremacy clauses declaring void any conflicting laws, such provisions protect rule of law by maintaining legal structures, checks and balances and guarantees of basic rights and freedoms.

Another, means to preserve fundamental principles and values is by making the constitutional amendment process burdensome.

Separation of power

Though Plato is the first thinker to reflect on the dangers of concentration of power, the doctrine is credited most to the French political philosopher Montesquieu who profoundly elaborated the idea in his book entitled ‟the spirit of the law ”published in 1748.

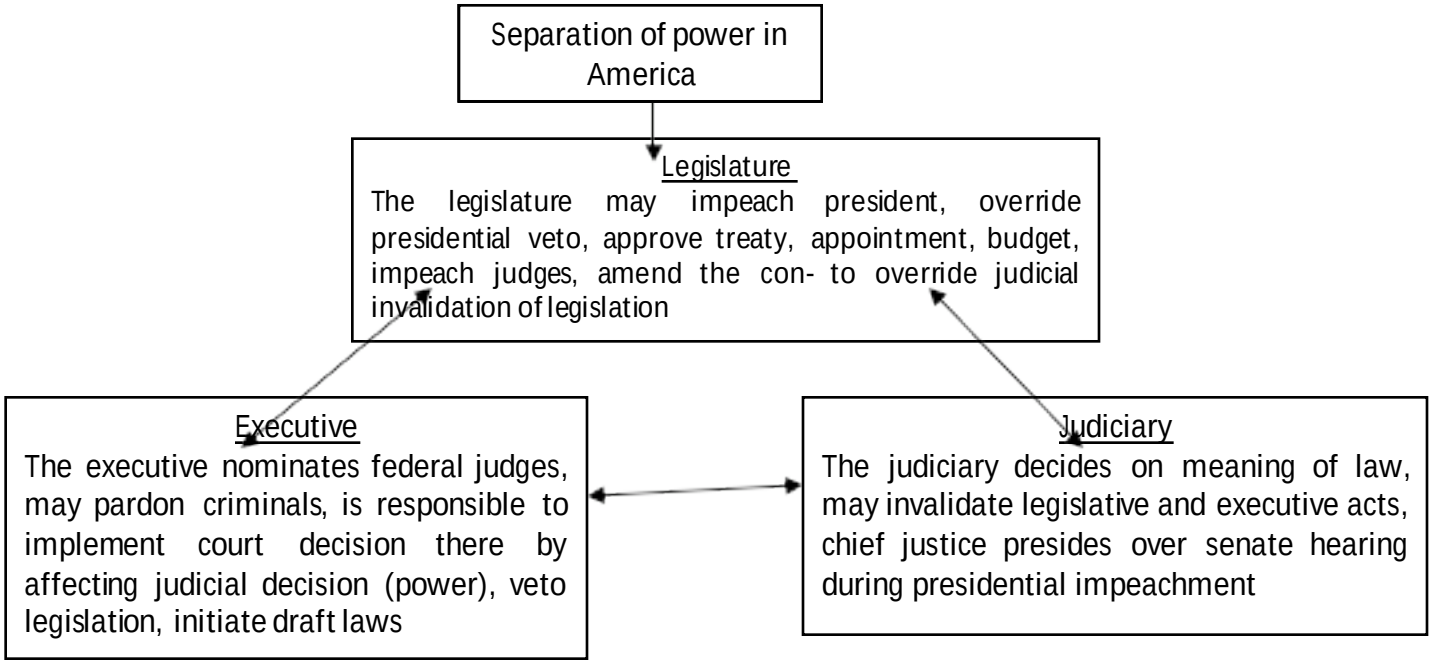
Montesquieu believed that human was the highest virtue to be pursued by any society. He said "constant experience shows us that every man invested with power is apt to abuse it and to carry his authorigh as far as it will go".

According to him "when the legislative and executive power are united in the same person or organ, there can be no liberity"

After identifying three functions he proposed ------ legislative, executive and judiciary. This theory has influenced the orgns. Of governments in the world though there are variations in its application.

Checks and balancers

This theory assumes that strict separation of power may create three institutions which can abuse their respective unchecked powers, therefore, to avoid such abuse, check and balance is needed to balance the powers of the different branches, that is to make them roughly equal, so that no branch can completely dominate the other branches.



Home work

Read the con- very carefully starting from art 50 and state how the sep. power and checks and balances works in the Ethiopian federation?

Separation of power

The doctrine is originated form the need to preserve and maintain liberty of individuals by dividing and distributing the powers of government so as to prevent tyranny and arbitrary role. The essence of the doctrine is therefore, one of constitutionalism or limited government.

To this affect the main control that the principle adopted is to vest the three types of governmental power legislative, executive and judicial in three separate and independent institutions with the personnel of each being different and independent of each other.

There are four touching elements to the doctrine

1. The government shall be divided in to three branches; the legislative, executive and judiciary
2. There are three separate functions interested to each of them, law making, law enforcement and adjudication of laws.
3. No person should have a double membership in any of those three agencies.
4. Each branch of the government shall serve as a check to the exercise of arbitrary powers of the other.

Madison, human being by nature are greedy, Jealousy and always power seekers, so, an individual rule in whose hands all the three powers are united can easily enslave the people.

Hence, in modern indirect democracy, in which the lows are the results of few representatives and enforced by few politicians, it is necessary to divide those powers among the different organs so as to protect individual liberty.

What is sovereignty?

- The supreme, absolute and uncontrollable power by which any independent state is governed. Self sufficient source of political power from which all specific political powers are derived.
- The international independence of state combined with the right and power of regulating its internal affairs without foreign dictation.

Being sovereign means:

- No one can compel you in a civil court without your consent.
- The only way you can lose rights are to injure the equal rights of other sovereigns and there by commit crime.
- In our country, the NNP, not the government is the sovereigns in its internal sense and the government exercises "sovereign "power explicitly delegated to it by them through a written constitution……

Sovereignty

The doctrine of sovereignty originated in Europe at the time when modern nation-states emerged around the fifteenth century. During the middle ages, a multitude of authorities, Princes, aristocrats, local kings, the church-wielded power until they were engulfed by the nation state.

Sovereignty, one of the fundamental legal and political concepts has different dimensions; Internal and external: legal and political.

Internal and external sovereignty

Internal sovereignty Refers to the possession of supreme authority over the internal affair of a state. That means, the possessor of internal sovereignty has the final decision making power. It follows that all individuals, groups and institutions must respect the will of the sovereign power.

External sovereignty Implies the status of a country in the international erena i.e. its ability to deal with other states independently it embodies the idea of National independence and self government.

Heywood pointed out "only if a nation is sovereign are its people capable of fashioning their own destiny in accordance with their own needs and interests. To ask a nation to surrender its sovereignty is tantamount to asking its people to give up their freedom.

This aspect of sovereignty recognizes the right of a state over persons and things found inside it.

External sovereignty is not. However, absolute as states have forfeited many of the traditional attributes of sovereignty,. When it comes to international law, the UN charter authorizes member states to intervene in another member states as when there is gross human rights violation committed by it. For example, in the 2011 popular uprising against the government of Libya, the UN Security Council passed a resolution authorizing member states to take "all necessary measures" against government forces in the name of protecting the civilian population. This is referred as "**principle of responsibility to protect** "

Legal and political sovereignty

Legal sovereignty (de jure sovereignty) signifies the supreme power as defined by law. The holder of legal sovereignty is determined by looking at the law of the concerned state. The legal sovereign is in a position to require others to comply with the law; he exercises power as a right, not by mere force.

Unlike legal sovereignty, political sovereignty is not in any may based upon a claim to legal authority but is concerned simply about the actual distribution of power that is de facto, sovereignty.

It therefore implies, the supreme political power having the ability to command obedience because of his monopoly over the use of coercive force.

Hence, legal sovereignty needs to be complemented with political sovereignty. If political sovereignty is lacking, the ruler lacks the means to enforce his commends. Political sovereignty alone without legal sovereignty is not legitimate and is susceptible to be collapsed as a result of popular resistance.

The idea is neither legal sovereignty nor political sovereignty alone establishes a viable authority (sovereignty). A government cannot rely on coercion alone; nor can it rely on legal authority alone. Both are vital for a stable and viable political system.

The monist and pluralist views about sovereignty

Who holds sovereign power within a state? In the past-sovereignty vested upon kings Now a days-shifted to popular sovereignty (implying sovereignty resides in the people not in the rulers).

These two views are monist outlooks, in the sense they try to identify a single sovereign the "king" or a group "parliament" or the "people" as bearers of sovereignty the monist doctrine is associated with the absolutist state where by one person or institution monopolizes power.

The monist approach to sovereignty is challenged by some critics 'b/c of the ff reasons.

- In modern and democratic state decision making is not centralized in one authority but is dispersed to d/t institutions with the system of checks and balances.
- Especially in federal systems both government tiers are autonomous. In this regard others say it is the federal constitution which is above the two government s which is supreme but the formers argue the constitution is going to be enforced by either of the two government s or by both, it is not self enforcing.

On this respect, those people argued the organ which has an ultimate power on the constitution. Is supreme or sovereign - - - the HOR but the decisions of the HOF can be turned down by constitutional amendment - - hence the organ with the power of amending the con. Is supreme - - the HOF, the HPR - - - the state councils.

Classification of constitutions

The purpose of classifying constitutions is to better understand their nature, similarities and differences.

There are two approaches in classifying constitutions:

- The traditional approach – which emphasizes on the form of constitutions and the institutional structural created by them.
- The modern classification – which is yet blurred emphasize on understanding the effect of economic, social, political forces on the operation of constitutions. This is because of the assumption that constitutions do not stand independently from the prevailing social reality.

The traditional approach is based on three criteria;

1. The form of the con. (whether it is written or unwritten)
2. The level of ease to amend the document (whether it is rigid or flexible)
3. The institutional structure (whether the con. Establishes a monarchy or republic, a federal unitary or confederate states, a parliamentary or presidential form of government).

Accordingly, K.C where, classified constitution in to five using the traditional approach;

a) Written and unwritten
b) Rigid and flexible/supreme and subordinate
c) Parliamentary and presidential

d) Republican and monarchical
e) Unitary, federal and confederate

A) <u>Written and unwritten cons</u>

A country is said to have a written constitutional if its basic legal rules are embodied in a single or a few documents. Conversely, a country is said to have an unwritten constitution if its basic rules of government are not incorporated in a single document. Britain, Israel and Eretria belong to this category.

As far Britain, its constitutional law is found in the form of usages, conventions and parliamentary statutes. Usages and conventions are not stipulated in any document, they emerge where there is an agreement to do things in a certain way.

- The advantages of written con. Over unwritten con.
  - ® They offer the advantage of clarity, stability and enforceability.
  - ® Constitutional rules can easily be known offering more predictability and certainty.
  - ® Better protection to fundamental rights. Clearly set societal goals and have educational value.

However, written constitutions are more rigid, hence are difficult to adapt to social changes. Constitutional principles emhrined in custom and conventions may have wide acceptance among the people since they are derived from their tradition, not invented - - compared to written constipations.

<u>B) Flexible and rigid constitutions</u>

Taking in to account the process of their amendment constitutions can be classified as flexible and rigid.

A constitution is flexible if it can be changed by a simple legislative majority (50% + 1 vote) –ex-cons. of Britain and New Zealand.

- The amendment of cons. May take d/t forms:

- ® The qualified legislative majority (2/3 or 3/4)
- ® The involvement of multiple government organs ex- FDRE con. Involves the Fed. and statehouses
- ® The consent of the people - referendum ex-Swiss constitution.

- Do you think flexibility of constitutions have a direct effect on frequency of their amendment and vice versa?

Flexibility or rigidity are one of the factors (not the sole factors) affecting frequency of constitutional changes. What matters most is the desire for change on the part of the concerned actor. Therefore, a con with a rigid amendment procedure may be more frequently changed than a flexible con. Ex.- Swiss con.

C) Monarchical and republican

Under a republican con., the head of state is answerable to the electorate and to the con on the contrary, a monarchical con provides for a monarch who inherits a throne and becomes head of state for life without accountability to the people. In modern world monarchies are over thrown in many countries. In countries where there are still monarchies, they have only a marginal power. Such system with ceremonial monarch and a prime minister with real executive is referred to as constitutional monarchy. Ex.- Great Britain, Norway, Denmark, Sweden, Thailand and Japan.

D) Parliamentary and presidential constitutions

The classification takes in to account primarily two issues.

- ® The extent to which the head of government depends on the legislature for its authority and the method used to elect the head of government

A. The parliamentary system

- ® The head of government , the prime minister, is elected from the party which command majority in the parliament and is directly accountable to the parliament (legislature)

- The prime minister reports periodically to the parliament on the activities of his administration.
- Government remains in office so far as it secures the confidence of the parliament (vote of confidence) and vote of no confidence removes it from office.
- Members of the executive may be members of the legislature –resulting in the fusion of power b/n the executive and the legislature
- The fusion in turn creates strong party discipline
- There are two heads-head of state (president) and head of government (the prime minister)
- Parliament has supreme authority on the government
- Only members of parliament are directly elected by the people

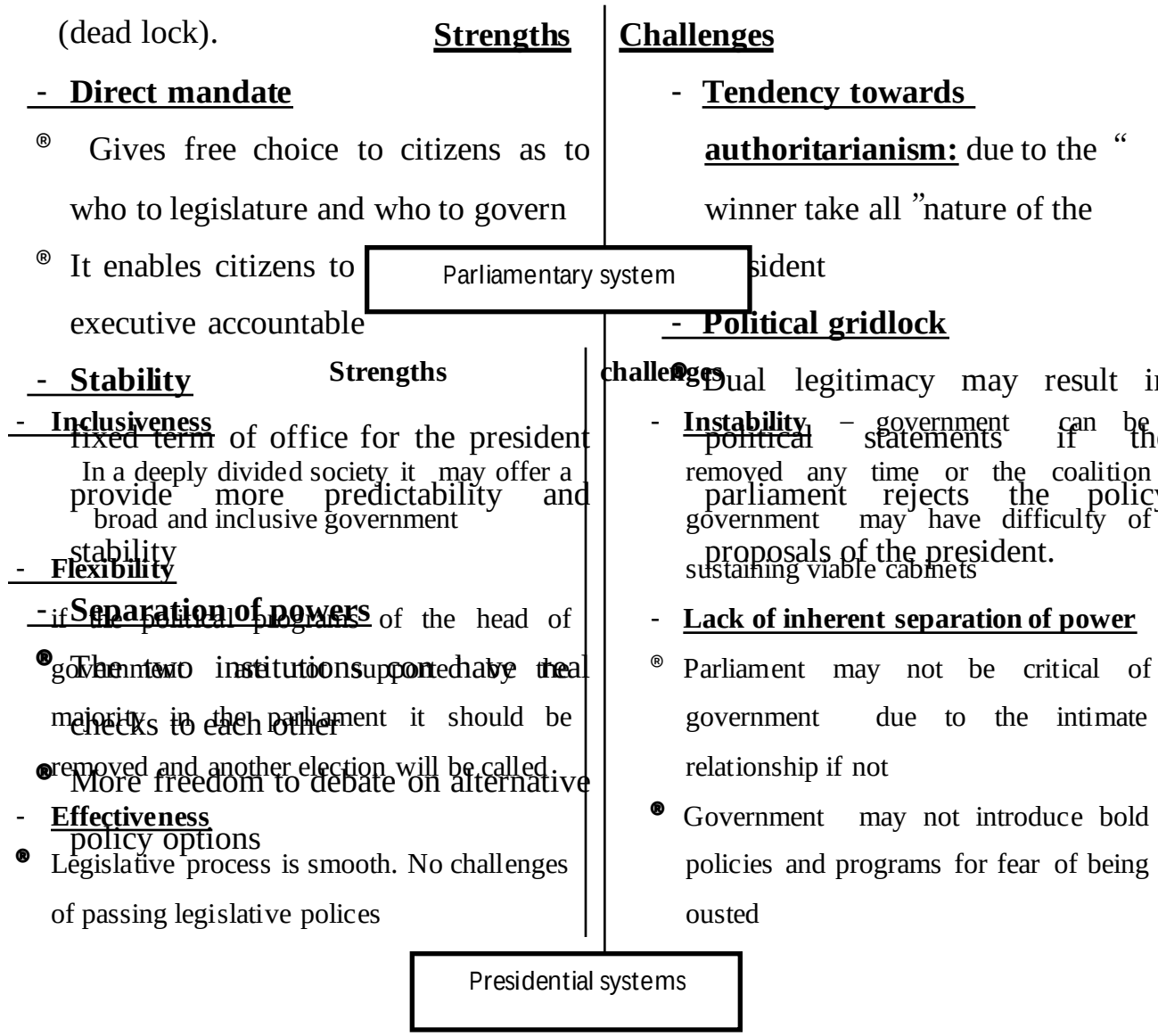
B. The presidential system

- The president and the legislature are directly elected by the people in separate elections
- The three government organs are separate, one is not dependent on the other
- The president is both head of state and government
- The president is the sole executive
- The executive is directly responsible to the electorate

When we take the American presidential system, it works in two party system-hence the outcome of an election could be

- The president and the majority in the parliament could be from the same party where there could be more or less harmony
- The president and the majority in the parliament could be from different parties as a result the initiatives of the executive may be blocked on grounds of party allegiance. This creates difficulty on the executive to get his policy

initiatives approved by the legislature. There could be political gridlock (dead lock).



E) Unitary, Federal and con-federal

® This is a part which is going to be covered in the course entitled "Federalism"

Organization of government

The division of government in to legislative, executive and judicial organs in founded on the doctrine of separation of powers with the view to avoid power concentration in the hands of a single body. The ultimate goal is to avoid the misuse of power.

The legislative branch

The legislature serves as a forum where critical issues, policies and proposed laws are open by discussed and debated. The role of the legislative body is not confined to legislation alone thus, the name ĺegislature is not fully descriptive of its numerous functions.

Function of the legislature

Parliaments perform a number of functions including appointment, supervision, budget authorization, making war and peace and foreign affairs.

1. Legislative function- the frequent use of the word legislature appears to show that legislating is its most important function. However, this should not give the impression that they have monopoly over lawmaking.
    - ® Taking the constitution as a law, is not in many countries, made by the parliament
    - ® Executive bodies issue emergency decrees
    - ® In all political systems, executive bodies pass secondary laws
    - ® Presidential constitutions authorize the president to veto legislation permitting him to influence legislation.
    - ® Above all most draft laws come from the executive, which has the organizational coherence, access to specialist advice and information necessary for policy formulation. This gives the executive a leverage (influence) to shape law and policy making.
        - In USA about 80% of the draft bills come from the president.

On top of this, parliamentarians have limited capacity to initiate laws due to lack of expertise and legislative scrutiny of draft laws is highly limited. Therefore, are

warranted to say as Heywood, said, "Legislation is passed through assemblies rather than by assemblies"

2. Representation and deliberation

The motto of American revaluation "No taxation with our representation" underlines the impotence of representation in government b/c legislatures serve to bridge the gap b/n government and the governed.

More than any other institution, legislatures reflect more accurately the range of diversity in a polity. The representation may go along.

Geographical location, partisanship, race, the openness of legislative sessions enables the electorate to be informed about government activities which eventually enable the people to make informed decisions in the next electron.

3. Check and control

Despite the privileged place of majorities in democracies, unrest rained majority rule is a source of concern as it may lead to majority tyranny. Opposition groups particularity use the legislative deliberation as a venue to expose and criticize the conduct of government.

4. Investigation and oversight

With a view to promote responsive government, law makers carry out investigation and supervision in to the activities of the executive organ.

The executive branch

The executive organ is changed with policy formulation and implementation. Unlike the legislature which is organized on the basis of equality of members, the executive is typically organized under the leadership of one person it consists, two layers, the political executive and the bureaucratic executive.

Where the former is in charge of policy making while the later (comprising civil servant) is responsible for policy implementation and professional service.

The executive in parliamentary and presidential systems and their interrelation ship

with the parliament.

Parliamentary systems have dual executive structure in the head of state with formal roles and the head of government with real decision making powers.

As regards the relationship b/n the legislature and the executive, two types of relationships exist, that is, hierarchical and coordinate (transactional).

In a hierarchy one institution derives its authority form another institutional, where as in a transaction, two or more institutions derive their authority independently of one another.

In parliamentarianism, the executive holds a subordinate position compared to the legislature and its term of power may be terminated by the legislature, but, in presidential system neither the executive nor the legislative organ is subordinate rather they are independent and to govern the country, they must bargain.

Comparison

parliamentary	**Presidential**	**Semi-presidential**
Executive comprises prime minister and a cabinet, it arises from the legislature.	The executive is headed by popularly elected president who combines the offices of head of state and government	The president is popularly elected while the prime minister is raised from the parliament
Executive is subject to the dismissal through legislative vote of no confidence.	The president and the parliament enjoy fixed term of offices no vote of no confidence	The president assumers considerable political authority
	The president has some role in law as he may vote legislation	There is also a prime minister and cabinet subject is legislative vote

		of no confidence

Electoral systems

In modern complex society, democracy necessarily means representative democracy in which elected officials make decisions on behalf of the people.

Then the question remains, how are these representatives elected? This indispensable task in democracy is performed by electoral systems. Hence, electoral systems are set of mechanisms by which the citizens ʾvotes are converted in to representative seats.

Political institutions draw the rules of the game under which democracy is practiced and it is often argued that the easiest political institution to manipulate for good or bad is the electoral system. Therefore, its choice is the most important institutional decision for any democracy.

- Elect systems have effects

® On who shall will the election

® On governability

® On multi party

® Stability

® Representation

® Inter or intra party relationships

® Voter turnout

® Legitimacy

Dichotomies

The most common trends of classifying electoral system is based on their proportionally. That is how closely the number of seats in the legislature won by party mirrors that party ś share of popular vote - - - one has to even see the level of

wasted votes.

On the basis of these criteria electoral Systems can be categorized in to three families;

1. Plurality –majority systems(simplest and oldest)
   - ® TPTP(plurality) electoral system
   - ® Block vote (BV)
   - ® Alternative vote(AV)
   - ® Two round systems (TRS)
2. Proportional representation
   - ® List PR
   - ® Closed PR
   - ® Single transferable vote(STV)
3. Mixed systems
   - ® Mixed member proportional and
   - ® parallel systems

The plurality-majority can be divided in to those requiring candidates to win a plurality or an absolute majority to be elected. Instance to the former could be FPTP and to the later two round systems or alternative vote.

FPTP (simple plurality)

- ® Is used in 43 countries including US, Canada, India and others
- ® In this system countries are divided in to territorial single member districts (constituencies), voters within each constituency cast a single ballot for a candidate, the candidate with the largest share of the votes in each constituency is returned to office and in turn the party with an overall majority of seats in the parliament forms the government.
- ® Under this system there is no minimum threshold of votes, nor absolute majority votes.

- All they need is simple plurality - i.e. one more vote than their closest rival
- In this system the parties share of parliamentary seats counts for holding government not the share of total votes.
- This system is aimed at creating manufactured majority i.e. exaggerating the share of seats for the leading party for producing working parliamentary majority.
- It penalizes minor parties especially whose vote is spatially dispersed.
- The spatial concentration of supporters is decisive to the outcome of the election.

Merits of PPTP

- Simplicity-easy to understand to voters and to election administrable
- Enhancing territorial representation
- Gives single party government s – the seat bonus for the largest party common under FPTP means coalition government s are the exception. This will give effective government as the big parties will not bargain the minority parties
- Excludes extremist parties form representation- when the extremists supporters are not territorially concentrated.

Demerits of FPTP

- Excludes smaller parties form having fair representation.
- Encourages the formation of political parties on the basis of clan, ethnicity or region - - as a result parties base their campaigns and policies on conceptions that are attractive to the majority of people in their district or region but may exclude others or the policies may be hostile to the other society.
- This is an ongoing problem in Africa specially Malawi, Kenya and Ethiopia.
- It leaves large number of votes wasted which do not go towards the election

of any candidate – this increases groups who will be alienated from the system of government –which can have anti-system movements.

- ® May give raise to minority government with the support of minority votes. This may goes against democracy itself - - - b/c it is against majority rule. Hence,
- ® The system of government may lack legitimacy as the majorities are voted out.

Proportional Representation Elect systems (PR)

There are three inter presentations of democracy and the voting process:-

- ® Utilitarian interpretation of democracy the goal of political institutions including the voting system is to maximize social utility is the elect the alternative for which the sum of individual utility is the greatest hence " misrepresentation "is equivalent to "disutility ".
- ® Minimum coercion interpretation of democracy is justified for maximization of individual liberty. Democratic out comes including voting should be a system which force the fewest people to act against their will the system which minimizes individual coercion is required- - - here misrepresentation shows coercion.
- ® Epistemic interpretation of democracy assumes that democracy is an instrument for the revelation of common good.

Under this system the best electoral system should be the alternative which has the maximum likelihood of being the objective best. So, voting system is nothing but statistical devise, misrepresentation on here shows the election of wring person.

- All of them show a voting system should be the one which "minimizes misrepresentation ".

In pe in some, the whole country is one electoral district while in others there are

some divisions, in this system the whole vote within the country or the region will be aggregated and then quotient will he made.

Total Votes = quotient

Total seats

Advantages of PR

- Producing representative legislature i.e. Ensuring fair representation
- No wasted votes- almost all votes go towards a candidate ś choice.
- Increase voter turn out
- Avoid post election conflict
- Enhances power sharing b/n parties and interest groups.

Disadvantages of PR

- It gives raise to coalition government and as a result in turn leads to legislative deadlock and instability
- No territorial representation and hence is difficult to ensure accountability.

Mixed electoral systems

Is designed to avoid the disadvantages of the two systems, namely the Majoritarian and the PR it is intended to combine the best results of the two systems.

In mixed systems, there are two electoral systems using different formula running alongside each other.

Voters will have the right to vote to two votes, one by the majoritarian and the other by PR.

Advantages

It retains the proportionality benefits of PR and ensures as well territorial representation.

Disadvantages

It creates two classes of legislatures this may create fragmentation.

Comparing FPT and PR

The result of 2002 Addis Ababa election

No.	Party	Popular vote	seats		Discrepancy
			FPTP	PR	
1	EPRDF	564,821	22	13	+9
2	Medrek	380,392	1	8	-7
3	EDP	39,786	0	1	-1
4	AEUP	19,622	0	1	-1
5	CUD	14,108	0	0	0

Total vote = 1,018,729/23 = 44,292 vote for one pm

EPRDF = 564,921 = 13

Wasted votes = 409,616

Division of Power in the FDRE Constitution

Despite some variations there are some common features among federations in allocating powers to the federal and state governments.

The constitutional allocation of power follows three categories of powers;

- Exclusive powers → federal
  State
- Concurrent powers
- Reserved (residual powers)

Exclusive powers

In theory the exercise of an exclusive power as described in the federal constitution is left entirely to the entity to which it has been attributed.

Looking at the federal level there are some functions *exclusively given to the federal government* which by their very nature *covers the entire territory* of the federation and *apply equally to all member states and citizens*.

Exclusive power is very much necessary because there are some matters which come under the exclusive control of the regional governments. Because shared power can through process be absorbed by the central government.

The Ethiopian constitution generally follows the American and Swiss forms of distribution of powers despite it has also the feature of holding together federations like India. According to art-50(2) the federal government and the states shall have legislative, executive and judicial powers.

In the creation of Ethiopian constitution although there were no any constituent states which have prior existence to the central government, from the constitutional power structure of the federation one may argue for coming together federation.

In the Ethiopian constitutional setup the states are the holders of the residual powers according to art- 52(1) excepting the powers of taxation, for undesignated powers of taxation are as per art-99 left to determine by the joint session of the two houses.

Therefore, logically speaking art-99 shall be treated as an exception to art-52(1). Besides, the constitution lists some powers of states under art-52(2) which seems a kind of exemplary lists.

It is important to remind that the powers of the federal government are not only limited to art-51. Reading the reserve clause, one may say that any power not mentioned under art-51 belongs to the states. But, other provisions of the constitution also indicate additional powers are entrusted to the federal government. During the constitutional drafting art-51 was intended to cover the whole powers conferred to the federal government, while the other lists were meant to allocate from the lists to the different departments of the federal government. (Horizontal division of power)

Yet what appeared as a final product did not reflect the above thinking for we find powers seem to be additional under art-55, 74 and 77.

Some of the federal government's powers not mentioned under art-51 but indicated elsewhere include the power to enact labor, commercial, penal code, approval of federal appointments submitted by the executive and the establishment of federal institutions.

So, the reserve powers of states only apply after counting all powers of the federal government distributed throughout the constitution. The Ethiopian constitution providers neither a "necessary and proper clause" nor a comprehensive list of shared powers except for taxation.

The constitution empowers the federal government to formulate and implement the countries policies, strategies and plans in respect of overall economic, social and development matters, . . . establish and implement national standards and basic policy criteria for public health, education, science and technology (art-51(2)(3))

One may state that this is perhaps more than "the proper and necessary clause" for it grants the federal government with wide powers on economic, social, health and education aspects.

The same constitution also empowers the states among other things to formulate

and execute economic social and development policies, strategies and plans for the states. (art -52(2)(c))

The big question is to "draw the border line "b/n the two, but certainly there is no doubt that this makes most of the "policy making areas shared ".

Despite some variations the common trend in federations is that allocation of responsibilities has usually been based on the vague concept that matters of National importance should be reserved to the cent5al government, while matters of regional importance should devolve to the states. But the principle does not tell us much about the specifics of what powers should go to the central government and which one to the states.

Besides, it is impossible to avoid a wide range of shared powers.

However, broadly speaking, exclusive federal power includes defense, foreign affairs, immigration, major taxation powers, foreign exchanges and currency, foreign and interstate trade, maritime shipping, inter-regional communication, postage and matters physically transcending state boundaries such as high way transport services and key aspects of economic activities for which uniform regulation are deemed.

Shared legislative powers

Although there is a division of exclusive powers in a federal system b/n the tiers of government s, the dividing line b/n them is not clear.

There are some deliberate and unintended overlaps in the division of power.

Shared power represents the meeting point of the two levels of government s. These powers refer to that category of power in which both the federation and the states exercise at the same point of a power.

Reasons why shared powers

1) Experience has shown that there are certain matters which cannot be allocated exclusively either to the federal government or the states, it may

be desirable that the states should legislate on some matters but it is also necessary that the federal government should also legislate to enable it in some cases to secure uniformity across the nation.

2) Another reason for heaving shared powers is the fact that the federal government may need to guide and encourage state efforts and more importantly some measures taken by the states may have spill-over affects and for this reason the federal government may need to intervene.
3) Practical impossibility – shared power avoids the necessity of enumerating complicated minute subdivisions and it is necessary b/c there is practical impossibility to have neatly divided the whole powers b/n the tiers of government s.

'Conventionally' it is assumed that in case of conflict b/n regional and federal laws in the "shared powers" the federal laws shall always prevail to the extent state laws inconsistency.

Regional governments have the primary constitutional responsibility on social services.

- Social services cover education, health protection and welfare of citizens, insurance and assistance for old age, unemployment, accident and works of compensation.
- The personal nature of the service, the need to adapt them to local circumstances and their close relationship to other aspects of local government urge for state power. However, extensive federal assistance has often been necessary b/c of program costs and b/c of the pressure for federal wide standards of service to the citizen.

Experience so far indicated that one can distinguish at least two types of shared powers,

® Concurrent powers and

® Frame work powers

Frame work powers

Frame work powers grant the federal government in principle the competence to iss ue general legislation in a specified policy field. This power is subject to strict conditions b/c it has to leave substantial room for the states to issue their own legislation.

The federal government may use frame work legislation to ŕegulate federation wide standards ʾwhile leaving the states room to legislate the details and to deliver the services in a manner adaptable to local situations.

Unlike the concurrent powers in which the federal government has the potential competence to absorb, federal framework legislation indicates an interesting compromise that requires significant decentralization of policy making all authority without sacrificing uniformity where it is needed, especially in the social services.

Although it has traditionally been argued that the Ethiopian constitution has no shared powers except in the areas of taxation, it is clear that it provides some provisions dealing with frame work powers.

1. Art -55(6) –the federal civil laws "to establish and sustain one economic community "in principle by virtue of art-52(1) civil law is a matter reserved to the states
2. Art-51(2)(3) Vs 52(2)© another framework legislation refers to land law.
3. Art-51(5) + 55(2a) Vs 52(2d)

Concurrent powers

As one category of shared powers, concurrent powers refer to powers attributed to both entities.

- Art-521(1) Vs 52(2a)

- Art-55(5) penal code
- Taxation power (98)

Here, the conventional experience shows that the federal government can exhaust the field of powers in concurrent powers leaving no room to the states.

CHAPTER THREE

FEDERATIONS AND SECOND CHAMBERS

In assessing the legislative powers of second chambers there are two trends;

- ® Co-equal legislative power USA and Switzerland
- ® Subsidiary legislative- keeping the interests of states- German and India – sometimes veto power

In USA, the constitution in section 1, art 1 stipulates that all legislative powers shall be vested in the congress → Senate
→ HPR

The senate has exclusive power

- Impeachment of the president
- Approval of Int'l treaties

In Swiss legislative power is conferred to the federal assembly → National assembly
→ Council of states

German there are two houses → Bund stage (lower h.)
→ Bund estate (upper h)

In some legislation the bundestate has suspensive veto however; it has absolute veto in legislations which have

- ® Financial implications
- ® Affects the duties of the lander

In India –the parliament holds → the house of the people
→ The council of the state

The upper house has an absolute veto only in cases where laws are to be enacted covering matters included in the state list. Otherwise, in all other

cases it has simply the right to give recommendation.

What about our case?

First of all look the powers of the house of federation which are listed under.

Art -62(1-11) –primary powers of (2), 83(1), 99,104,105 furthermore, the powers of HOF are illustrated in the 251/2001 proc. n.

Having reading all this lists and others, we can say that the HOF does not have legislative power except under art 62(7), 99 and 105.

When we read art-55(1) of the constitution it exclusively reserves the legislative powers to the HPR. Then in the strict sense of the word we cannot say that we have bicameral federal houses.

Why the need for upper houses?

- ® See the composition of the lower house
- ® They represent the people as a whole (unity)
- ® Majoritarian house (as population increases representation increases)

- Then it is to counter balance the majority rule that we need upper houses (counter majoritarian houses)
- To keep interests of small states
- The majorities can legislate prejudicial rules (laws) against the minority.

Then does our house (HOF) perform this? If the HOF does not have lawmaking power then it means that we don t have a counter majoritarian house.

Say in our case, the Oromo s and Amharas constitute more than half of the seats in the HPR (304). Then if they want they can legislate laws which are objected by the other 7 states. In this case we badly need a house which counter react these decisions.

- ® It is this fear that led federal states to form an upper house which is non-majoritarian.
- ® We have said states in a federal system have the right to participate in the

federal policy making.

Composition of the house

In USA –states are equally represented, this is the price that larger states have to pay in favor of the smaller once, as the upper house will ultimately counter balance the majorities decision coming from the lower house.

Swiss –each canton 2 representatives

- Half canton 1

German – to compromise the populous states they use a d/t composition. In German –each Lander has at least 5 representatives but Landers which have;

2-6 million popn = 4 representatives

More than 6 " = 5 " "

More than 7 " = 6 " "

Despite fractional disparity, it is a non majoritarian house.

The HOF

The composition of this house is proportional which is characteristics of the lower house, the representation system of the HOF is almost similar with the HPR except that there is a significant difference in the number of constituencies, hundred thousand for the latter and 1 million for the former.

- Then although the HOF is pretending as if it is the house of Nation, Nationalities and peoples, it is actually the house of the majority. A majority in the lower house is also a majority in the upper house.
- Take the comparison b/n two states, the Oromo and the Harar; while the latter has one representative the former has almost 27 representatives, the difference is clear.
- There is no possibility to counter balance the tyrannical rules of the HPR through the HOF.

Tenure

In USA and India the upper house is a permanent institution which is not subjected to total dissolution rather it is only part of the members that will be re-elected with 2 years despite senators have 6 years tenure.

When we come to our case, thought the HOF does not have any law making power, the HPR, the HOF and the executive dissolve in a similar time and hence it is the nominal president only that will be left in power, this actually creates a vacuum power.

Constitutional interpretation

Why we need constitutional interpretation?

1) To check the actions or inactions of the political actors, whether they are within their boundaries.
2) To ensure the supremacy of the constitution to exclude laws and actions which challenge the constitution
3) Expounding the constitutional text, this is a work on the constitution it self-b/c

- The constitution is a human product then it may suffer from some human defects:
    - Problem of clarity
    - Omissions
    - There may be potential conflict within the constitutional provisions each other
    - There may be issue of dynamism (dev t')

The subject matter of constitutional interpretation emerged for the first time in the history of adjudication in 1803 when the American Supreme Court decided in Marbury Vs Madison.

The history of the case

In 1800 a presidential election was held in USA to replace President Adams. In that election, the two competitors had got equal votes (Jefferson and Bur). In situations, where the competent got equal votes the compress shall decide who should be president and who vice president. But this had been delayed a bit more and within this period President Adams appointed 42 Justices of states. In addition to this john marshal who was secretary of president Adams was appointed chief justice of the Supreme Court.

In February 17, 1801 Jefferson was made the winner but the handing over of presidential power is to be made in March 3 of the midnight.

In 2 March 1801 the congress had approved the appointments of the 42 justices and in the mean time 39 of them were served with the letter of appointment.

In three March 1801 the new president had taken office in the midnight. Then Madison was appointed the secretary of Jefferson who took the three letters of appointment yet not served, which after wards Madison refused to give the commission as he is ordered to do so by President Jefferson.

From the three justices who were not served with the commission, one was Marbury and as a result of this refusal he had instituted a petition to the Supreme Court claiming the letter of appointment.

Ultimately, though John marshal declined to order the secretary of the president fearing that this is purely political issue but his reason in the case was left as a bench mark to judicial review.

Marshal has argued to the question whether the courts can nullify laws which contradict the constitution.

- He argued; the constitution is the will of the people and the legislation is the will of the legislature hence the constitution shall be given paramount importance.

- Whenever laws become controversial it is the court who says what the law is. He then concludes, the constitution is a law hence it is the court who shall say what the constitution is and further if any law contradicts the constitution it shall be nullified by the courts.
- It is this decision which is serving the base of the American courts to interpret the constitution. Otherwise, the American constitution says nothing about judicial review. This also serves as a model of constitutional interpretation in other countries.

Generally, there are two models of constitutional interpretation

- The court model → the US model
  → The European model
- The non court model

The chief distinction b/n US and European models

- Diffused Vs centralized (constitutional court not part of the judiciary) why the Europeans preferred other model than the courts;
  - ® Supremacy of the parliament
  - ® Nature of the legal system(civil law)
  - ® Understanding of the separation of power
  - ® The non trust worthiness of courts
  - ® The nature of training of the judges.

Generally, there is no uniformity regarding who shall interpret the constitution;

- ® US, India, Switzerland → ordinary court
- ® European countries → a special court
- ® China → the legislature (National people ś congress)
- ® Switzerland → referendum

The non-court model

The non court establishments are given whether to pure political or quasi political

bodies. The main reason why these countries give the power to political bodies was highly influenced by the socialist ideology. For instance, the soviet constitution has entitled the doma as the constitutional interpreter which is the parliament. The derg has also given to the National shengo, the china to the people s̓ National congress. Then the non-court models are fashioned on the socialist ideology (philosophy).

When we see the FDRE model, it is a non court model but it is hard to say that it is influenced by the socialist ideology b/c though the HOF is a political body, it is with very unique arrangement in which it is designed to solve Ethiopian contexts.

The centrality of the Ethiopian constitution is retained by group rights, and then the constitutional interpreter is a result of this ideology.

- The first reason is the fact that the con. is a covenant entered among the NNP and hence they can give the power of interpretation to an again whom they trust. If this is given to courts, the courts may not understand the interests of these contracting parties.
- The courts as part of public opinion were not neutral when we look back to our history. They were involved in the red terror and hence the NNP do not have a trust on the courts b/c as they did before, they can align themselves with one part and attack the other. The political activism of courts may endanger the interests of NNP.
- While interpreting the constitution, there are some conte4al political issues which need political knowledge other than technical legal knowledge. On this sense the HOF which is political organ is preferred.
- During the constitutional negotiation an idea was proposed to divide the power of constitutional interpretation giving individual rights to courts and group rights to the HOF. But letter objected b/c of the following reasons;
    - Rights cannot neatly divided as individual and group rights all the time

- ü The judiciary can jeopardize group rights in the name of individual rights
- ü If constitutional interpretation is given to two organs inconsistency may arise in the final decision and is susceptible to conflicts.

The issue of the need for legal expertise during constitutional interpretation was at the heart of the discussion that is why the CCI is appointed constituting 8 legal experts out of the total 11 members.

Principles of constitutional interpretation

When the task of constitutional interpretation is undertaken, there are certain rules or principles of interpretation developed mostly in the American legal system.

Generally the following are some of the most widely used rules/principles of constitutional interpretation.

1. Textualism
2. Originalism
3. Develpmentalism
4. A philosophic method
5. Systemic structuralism
6. Balancing

1) Textualism - Emphasis on the textual understanding of the constitution. The role of the interpreter is to understand the text. Decisions on constitutional interpretation are results of the plain meaning of the constitution

- close bound textualism
- structural textualism

Under the close bound textualism the interpreter looks only at the specific text which deals with the issue. For instance, if the issue is freedom of religion, you should look only at the provision or phrase which deals with freedom of religion.

However, structural textualism tries to solve the issues by reading and understanding the text as a whole. The constitution in this principle is seen as a unit rather than as a separate text. (The silte case-52, 39, 47, 62)

2) **Originalism**- is the point of view that words, phrases and provisions in the con. Should be construed as if they were at the time of their adaption. Then the meaning is given the meaning it had at its adoption. There are two approaches;
    - Original meaning
    - Original intent

Originalists argue that the constitution should be construed by the original understanding of the founders. A constitutional word is chosen carefully, and then the meaning of words shall not be changed. They further say the constitution is the decision of the people hence should not be changed by courts.

But the critique is that the constitution shall not be confined to one period of understanding. This limits advancements in outlook.

For instance, the understanding of cruel and inhuman treatment was so much different if we look 100 or 200 years back slavery was not for example that much cruel but now a days it is.

If we stick to the original understanding we are limiting the advancement of the con.

3) **Developmentalism** – understands the constitution as an evolving document. For instance the understanding of "cruel and inhuman treatment was changed from the 18th century understanding. Because during that time slavery was not considered as cruel and inhuman. Then this approach considers the societal moral development to construe constitutional interpretation.
    - ® The criticism towards this approach is that the constitution would

unpredictable because the judges will construe their own understandings.

- ® The śilte ʾdecision of the HOF is seen from developmental approach. Because the identify claim is not included in the constitution but the HOF by taking possible developments made a convincing constitutional interpretation.

4) **Philosophical approach-** this is an interpretation using moral, political and other sociological philosophies to serve or give meaning to the constitution.

Philosophical approach is essential to solve conflicting theories or theories of law which have more than one interpretations.

For instance, the issue of sovereignty, rule of law, majority rule etc are always unsettled fluid issues which needs philosophical look.

Therefore, controversial terms of the con. Shall be seen from the philosophical point of view so as to give constitutional meaning?

5) **Systemic structuralism** – this shares quite a good relationship with textualism. Systemic structuralism says the constitutional text has systemic unity. The text of a constitution on aspires or serves the same end. Then though we may find conflicting provisions, every provision shall strive to serve the common good or end of the constitution. Hence, each provision shall be interpreted on such understanding.

When a constitutional text is prepared in a country the society will definitely have some common political purposes. Then the constitution shall be interpreted in a way to achieve this goal.

"Brown Vs Board of Education "

"Separate but equal treatment "to the whites and blacks.

When the court decided against this treatment as unconstitutional, it reasoned out that this is against the constitution which America wants to Aspire.

Prudential approach – is part of systemic structuralism which says the rendition of constitutional interpretation shall be made with due care. The interpreter shall not disturb the political system.

For instance, in the separate but equal decisions the court did not say that the act should cease immediately but rather it should be progressively rectified. This is 0 gap given to the states to prepare morally and psychologically.

6) **Balancing of interest**

The method springs from the assumption that society has competing and often times conflicting interests. Hence, the constitution cannot pass this fact rather the interpreter must strike a balance to the interests when giving a decision.

The above discussed methods are developed in the American legal system but further there are methods developed in the German legal system like.

- The historical method which is similar to originalism
- Natural law method
- Systemic interpretation
- In a certain issue, we can use one or more of the above methods, we cannot always stand on a single method to dispose a constitutional issue.
- Not all methods are accepted by all interpreters even within a single court there are people who follow their own methods or approaches.
- There is also a lot of dynamism in the methods, the kind of case that appears before the constitutional interpreter might suit to some methods than others then the application of methods differ on the kind of case at hand.

Some clues in our constitution which use as a base of constitutional interpretation

1) Art – 13(2) of the constitution when fundamental human rights are at conflict they shall be interpreted in conformity international instruments which include both binding and non binding treaties.
2) The preamble of the - this gives a highlight on the content of the constitution is a general form.
3) Chapter -two of the constitution Art-10, Art –11
4) Chapter -10 of the constitution which outlines the policy considerations of the government beginning from art -85 of the con.
5) Art -9(1) of proc. 251/2001 which talks about presumption of constitutionality. Then burden of proof lays on the party who alleges its unconstitutionality.
6) Art -106- which say, the Amharic version has final legal authority.

   Therefore, before looking at the other methods the constitutional interpreters must first observe these provisions of the constitution though both process give the right to the CCI and the HOF to develop or adopt their ocan methods of interpretation.

   Art –20 of procn. 250/2001

   Art –7 of procn. 251/2001

   Stipulates that the house and the CCI can adopt their own methods

Procedural and jurisdictional issues in constitutional interpretation

In the US system, there are certain rules or procedures which are intended to limit case burden flown to the courts.

Justifiability

1) **Case and controversy requirement**

The jurisdiction of the courts in entertaining issues of constitutionality is limited to

concrete cases. A case cannot be addressed in the abstract, you cannot ask the court for advisory opinion for example or you cannot take a case simply to entertain its constitutionality. Then constitutional cannot be brought to the court on their own but rather should be incidental to cases of controversy or to solve cases at hand.

2) It standing requires personal interest (personal sake)

The litigant must be the one who have an interest or should incure personal injury. Ideological plaintiffs (for the sake of others) can notbrought issues fo conslitntional cases. Then proconal injury is necessary. The person actually responsible must be sued.

3) Political questions
4) Timing limitation

- Mobtness – is a time limitation which means there is no more case if the outcome is already known by fact then the case is already died then it can not be seen by the court.
- Ripeness –is other time limitation which means the case is pre-matured.
- The circumstances existing when the facts underlying the plaintiffs complaint do not yet create a live claim.

In the constitutional court system

In the constitutional courts system (European model) there are no as such procedures intended to limit case flows. Constitutional matter can be directly brought to the court without having any disputants (review in the abstract).

The Ethiopian case

Jurisdictional and procedural issues

To analyze the jurisdictional and procedural issues we shall first look at procn. -250/2001, 251/2001 and the constitutional provisions Art-62(1),83, 84 and the decisions of the HOF as they are serving as binding precedents.

Substantive issues in constitutional interpretation

This might mean what is constitutional interpretation? Or powers of the HOF? Or matters for constitutional interpretation.

There are people who argue that Art-84(2) determines the scope of the HOF for constitutional interpretation which includes;

- Federal procn. (international treaties)
- State procn.

This stand was also the stand of the CCI, which excludes other laws and decisions. Whether art-84(2) is determinative of the powers of the HOF we should look at the constitutional making history.

- During the constitutional making the constitutional assembly argued that the court shall not have any role in constitutional disputes. During that time some had suggested that individual rights to be interpreted by courts and group rights by the HOF. But letter on the over whelming argument was all constitutional interpretation should be given to the HOF. Then the two proclamations are making operative the intentions of the law makers.
- The caption of the article 84 says powers and functions of the CCI, it does not say anything about the HOF.

  In terms of substantive functions of the council, art-84(1) is more important than the subsequent sub articles.

Then the power of the HOF should be construed rather on the basis of art-83(1) and 62(1) of the constitution.

Art-84(2) only puts small portions of constitutional interpretation i.e., it is very much procedural which says "what will happen if laws are contested by parties as being unconstitutional"

Sub art-3 is saying "issues of constitutional interpretation. Then this may include any issues which might be "issues beyond laws".

Therefore, art-84(2) is dealing with procedural issues (matters) on how to challenge laws o the two levels of government legislatives. This shows that the primacy given to legislative organs since they are recognized as the highest authorities in their respective government (art 50(3)).

The role of courts

If we say that the HOF has exclusive jurisdiction what would be the role of courts in relation to constitutional interpretation?

Under art 13(1) the fact that the court is mentioned along with other organs of the government. their power is not as such exaggerated. But from their role they are organs which will settle disputes by invoking even the constitutional provisions.

Procn. 250/2001-has dealt to some extent the role of courts Art-21 and 22 of the pron. deals with courts in relation to interpretation proper.

Art-21 is meant to clarify Art-84(2) of the constitution. The expression employed in art-21 is if the court believes that the issues need con.al interpretation then in relation to this interpretation. Proper, the role of courts is helping, as an expert to the CCI and the HOF.

In this case the court can decide that there is no need to interpret the constitution but the party dissatisfied by the decision may appear to the CCI. As every party or person is granted the right to take his case to the CCI for constitutional interpretation.

In all other cases not involving issues of constitutional interpretation in the strict sense the court can dispose cases by interpreting the con.

However, the court may not interpret the con. In fundamental constitutional disputes (hard cases) cases which fundamentally affect the con.

1. In terms of raising high political issues
2. In terms of filling gaps in the con.
3. In terms of resolving two conflicting provisions of the con.

4. In terms of interpreting group rights etc.

But in plain interpretation of the con especially in cases involving individual rights courts can handle it is as to resolve the case at hand.

Proc. 250 –17 2(5) is the explanation of art -84(2)(3) defines what "law "is

Art -23 is very important which raises new ground which is not clearly stated in the constitution. This is what is said for instance in the Germans as constitutional complaints.

This might emanates from final decisions of organs of state or officials of state and it such violates constitutional rights. The decision of the Supreme Court is also susceptible to complaint. (The Kedija case is a clear example)

Art -23(4) also explains about abstract review in which petition can be brought to the CCI or HOF without having real disputants.

Therefore, to conclude giving constitutional interpretation to two bodies with final decision is too much problematic. That is why the HOF is not only limited to parliamentary laws of the two tiers of government s as some writers said. Rather to have uniform constitutional interpretation (jurisprudence) it is necessary to have one organ designated with final constitutional interpretation.

However, the CCI and the HOF sho8ld encourage courts to handle some issues of constitutional interpretation with lesser constitutional significance. Hence, the CCI and HOF should discourage minor relevance cases so as they will be resolved by courts.

Rules of procedure of the CCI on constitutional interpn

- In the CCI there is no admissibility rule which will settle the inadmissibility of cases. In German there are two rules to admit a certain issue whether it

needs constitutional interpretation or not (the rule of three (1/3 and the rule of 8(3/8). That means if one of the three judges accepted, it will pass to the rule 8 then if three judges accepted out of the 8 then it will be admitted.

- Principle of removal of members of the CCI if they do have an interest in the case.

  In the Kedija case for instance the EWLA had asked to remove the president of the Supreme Court from seeing the case as he decided on it in the Supreme Court. Fortunately enough, the president removed himself from the bench without having any procedure.

The judiciary and the organs of control

In federal systems there are two kinds of court structures

- The dual court structure
- The integrated court structure

In the dual structure of courts, it is held by sticking on the general division of power. In the division of power vertical and horizontal division of power, powers are normally divided b/n the tiers of government s and among the legislature, the executive and the judiciary. Then this leads to dual set of courts. In which federal courts applying and interpreting federal laws and the state courts interpreting state laws.

This structure is led by the general line of federal arrangement. The USA courts are examples to this division. In this case each court interprets its own respective laws; federal courts federal laws and state courts, state laws.

Unlike the American case, the German system follows an integrated judicial system. All judicial power not given to federal courts is reserved to the state courts. This means most matters involving federal law are litigated initially in state courts subject to federal appellate review.

In Germany all lower and intermediate courts of appeals are state courts, where as courts of final appeals are federal courts.

In this system the organization and operation of the judiciary is shared b/n the federal and state courts.

Therefore, there are not competing federal and state courts in countries that follow the latter structure of courts.

In Germany, the federal government legislates laws and state courts apply these laws and finally there is federal Supreme Court with appellate jurisdiction at eh apex of the judicial structure.

When we see the Ethiopian case, the constitution stipulates that there are dual court systems (50(2)) 78(3), 50(7). However, regarding the establishment of inferior courts (except the Supreme Court) it reserves for the HPR to decide by a two third majority vote as it deems necessary, nationwide or in some parts of the country. (78(2))

There is only one federal Supreme Court with nationwide jurisdiction and until recently the federal high court and federal first instance courts were limited to Addis Ababa and Dire dawa.

If inferior courts are not established by the decision of the HPR, the constitution has put a way out how the powers of these courts are implemented in state courts. This is through delegation.(78(20)

80(2)(4) { Powers of fede. First inst. Court → state high court
Powers of fed. High court → state Supreme Court

And in case of appeal, the delegated powers of state high court are appealable to state Supreme Court however; the delegated powers of state Supreme Court are appealable to federal Supreme Court.

But recently the parliament according to its power has decided to establish inferior

federal courts in states excepting Amara, Tigray and Oromia. Then except in these regions a full-fledged dual court system is on its way however, in the three regions the delegation is still to continue.

Therefore, theoretically speaking, the Ethiopian judicial system is organized on a dual basis in which there are two parallel court systems with their own independent structure and administration.

However, until the enactment of the new law the operation of state and federal courts was an integrated one. One reason for this was the lack of trained man power.

Shared Judicial Powers?

There are two arguments on whether there is concurrent judicial powers b/n the federal and state government s?

- ® There are those who hold that the dual court structure is strictly taken both under the constitution and the procn 15/1996. Then, they argue that civil and criminal cases fall either before an exclusively state or federal courts. One indication of their argument is the fact that there are no powers listed to be shared b/n the tiers of government s in the 25/1996 proclamation.
- ® The other argument contents that despite the laws silence, there still remains a concurrent judicial power. For instance,
    - Labor law (55(3))
    - Commercial law (55(4))
    - Penal code (55(5))

We know these laws are federal laws but they are not mentioned in the 25/96 proclamation and hence should be among the shared powers.

Here my argument is different, as far as these laws are concerned the porcn 25/96 though not mentioned specifically, has tried to illustrate generally in its art-3(1) by stating cases arising under – ‘federal laws ”and federal laws is defined in art-2(3)

then how can we say that the law fails to mention them?

However, it is true that these laws are not mentioned in the subsequent lists of federal court jurisdictions but the question is whether such lists are exhaustive or enumerative? This will somehow solve the issue at hand regarding these and other federal laws.

Had the lists been intended to be exhaustive why the law needs to list out general powers under art 1, 2, and 3?

If there is a federal law and a conflict arises on this law, there is no such heated argument as to which courts are best suited to enforce these laws through interpretation.

The federal courts are always there to enforce federal laws. On this point my argument is that yes federal court are there to interpret mainly of federal laws but I argue further that the procn illustrates specific powers of the federal courts and hence powers which are not listed specifically may not show the exclusion of federal courts from interpreting these laws. But shows that these powers are not exclusive powers of the federal government which means that these kinds of powers shall be exercised by both the federal and state courts, In this case there seems a shared judicial powers in our federations judicial structures.

Besides if we read art-13(1) of the federal constitution and the respective state constitutions; it is declared that all federal and state legislatures, executive and judicial organs at all levels shall have the responsibility and duty to respect and enforce the provisions of this chapter (3).

This clause, if taken seriously has far reaching consequences as far as the role of the judicially in enforcing and protecting human rights is concerned.

Surprisingly however, when stating jurisdiction of federal courts under art-3(1) of the procn 25/96 the law thought mentioned the constitution as one area of the federal courts jurisdiction it does not state as to the powers of state courts.

Likewise, though there is the general illustration of "federal laws" unless specifically mentioned in the subsequent articles. It makes sense if we assume they are shared powers with the state courts.

Further if we look at art-52(2)(a) the states are duty bound to enforce and protect the federal constitution. Then the states are assumed to enfo4ce the constitution through their agents 'one of which is the state courts.

Jurisdiction

As to the issue of jurisdiction; the con declares that judicial powers both at federal and state levels are vested in the courts.

Moreover, the con states "everyone has a right to bring a justifiable matter to and obtain a decision and judgment by a court of law and other competent body with judicial power. This seems to define broadly the scope of judicial power. It suggests that not all disputes are within the scope of judicial power.

The constitution further states that the federal Supreme Court has the highest and final judicial klpower over federal matters and the state Supreme Court likewise on state matters.

But the question which is vaguely stated by the constitution is what federal matter is? Defining this seems key for allocating powers to federal and state courts at this juncture despite the existence of controversies on whether federal courts have exclusive judicial power on all federal mattes, proc. 25/1996 seems better in defining specially what federal laws constitute.

As can be seen the proclamation allocates subject matter jurisdiction to federal courts on the basis of three grounds; laws, parties and places.

"Federal laws" is given a very wide definition under art-2(3) of the 25/96 proclamation. Accordingly, all laws enacted by virtue of article 55 of the federal constitution by the HPR are federal laws. Besides all other laws enacted by

previous regimes that are not repealed are also federal laws. The labor code, the commercial code and the criminal code are then federal laws.

While this is general clue as to what constitutes federal laws, the proclamation that defines the civil and criminal jurisdiction of federal courts lists only a fraction of offences or cases to be adjudicated by federal courts.

Then the question is what will happen to the powers which are not explicitly mentioned?

Whether they are shared powers if so do state courts have jurisdiction to try federal cases as a result of this concurrency and can these cases be appealed before the federal Supreme Court?

If we assume that the state courts can handle federal cases form the above interpretation the next question is whether this is a delegated power or shared power? The effect on appeal likewise is different.

Constitutionally speaking as per art -80(1) the federal Supreme Court has final authority on federal matters. Then in case of delegated power the federal Supreme Court can have appellate jurisdiction on cases seen by the state supreme courts by delegation. (Art -80(6))

Wherever, if it is a case of shared power that falls on federal matters the state Supreme Court shall have the appellate power as per art -80(2).

But the practice reveals that whether powers are exercised by state courts on the delegated one or on the shared one there is no appeal except the cassation which emanates from fundamental error of law. (art -80(3)(a)) Look the 25/96 procn on its art -9(appellate jurisdiction of the F. supreme court).

The difference b/n delegated power and shared powers of regional courts?

If we say shared power we are referring to procn 25/96 in which it lists exclusive powers of the federal courts. Then powers left from the "exclusive list "are deemed shared powers b/n the federal and state courts. However, when we say delegated

powers we are referring to those a "federal courts exclusive powers "but because of inconvenience delegated to the regional courts as per art -80(2)(4) of the constitution.

Except the power of cassation given to the federal supreme court, the Ethiopian judicial structure seems "a dual court structure ".

But, the federal Supreme Court has power of cassation over all matters arisen in federal and state courts.

There is a counter argument for this power emanated from the principle of federalism. Which states;

When a matter is assigned to belong to a state jurisdiction it is based on the view that the matter is local rather than of national importance. It is because it is felt that the case allows for regional variation as opposed to uniformity. The review of cases by federal Supreme Court which are cases emanated from state laws is contradictory to the idea of federalism. Because, through cassation the federal government is intervening in the regions autonomous powers.

The Supreme Court is using this power to guarantee a uniform interpretation of laws across the states. From experiences of other federations uniformity is needed in some areas. However, this uniformly is limited to federal laws. This important qualification is missing in the Ethiopian situation.

Emergency powers

In any country emergent powers may arise owing to various factors like war, rebellion, natural disaster etc. which call for immediate measure to be taken by the government to safeguard the stability of the citizens.

This kind of power is different from the normal system of administration rather is a special power which is designed to tackle the new situations.

Most of the time emergency powers are seen in r/n to human rights. On this regard

human rights can be curtailed by limitations and derogations. But what are the difference b/n limitations and derogations?

States may impose limitations on the enjoyment of certain rights. Such limitations are ordinary limitations since they can but derogations are designed for particularly serous situations that require the introduction of extraordinary measures.

Limitation

- Normal time limitation
- Permanent
- Ordinary limitation
- Almost every right has limitation
- Always limits some part of the right

  Are enforced by the ordinary law enforcement agencies

Derogation

- In serious situations
- Temporary
- Extra ordinary limitation
- Not all rights derogable (Non-derogable rights)
- May take part or the whole right (Abrogate)
- The eatens the organized life of the whole common

Measures derogating, from the provisions of the constitution must be an exceptional and temporary nature.

- Before the state invokes art -93 of our constitution two fundamental

conditions must be met.

- ® The situation must amount to a public emergency which threatens the life of the nation
- ® A state of emergency must be proclaimed this latter requirement is essential for the maintenance of the principles of legality and rule of law.

- Not every disturbance or catastrophe qualifies as a public emergency unless it is serious which threatens the public. In our case when we read art -93(1)(a) it signifies that the situation must be the one which endangers the constitutional order and which we cannot control by the regular law enforcement agencies and personnel. Therefore, the seriousness of the emergency is measured by such thing.
- But the general comment on the ICCPR of art -4 reveals that the seriousness is measured as to whether the situation constitutes a threat to the life of the nation.

  At times when the normal law enforcement agencies and personnel are unable to control the situation, it may amount that it is a threat to the life of the nation.

  But what if it is not a threat to the life of the nation despite the normal law enforcement agencies fail to control the situation?

In the general comment to the ICCPR, the element of proportionality is highly needed which means that the measures shall be limited to the extent required by the exigencies of the situation.

This requirement relates to the

- Duration
- Geographical coverage
- Any measure taken during the state of emergency

In this case not only to proclaim state of emergency must be justified but also the measures taken shall also be justified regard to its proportionality.

The other issue is during state of emergency there are certain rights which can t̓ be touched at any case (non-derogable). But what will happen if there is discrepancy b/n the lists of our constitution and ICCPR to which Ethiopia is a party?

For instance the right to life and art(18) freedom of thought, conscience and religion are non-deraable in the ICCPR where as not in our constitution.

Of course, there is some dilemma in the interpretation of art-93 of the constitution. Specially, 93(4(b)) Vs 93(4(c))

Under the ICCPR, one of the justifications for any derogation is that it must not involve discrimination solely on ground of race, color, language, sex, religion or social origin.

In our case since art -25 is form the very inception non-derogable it seems better than the ICCPR. Even the grounds of non-discrimination are so wide than the ICCPR.